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Fee Simple Failures: Rural Landscapes and Race

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FEE SIMPLE FAILURES: RURAL LANDSCAPES AND RACE

Jessica A. Shoemaker*

Property law's roots are rural. America pursued an early agrarian vision that understood real property rights as instrumental to achieving a country of free, engaged citizens who cared for their communities and stewarded their physical place in it. But we have drifted far from this ideal. Today, American agriculture is industrialized, and rural communities are in decline. The fee simple ownership form has failed every agrarian objective but one: the maintenance of white landownership. For it was also embedded in the original American experiment that land ownership would be racialized for the benefit of its white citizens, through acts of colonialism, slavery, and explicit race-based exclusion in property law. Today, rather than undoing this racialized legacy, modern property rules only further concentrate and homogenize rural landownership. Agricultural landownership remains almost entirely—98 percent—white. This is a critical racial justice issue that converges directly with our impending environmental crisis and the decline of rural communities more generally.

This Article builds on work of rural sociologists and farm advocates who demonstrate, again and again, that despite a pervasive narrative of rural places dying for want of population and agricultural systems too far gone for reform, the reality is a crowd of emerging farmers—and farmers of color in particular—clamoring for access. Existing policy efforts to support beginning farmers have focused primarily on supporting a few private land transactions within existing systems. This Article brings property theory to the table for the first time, arguing that property law itself is not only responsible for the original racialized distributions of agricultural land but also actively perpetuates both ongoing racialized disparities and the currently industrialized and depopulated rural landscape. This Article deconstructs our most fundamental land-tenure choice—the fee simple itself—and calls on our collective legal

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imagination to develop more adaptive, inclusive, and dynamic land-tenure designs rooted in these otherwise overlooked rural places.

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“If you remember nothing else in your whole life, Cassie girl, remember this:
We ain’t never gonna lose this land. You believe that?”¹

“Most importantly, we might forget that the land beneath our feet holds
endless stories of struggle to claim it.”²

“Land represents both a set of values and a store of wealth.”³

INTRODUCTION

Property law bears a lot of responsibility. At its core, property is society’s system for distributing valuable resources.⁴ Through property law, we decide who gets what and how our relationships around resources are defined and managed. This constructive power of property law—to literally choose who has and who has not—was deployed at our country’s birth to achieve a very particular vision of American identity.⁵ America deliberately rejected Europe’s history of feudalism, with its servient serfs working the inherited lands of a dominant lord and its entrenched class system.⁶ Instead, America sought to build a society of equal opportunity and individual liberty, using private property (and agricultural property in particular) as the key instrument of this vision.⁷ America offered individual homesteaders who invested their agricultural labor in land the strongest and most complete set of property rights imagined by law: the fee simple absolute.⁸ With fee simple title, these owners enjoyed broad rights to control, sell, lease, use, possess, develop, and

1. MILDRED D. TAYLOR, *ROLL OF THUNDER, HEAR MY CRY* 152 (1976).

2. NATASHA BOWENS, *THE COLOR OF FOOD: STORIES OF RACE, RESILIENCE AND FARMING* 7, 9 (2015).

3. Katrina Quisumbing King, Spencer D. Wood, Jess Gilbert & Marilyn Sinkewicz, *Black Agrarianism: The Significance of African American Landownership in the Rural South*, 83 *RURAL SOCIO.* 677, 677 (2018).

4. See generally Lee Anne Fennell, *The Problem of Resource Access*, 126 *HARV. L. REV.* 1471 (2013).

5. See Jim Chen, *Of Agriculture’s First Disobedience and Its Fruit*, 48 *VAND. L. REV.* 1261, 1276–78 (1995) (emphasizing centrality of agricultural development in original colonization and settlement of United States); ALLAN GREER, *PROPERTY AND DISPOSSESSION: NATIVES, EMPIRES AND LAND IN EARLY MODERN NORTH AMERICA* (2018) (exploring early American property choices).

6. See Chen, *supra* note 5, at 1274–86; Anna di Robilant, *Populist Property Law*, 49 *CONN. L. REV.* 933, 951 (2017) (outlining history of landless farmers pursuing homesteading as progressive land reform and framing ultimate outcome as antifeudal).

7. See, e.g., Robert C. Ellickson, *Property in Land*, 102 *YALE L.J.* 1315, 1317, 1352–54, 1356 & n.202, 1375 n.275 (1993).

8. See Homestead Act of 1862, ch. 75, 12 Stat. 392 §§ 2, 4–5 (codified as amended at 43 U.S.C. §§ 161–284) (repealed 1976).

exclude others from a specific bounded space on the earth's surface—into perpetuity.⁹

The fee simple was designed to construct a specific set of social and economic incentives.¹⁰ The land's owner—the original hardworking farmer—would profit directly from his own individual effort and investment. With secure, perpetual rights to a defined physical space, fee title also aspired to strengthen commitments to place and community. As an invested owner, the new farmer would be motivated to steward the land well for the future and to connect deeply with the surrounding community where land is located.¹¹ By distributing clear, exclusive property rights to widely dispersed individuals, the fee simple would give rise to a uniquely engaged group of landowning, enfranchised citizens, forming a more perfect republic.¹²

Or at least a more perfect republic for the chosen beneficiaries, because American agrarianism was also always explicitly coded in both gender and race.¹³ America's western expansion was a project of race-based exclusion and control, using colonialism, slavery, and other blatantly racialized tactics to ensure that private landownership emerged in the image of the white yeoman-farmer ideal.¹⁴ Indigenous land rights were displaced, in part because of a failure to recognize the value of Native agricultural practices and often the work of Native women in particular.¹⁵ Instead, Native land claims were reimagined as a weaker property fiction called "Indian title"—a limited right

9. JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, *PROPERTY* 254 n.9 (9th ed. 2018) (identifying the fee simple as "the greatest modern estate known to law").

10. See Katrina M. Wyman, *In Defense of the Fee Simple*, 93 NOTRE DAME L. REV. 1, 33–38 (2017).

11. See *infra* note 223 and accompanying text.

12. See Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 DRAKE L. REV. 361, 371–80 (1997).

13. See, e.g., Angela P. Harris, *[Re]Integrating Spaces: The Color of Farming*, 2 SAVANNAH L. REV. 157 (2015) (analyzing all that is encoded in American agriculture, including in iconic images like the *American Gothic* painting); Chen, *supra* note 5, at 1276 (framing original constitutional choices about slavery as a "nakedly economic boost" to "certain farm interests").

14. See Harris, *supra* note 13, at 1276 (revealing racialization of agrarian visions). The New Deal famously "modernized the concept of Jeffersonian democracy by broadening it to include homeowners in an industrial society as well as the idealized yeoman farmer," but again in racialized ways. Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665, 676 (2002) (quoting Arnold R. Hirsch, *Choosing Segregation: Federal Housing Policy Between Shelley and Brown*, in *FROM TENEMENTS TO THE TAYLOR HOMES* 206, 208 (John F. Bauman, Roger Biles & Kristin M. Szylvian eds., 2000)).

15. See Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763, 773 (2011) ("We cannot trace our land titles to a just origin, and we should stop pretending we can."); Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 87 (1985); Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637 (1999).

of occupancy subject to one-way extinguishment by the federal government.¹⁶ At the same time, enslaved people came to America treated *as* property and were forced to build and run the wealth-generating plantations of white agriculturalists.¹⁷ Meanwhile, westward expansion across the new country was driven by allocation of homestead rights almost exclusively to white men.¹⁸

The result is an agrarian vision that still underlies so much of our national identity—the heroic, hardworking, wholesome (and almost certainly, white and male) farmer.¹⁹ It is no accident that today 98 percent of agricultural lands remain owned and controlled by people who are white.²⁰ Nor is it accidental that some of this country’s most notorious and persistent regions of concentrated poverty are both rural and racialized: the farming Black Belt of the Southeast, the Hispanic colonias along the southern border, and the Native American reservations of the Southwest and Upper Midwest.²¹

This is a complex story with many threads. In 2020, America is experiencing massive protests for racial justice. Much of this energy is centered on responses to police brutality in urban settings, but 2020 also brought us frightening coronavirus clusters among workers at highly industrialized—and rural—meatpacking plants and in tightly packed buses transporting migrant farmworkers from one enormous commercial field to another.²² The

16. See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 588–90 (1823) (defining Indigenous peoples of the United States as “fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest” and justifying European colonial dispossession and displacement on the basis that Indigenous peoples would “leave the country a wilderness”); see also *infra* Section II.A.

17. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 411 (1857) (enslaved party) (defining African slaves as “articles of merchandise” not eligible for the benefits of citizenship), superseded by constitutional amendment, U.S. CONST. amend. XIV; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1716 (1993); see also *infra* Section II.C.

18. Some women and farmers of color did achieve homesteading status, albeit in disproportionately low numbers and often impermanently. See *infra* Section II.D.

19. “America has moved to the city, but the romantic imagination of its law still lives on the farm.” Chen & Adams, *supra* note 12, at 371. For many, the farmer is still the person who feeds America, who stewards a critical landscape, who drives a weathered truck to Sunday church suppers and Friday night high-school football games. See Debra Lyn Bassett, *The Rural Venue*, 57 ALA. L. REV. 941, 958–61 (2006) (collecting evidence of positive stereotypes for rural landscapes as scenic and rural lifestyles as charming and community oriented). But the story is getting complicated. Others now see farmers as responsible for the 2016 election of President Donald Trump and recipients of rich farm subsidies and financial support denied to other Americans. See, e.g., Rick Su, *Democracy in Rural America*, 98 N.C. L. REV. 837, 838–39 (2020); Bassett, *supra*, at 969 (collecting evidence of rural residents stereotyped negatively as close-minded, irrational, and naive).

20. See *infra* Section I.A.

21. See *infra* Section I.B.

22. See, e.g., Mike Dorning & Jen Skerritt, *Every Single Worker Has Covid at One U.S. Farm on Eve of Harvest*, BLOOMBERG (May 30, 2020, 12:00 AM), <https://www.bloomberg.com/news/articles/2020-05-29/every-single-worker-has-covid-at-one-u-s-farm-on-eve-of-harvest> [<https://perma.cc/T4D6-WCCN>] (noting example of one Tennessee farm where every single one of roughly 200 workers was infected with COVID-19); Nina Lakhani, *US Coronavirus Hotspots Linked to Meat Processing Plants*, GUARDIAN (May 15, 2020, 7:45 AM),

workers getting sick in these plants and fields are overwhelmingly nonwhite, and many are vulnerable both in immigration and economic status.²³

These COVID outbreaks underline other truths about the actual state of American agriculture. We have drifted far from our original stewardship ideals. American agriculture is dramatically industrialized and concentrated in the hands of a few powerful operators.²⁴ Meanwhile, rural communities have emptied as self-supporting, middle-class farmers disappear.²⁵ Farmlands are increasingly owned by fewer and more powerful landowners who manage operations, if at all, from a distance.²⁶ Indeed, many of the modern production contract arrangements and tenant farm dynamics that characterize our food-production system now look a lot more like the feudal systems the fee simple was supposed to prevent.²⁷ Although a significant group of new farmers and ranchers—disproportionately members of disadvantaged groups—wait in the wings with new commitments to sustainability and diversification, these potential innovators consistently cite an inability to access farmland as their number-one barrier.²⁸ Experts predict that as many as half of American farm acres will change hands in the next two decades; without a radical course correction, these acres are destined for pension funds, foreign investors, and even greater concentration in the hands of absentee landlords.²⁹

<https://www.theguardian.com/world/2020/may/15/us-coronavirus-meat-packing-plants-food> [<https://perma.cc/UPD8-QLLP>] (identifying meat processing plants as “incubators for the coronavirus,” with high infection rates both among employees and USDA inspectors who actively monitor these plants); see also Tim Marema, *The Rural Counties with Highest Rate of New Infections*, DAILY YONDER (June 15, 2020), <https://dailyyonder.com/new-infections-hit-counties-with-meatpacking-plants-prisons-and-non-white-populations/2020/06/15> [<https://perma.cc/NJG7-J54H>] (identifying meatpacking plants as “largest single factor in Covid-19 hotspots in rural America” but noting that “unifying characteristic” of rural counties hardest hit by COVID-19 “is that they are home to large numbers of non-whites,” including in some counties’ prison populations).

23. Art Cullen, Opinion, *Why Is Trump Insisting that Meat-Packing Plants Stay Open Despite Risks?*, GUARDIAN (May 1, 2020, 7:31 AM), <https://www.theguardian.com/commentisfree/2020/may/01/trump-meat-processing-executive-order-workers> [<https://perma.cc/WRT2-HSVU>] (“Thousands of workers stream in single file, at dawn and mid-afternoon, to suit up in masks and chain gloves and put their lives on the line so you can put cheap sausage on your biscuit.”). At least 60 percent of U.S. farm workers are in poverty, five times the national average. SOPHIE ACKOFF, ANDREW BAHRENBURG & LINDSEY LUSHER SHUTE, NAT’L YOUNG FARMERS COAL., BUILDING A FUTURE WITH FARMERS II: RESULTS AND RECOMMENDATIONS FROM THE NATIONAL YOUNG FARMER SURVEY 48 (2017), https://www.youngfarmers.org/wp-content/uploads/2019/03/NYFC-Report-2017_LoRes_Revised.pdf [<https://perma.cc/64EG-MZ33>].

24. See *infra* Section III.B.2.

25. See *infra* Section III.B.2.

26. See *infra* Sections III.B.1, III.B.3.

27. See, e.g., Chen & Adams, *supra* note 12, at 384.

28. See *infra* Section I.C.

29. See *infra* notes 92–93, 193–196 and accompanying text.

So, where is property law in this? In this Article, I argue that property law is right at the heart of it.³⁰ In the beginning, a series of property-law choices systematically excluded people of color from original agricultural landownership.³¹ This original sin of racialized exclusion still stains the entire project of American property law, but it does not end with those unfair advantages and disadvantages. Our property system is still designed to *keep* property in these racialized patterns.³² The surprising thing may be how many of these original property features are now turning on white rural residents too, as property law has no response to the ongoing industrialization and exploitation of rural landscapes more generally.³³

It is important to recognize these features of property law as what they are: choices. It is possible to imagine a different set of ownership institutions that produce more just, equitable, and sustainable rural outcomes. Outside of the rural context, property scholarship is doing good work by critically reexamining the fee simple itself. Ironically, much of this work has emphasized, as its predicate, how “not-rural” property law has become and suggested changes to the fee simple in light of specific changed conditions: growing wealth inequality outside of land ownership,³⁴ the increasingly urban nature of many high-density housing concerns,³⁵ and the potential for dramatic environmental and climate change globally.³⁶ Some of this work has stressed the fact that land use in modern society is “overwhelmingly urban.”³⁷ Whereas the fee simple was originally designed for an agrarian society which land value was derived primarily from the land’s ability to produce goods

30. To be clear, my argument is not that property is the only factor of concern. All new entrants to agriculture face a range of challenges, including navigating complex federal farm and credit programs, supplying labor and equipment, accessing tightened markets with narrow profit margins, and needing sophisticated and complex knowledge for both the financial and physical acts of managing a farm with attendant weather, climate, and other risks. My argument is that core features of property design also contribute significantly to these challenges in ways that have been fundamentally overlooked.

31. See K-Sue Park, *Conquest and Slavery as Foundational to Property Law*, SSRN 4 (Feb. 22, 2021), <https://ssrn.com/abstract=3793972> [<https://perma.cc/9GRK-9EAT>] (“[H]istories of conquest and the slave trade . . . present more than an opportunity for apology or condemnation. They are essential to understanding what American property is and how it has been constructed by law.”). Indigenous dispossession and slavery, however, are only two of many core choices that have racialized American property law. See *infra* Part II.

32. Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 111–12 (2013) (arguing that even progressive property scholars have failed to adequately account for race-based acquisition and distribution of property in the United States).

33. See, e.g., Stephen Carpenter, *Family Farm Advocacy and Rebellious Lawyering*, 24 CLINICAL L. REV. 79, 94 n.51 (2017) (describing ongoing economic crisis for many family farmers, including persistent poverty and disproportionate wealth and income inequality).

34. ERIC A. POSNER & E. GLEN WEYL, *RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY* (2018).

35. Lee Anne Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457 (2016).

36. John G. Sprankling, *Property Law for the Anthropocene Era*, 59 ARIZ. L. REV. 737 (2017).

37. Fennell, *supra* note 35, at 1459–61.

within the physical boundaries of the property itself, in urban settings land value is more likely tied to the property's location within a web of other dense, interconnected land users.

The aim of this Article is to explore the many ways the fee simple is not working for rural landscapes either. Here are two examples. The first stems from the fee simple's endlessness.³⁸ Although perpetual property rights were originally intended to encourage owner investment, security, and place-based attachment, in practice, the fee simple's endlessness has entrenched familial and generational wealth. Endlessness, exacerbated by recent reforms to make dynastic ownership and control easier to achieve, has entrenched historic racial disparities and now further facilitates continued white landownership—including in more concentrated and even absentee forms. As a result, minority farmers who are already less likely to inherit farmlands because their ancestors were excluded from agricultural landownership also face steep competition for increasingly valuable farmland assets. In this competition for new land, minority farmers are also less likely to come to the table with generational wealth (in part because of this same ancestral exclusion) and more likely to face private discrimination in the transaction.³⁹

Second, the fee simple's ever-increasing construction as an abstract set of profit rights facilitates a commodified form of ownership separate and apart from the physical experience of the land itself.⁴⁰ Rather than tying people to physical spaces for stewardship and deep community engagement, as originally intended, modern property rules have evolved to condone dramatic gaps between legal landownership and the physical experience of agriculture. This is facilitated, in part, by the conception of the fee simple estate as a bundle of rights and a predominantly economic layer of relationships over—and apart from—the physical space itself.⁴¹ Rather than rooted, the fee simple is increasingly abstract, disembodied, and commodified, allowing for the fracturing and scattering of profit rights for investment and wealth accumulation apart from the (increasingly marginalized) day-to-day work of farming.⁴²

What if at least some rural property rights were instead tied to actual possession and use? What if property access were framed more deeply as a relationship to community, combined with responsibilities to tread gently on the land as a citizen of place? What if we reimagined rural property altogether? This Article proceeds to do just that in four parts. In Part I, I provide a

38. *Id.* at 1480, 1489 (using frame of “endlessness” and “rootedness” to define fee simple's core design features).

39. *See infra* Section III.A.

40. *See* Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 387 (2006) (identifying early American property reforms that allowed, in some ways, the “legal treatment of land as a substitute for money”).

41. *See* Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period*, 33 L. & HIST. REV. 277, 280 (2015) (exploring how antifeudal, pro-alienability property reforms led to increased risk for smallholders and how inalienable estates like the fee tail “might have buffered against land consolidation”).

42. *See infra* Section III.B.

snapshot of land ownership, poverty, and racial dynamics in today's rural America, emphasizing the demands for, and the possibilities of, this kind of radical reimagining. In Part II, I briefly explore some of the historic roots of these modern racial disparities, revealing the specific ways property law created a white rural landowning class in the first place. In Part III, I deconstruct the fee simple, revealing how features such as endlessness, abstractness, and racialized apportionment of security and vulnerability produce and reproduce a rural landscape that benefits only a chosen few. Finally, in Part IV, I begin to imagine a series of land reforms—some on the edges of property law doctrine, some more major—that could help address some of the current challenges.

These initial seeds for more experimental agricultural land reforms are offered with two key caveats in mind. First, property system change is difficult and messy and tends to happen in long, slow cycles—driven best by grassroots momentum and adaptation.⁴³ Second, I recognize that many impacted farmers worry, rightly, about outsiders “introducing solutions for communities they have never lived in or fields they have never plowed.”⁴⁴ Although I have spent a fair amount of time in farm fields, I am neither a farmer nor a person of color. So my purpose, very intentionally, is not to prescribe universal reforms but rather to bring the work of property theory and design to these issues in new and creative ways. The primary goal is to “open our imagination to the possibility that things can be different” and then, liberated from existing property rituals and languages, to create space to let those new imaginings “dance on the table.”⁴⁵

I. A SNAPSHOT OF RURAL LANDSCAPES TODAY

To engage more deeply with these land-tenure dynamics, this Part begins with a brief overview of the modern rural landscape, with an emphasis on rural America's racialized geography and wealth distribution.⁴⁶ The first Section focuses on the current status of agricultural landownership, including its shocking racialization and ongoing consolidation. The second Section addresses other important rural demographics, including the close correla-

43. See, e.g., Jessica A. Shoemaker, *Transforming Property: Reclaiming Indigenous Land Tenures*, 107 CALIF. L. REV. 1531 (2019) (discussing property system change in light of complex systems theory and other histories of property evolution and dynamic design).

44. BOWENS, *supra* note 2, at 4.

45. See A.J. van der Walt, *Dancing with Codes—Protecting, Developing and Deconstructing Property Rights in a Constitutional State*, 118 S. AFRICAN L.J. 258, 263 (2001).

46. My analysis here does not depend on granular distinctions between rural and urban place classifications, but I acknowledge at the outset that definitions of what constitutes “rural” is itself a subject of significant debate. See Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 177–84 (2006) (discussing many various metrics for defining “rural”); see also MICHAEL RATCLIFFE, CHARLYNN BURD, KELLY HOLDER & ALISON FIELDS, U.S. CENSUS BUREAU, REPORT NO. ACSGEO-1, DEFINING RURAL AT THE U.S. CENSUS BUREAU (2016), <https://www.census.gov/content/dam/Census/library/publications/2016/acs/acsgeo-1.pdf> [<https://perma.cc/5UB7-TVVX>].

tion between concentrated poverty and minority status in rural places. Finally, at the end of this Part, I address whether reform in such dire circumstances is possible, highlighting examples of the many aspiring farmers and ranchers who stand ready to hold us to our better values and forge a new way forward.

A. *Who Owns Agricultural Land*

Start with the land. Agricultural land makes up roughly one-half of the physical landscape of the contiguous United States.⁴⁷ The United States Department of Agriculture (USDA) reports that there are 911 million acres of agricultural lands in the lower forty-eight states, including both crop and pasture or grazing land.⁴⁸ Approximately two-thirds of privately owned farmland are operated by the landowner directly, while the remaining one-third or so is rented out for use by others.⁴⁹

Ownership of private farm acres is extremely racialized. White farmers “own and operate nearly all of the agricultural land in the United States,” and the farms they own and operate are larger than those of nonwhite farmers and landowners.⁵⁰ Overall, 96% of farmers who own their own lands (owner-operators) are white.⁵¹ Whites also make up 97% of agricultural landlords, that is, landowners who rent their lands to others to farm (nonoperating landowners).⁵² Focusing more closely on total acres owned (rather than the number of individual farmers and landowners), whites own a staggering 98% of agricultural land and operate 94% of farmland.⁵³ White land-

47. Cynthia Nickerson & Allison Borchers, *How Is Land in the United States Used? A Focus on Agricultural Land*, U.S. DEP’T AGRIC.: AMBER WAVES (Mar. 1, 2012) <https://www.ers.usda.gov/amber-waves/2012/march/data-feature-how-is-land-used> [<https://perma.cc/TF2R-37RH>] (noting 51% of U.S. land base in agricultural use in 2007).

48. DANIEL BIGELOW, ALLISON BORCHERS & TODD HUBBS, U.S. DEP’T OF AGRIC., EIB-161, U.S. FARMLAND OWNERSHIP, TENURE, AND TRANSFER (2016) [hereinafter BIGELOW ET AL., U.S. FARMLAND OWNERSHIP], <https://www.ers.usda.gov/webdocs/publications/74672/eib-161.pdf> [<https://perma.cc/3WP3-ZTTE>]. This is a lot of land. By comparison, urban land uses encompass 69.4 million acres. DANIEL P. BIGELOW & ALLISON BORCHERS, U.S. DEP’T OF AGRIC., EIB-178, MAJOR USES OF LAND IN THE UNITED STATES, 2012 (2017), <https://permanent.fdlp.gov/gpo136511/eib-178.pdf> [<https://perma.cc/3QVQ-ZSVP>]. Another 538.6 million acres (or roughly a quarter of the contiguous United States) is forest and timber. *Id.* The federal government manages roughly 250 million acres of pasture and rangeland. See CAROL HARDY VINCENT, CONG. RSCH. SERV., RS21232, GRAZING FEES: OVERVIEW AND ISSUES 29 (2019), <https://crsreports.congress.gov/product/pdf/RS/RS21232/31> [<https://perma.cc/4NF3-4LQ5>].

49. Megan Horst & Amy Marion, *Racial, Ethnic and Gender Inequities in Farmland Ownership and Farming in the U.S.*, 36 AGRIC. & HUM. VALUES 1, 5 (2018). A clear majority of private lands (61%, 557 million acres) are still owned and operated by the same person or entity (“owner-operated”), while the remaining 39% (353 million acres) are rented. BIGELOW ET AL., U.S. FARMLAND OWNERSHIP, *supra* note 48, at 15.

50. Horst & Marion, *supra* note 49, at 9.

51. *Id.* at 7.

52. *Id.*

53. *Id.* at 9.

owners who rent, but do not farm, their land also account for 98% of rent received and 98% of the value of rented lands and buildings.⁵⁴

It is difficult to find good historical data for near-term comparison, but a 1999 USDA survey (distinguishable, in part, because it includes Hawaii and Alaska while other data do not) indicated that of all privately owned agricultural land, “[w]hites account[ed] for 96 percent of the owners, 97 percent of the value, and 98 percent of the acres.”⁵⁵ In the past, however, farmers and ranchers of color owned more land. Although exact numbers are hard to pinpoint, most estimates suggest that post-Reconstruction Black farmers managed to acquire up to 19 million acres of farmland.⁵⁶ Today, Black farmers own fewer than 3 million acres and operate only 0.4% of U.S. farmland.⁵⁷ This is all part of a larger pattern of increased land insecurity—and continued, legally facilitated land loss—for nonwhite owners.⁵⁸

And yet, despite whites owning and controlling almost all the agricultural land in the United States, there are two other important trends to note. First, as discussed in more detail below, although whites as a group have maintained—and even increased—their relative share of farmland ownership, the number of white farmers and landowners has decreased as land ownership has concentrated.⁵⁹ The average farm size of 155 acres in 1935 ballooned to 444 acres in 2019.⁶⁰ Today, the top 8% of farms contain nearly 70% of all farmland.⁶¹ Meanwhile, agricultural enterprises have consolidated horizontally and integrated vertically, and outside investors—including private investment funds and even foreign countries—are increasingly looking to purchase farmland.⁶²

54. NAT’L AGRIC. STAT. SERV., U.S. DEP’T OF AGRIC., FARMLAND OWNERSHIP AND TENURE: RESULTS FROM THE 2014 TENURE, OWNERSHIP, AND TRANSITION OF AGRICULTURAL LAND SURVEY 3 (2015), https://www.nass.usda.gov/Publications/Highlights/2015/TOTAL_Highlights.pdf [<https://perma.cc/647K-TLQD>]. These white landlords also had 99% of the debt (evidencing their access to credit) in 2014. *Id.*

55. Jess Gilbert, Spencer D. Wood & Gwen Sharp, *Who Owns the Land? Agricultural Land Ownership by Race/Ethnicity*, 17 RURAL AM., Winter 2002, at 55, 59.

56. *Id.* at 55.

57. NAT’L AGRIC. STAT. SERV., U.S. DEP’T OF AGRIC., 2017 CENSUS OF AGRICULTURE 72 tbl.61 (2019) [hereinafter 2017 CENSUS], https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/st99_1_0061_0061.pdf [<https://perma.cc/CY57-N4JL>]; NAT’L AGRIC. STAT. SERV., U.S. DEP’T OF AGRIC., 2012 CENSUS OF AGRICULTURE HIGHLIGHTS: BLACK FARMERS 2 (2014), https://www.nass.usda.gov/Publications/Highlights/2014/Highlights_Black_Farmers.pdf [<https://perma.cc/8KY5-2SQF>].

58. See *infra* Part II (describing additional histories of dispossession); Section II.C.3 (discussing modern racialized land insecurity).

59. See *infra* Section III.B.2 (discussing modern land concentration trends).

60. Econ. Rsch. Serv., *Farms, Land in Farms, and Average Acres per Farm, 1850–2019*, U.S. DEP’T AGRIC. (Nov. 10, 2020), <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58268> [<https://perma.cc/G32F-A246>].

61. BIGELOW ET AL., U.S. FARMLAND OWNERSHIP, *supra* note 48, at 18.

62. See *infra* Section III.B.2.

Second, despite these obstacles, the number of principal farm operators who are minorities is actually growing—from approximately 132,100 minority principal operators in 2007 to 151,900 in 2012.⁶³ Yet, in relative terms, this remains a tiny percentage of the total number of farm operators. In 2007, minority principal operators made up just under 6% of all principal farm operators.⁶⁴ In 2012, the number grew to just over 7%.⁶⁵ These minority-operated farms also fell disproportionately into the group of farms with less than \$10,000 in annual sales.⁶⁶ Because they are largely locked out of farmland ownership now, these minority farmers are much more likely to be tenant farmers (working land they do not own).⁶⁷ People of color make up 14% of tenant farmers, but they earn only 3% of tenant-earned farm income.⁶⁸ In contrast, although white farmers are a smaller proportion of tenant farmers, they operate a whopping 92% of tenant-operated farmland.⁶⁹

Finally, as agricultural operations have consolidated and industrialized, racial minorities also make up 62% of farm laborers.⁷⁰ Focusing on ethnicity rather than race, as many as 80% of farm laborers are Hispanic.⁷¹ Other reports indicate three-quarters of American farm workers are immigrants,⁷²

63. NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE HIGHLIGHTS: FARM DEMOGRAPHICS 3 fig.4 (2014), https://www.nass.usda.gov/Publications/Highlights/2014/Farm_Demographics/Highlights_Farm_Demographics.pdf [<https://perma.cc/Z85V-86NY>].

64. See *id.* at 1 tbl.1, 3 fig.4.

65. See *id.* at 3 fig.4.

66. *Id.* at 3 tbl.6. While 56.6% of all farms have annual sales less than \$10,000, 68.4% of Hispanic operators, 78.1% of American Indian operators, and 78.9% of Black operators fall within this group. *Id.* Only Asian-operated farms tend to be larger, with 26.8% of Asian-operated farms having annual sales over \$100,000 compared to only 18.4% of all farms regardless of operator race. *Id.* This may, however, account for contract-farming operations. See NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE: RACE/ETHNICITY/GENDER PROFILE (2012), https://www.nass.usda.gov/Publications/AgCensus/2012/Online_Resources/Race_Ethnicity_and_Gender_Profiles/cpd99000.pdf [<http://perma.cc/2TFV-DJFY>] (showing the number of minority-operated farms with sales less than \$10,000).

67. See *infra* Section III.C.3.c (discussing consequences of disproportionate leasing rates).

68. Horst & Marion, *supra* note 49, at 7 tbl.1, 11.

69. *Id.* at 9.

70. *Id.* at 7 tbl.1.

71. *Id.* The difference between racial and ethnic identities for Hispanic Americans is a persistent challenge. The U.S. government defines racial categories as only “white, black, Asian, American Indian or Pacific Islander” and defines “Hispanic” as an ethnicity, not a race. Ana Gonzalez-Barrera & Mark Hugo Lopez, *Is Being Hispanic a Matter of Race, Ethnicity or Both?*, PEW RSCH. CTR.: FACT TANK (June 15, 2015), <https://www.pewresearch.org/fact-tank/2015/06/15/is-being-hispanic-a-matter-of-race-ethnicity-or-both> [<https://perma.cc/45TW-LC7M>].

72. Dorning & Skerritt, *supra* note 22 (“Unlike grain crops that rely on machinery, America’s fruits and vegetables are mostly picked and packed by hand, in long shifts out in the open—a typically undesirable job in major economies. So the position typically goes to immigrants, who make up about three quarters of U.S. farm workers.”).

and the U.S. Department of Labor has estimated that nearly half of all farm workers are vulnerable in immigration status.⁷³

B. *Rural Demographics: Race, Geography, and Poverty*

These land realities connect closely to other demographic trends in rural America. First, as farms have gotten bigger and land ownership more consolidated, rural populations have dramatically declined.⁷⁴ This decline has occurred over the last century as Americans move to urban centers, but it may be accelerating.⁷⁵ As of July 2016, 46.1 million people—or 14% of the total U.S. population—live in rural or nonmetropolitan places, on 72% of the country’s land mass.⁷⁶

Overall, tracking somewhat the distribution of agricultural landownership, the people who live in rural places are disproportionately white.⁷⁷ Yet, somewhat surprisingly, while overall rural populations are declining, people of color are migrating *into* rural places.⁷⁸ The dispersion of these new rural minority residents, however, has been uneven and highly segregated.⁷⁹ Much of the Hispanic growth, for example, has been linked with specific meat processing or meatpacking plants, which disproportionately employ Hispanics “to do the ‘dirty work.’”⁸⁰ Rather than a positive story of new racial inclusion

73. See TRISH HERNANDEZ, SUSAN GABBARD & DANIEL CARROLL, U.S. DEP’T OF LAB., FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2013–2014, at 4–5 (2016) (presenting lack of work authorization figures), https://www.dol.gov/sites/dolgov/files/ETA/naaws/pdfs/NAWS_Research_Report_12.pdf [<https://perma.cc/3QCE-9PBX>].

74. See generally John Cromartie, *Rural Areas Show Overall Population Decline and Shifting Regional Patterns of Population Change*, U.S. DEP’T AGRIC.: AMBER WAVES (Sept. 5, 2017), <https://www.ers.usda.gov/amber-waves/2017/september/rural-areas-show-overall-population-decline-and-shifting-regional-patterns-of-population-change> [<https://perma.cc/Y8AB-GTGJ>] (noting that natural population growth in rural America is no longer sufficient to offset net migration losses).

75. For the first time in 2016, the aggregate rural population across all counties declined, with growth from natural change (births minus deaths) insufficient to offset total out-migration losses; this rebounded slightly in 2017. *Id.*

76. *Id.*

77. HOSSEIN AYAZI & ELSADIG ELSHEIKH, UNIV. OF CAL., BERKELEY, HAAS INST., THE US FARM BILL: CORPORATE POWER AND STRUCTURAL RACIALIZATION IN THE UNITED STATES FOOD SYSTEM 59 (2015), <https://escholarship.org/uc/item/55v6q06x> [<https://perma.cc/S8MC-7YJ5>]. Rural communities also have a larger proportion of white residents (78%) than urban communities do (64%). *Id.*

78. Daniel T. Lichter, *Immigration and the New Racial Diversity in Rural America*, 77 RURAL SOCIO. 3, 7 (2012) (noting increase of minority rural residents from 8.6 million in 2000 to 10.3 million in 2010, while proportion of rural white residents simultaneously decreased).

79. *Id.* at 8.

80. *Id.* at 10. A map of the racial demographics of Nebraska shows nearly all of the small towns west of Lincoln have predominantly white populations, but a few—Schuyler, Crete, parts of Grand Island—are noticeably and even predominantly Hispanic. Dustin A. Smith, Weldon Cooper Ctr. for Pub. Serv., *Racial Dot Map*, UNIV. VA., <https://demographics.virginia.edu/DotMap/index.html> [<https://perma.cc/5X67-TNP7>]. These Hispanic populations—orange dots on my classroom screen—track, in glaring relief, the locations of large beef-

and progress, many scholars currently see “a new kind of racial and ethnic balkanization over geographic space . . . and perhaps growing social distance and greater intolerance between minority and majority populations in some fast-growing rural places.”⁸¹

Poverty in rural places also tends to be geographically concentrated and racially segregated. Rural racial minorities are two to three times more likely to be poor than rural whites,⁸² and there is a “similarly extreme difference in the degree to which [minority] group members experience *spatially concentrated poverty*, that is, live among large numbers of other poor people in what are effectively rural ghettos.”⁸³

This spatially concentrated poverty also takes on a familiar geography across the country. Although the U.S. rural landscape is overwhelmingly white, the noticeably nonwhite exceptions are clearly concentrated and racialized regional geographies which are also, by no coincidence, some of the most well-known areas of persistent, concentrated rural poverty: the “Black Belt” of the Southeast, the “Borderlands” of the South and Southwest (where more than half of all rural Hispanics reside), and Native American reservations in the Southwest and Upper Midwest.⁸⁴ In light of these dynamics, rural sociologists have concluded that “discussions and analyses of poverty concentration in rural America cannot be separated from the issue of race.”⁸⁵

processing plants. To take one example: Schuyler, Nebraska, is a town of just over 6,000 dependent on the Cargill beef-processing plant as its single largest employer, and it is nearly 70% Hispanic or Latino. *DACA Causes Economic Concerns in Some Small Nebraska Towns like Schuyler*, 3 NEWS NOW (Sept. 21, 2017, 12:36 AM), <https://www.3newsnow.com/news/local-news/daca-causes-economic-concerns-in-some-small-nebraska-towns-like-schuyler> [<https://perma.cc/9X39-V438>]. See generally Rochelle L. Dalla, Francisco Villarruel, Sheran C. Cramer & Gloria Gonzalez-Kruger, *Examining Strengths and Challenges of Rapid Rural Immigration*, 14 GREAT PLAINS RSCH. 231 (2004) (assessing rapid growth of Hispanic population in Nebraska in relation to meatpacking-industry employment).

81. Lichter, *supra* note 78, at 9; see also Domenico Parisi, Daniel T. Lichter & Michael C. Taquino, *Multi-scale Residential Segregation: Black Exceptionalism and America’s Changing Color Line*, 89 SOC. FORCES 829 (2011); Lisa R. Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135 (2009).

82. Mark H. Harvey, *Racial Inequalities and Poverty in Rural America*, in RURAL POVERTY IN THE UNITED STATES 141, 141 (Ann R. Tickamyer, Jennifer Sherman & Jennifer Warlick eds., 2017).

83. *Id.* at 146.

84. *Id.* at 147. The predominately white Appalachian region is also a region where white rural poverty is concentrated. See *infra* note 111 and accompanying text.

85. Daniel T. Lichter & Kenneth M. Johnson, *The Changing Spatial Concentration of America’s Rural Poor Population*, 72 RURAL SOCIO. 331, 334 (2007). Sadly, this is not new, and many rural sociologists have noted that “rural America has an especially entrenched history of racism.” Michael Kimmel & Abby L. Ferber, “*White Men Are This Nation: Right-Wing Militias and the Restoration of Rural American Masculinity*,” 65 RURAL SOCIO. 582, 591 (2000); see also C. Matthew Snipp, *Understanding Race and Ethnicity in Rural America*, 61 RURAL SOCIO. 125, 126–27 (1996) (explaining that “[r]acial segregation is as much a reality in the American countryside as it is in the cities” and that, on top of profound poverty, minority rural communi-

There are numerous factors contributing to the persistent and disproportionate poverty of rural minorities. Exclusion from equitable farming and farmland ownership opportunities is clearly one factor. But other aspects of rural property ownership, including home ownership, are also tied to race. Although rural residents in general are much more likely to own homes than their urban counterparts, rural minorities are much less likely to own a home (50–55%) than rural white residents (75%).⁸⁶

C. *Why This Matters (and Is Change Possible?)*

As rural communities board up their town squares, the environmental consequences of industrialized agriculture become clearer, and minority residents move to rural places for low-wage agricultural work that keeps them poor, one has to ask: Is there a different way?

Agriculture is “the most palpable link between humanity and nature” and, as such, is “a stark mirror of human values.”⁸⁷ It is also true that modern agriculture is an enormously complex and deeply entrenched human and physical system. In some ways, it all just feels too far gone at this point in our development to turn the ship around in transformational ways.⁸⁸ At the same time, it is a fair question to ask whether we should care about the future of rural communities at all. Perhaps the urbanization of American and the industrialization of the countryside is inevitable. Even if we decide to care about rural communities, how do we decide which ones? Is it enough to emphasize that real people—drawn to or left in these places after generations of wealth and resource extraction, driven by our collective policy choices—are suffering?⁸⁹

One of the best things that can be said about our current system of agriculture is that it produces a lot of food.⁹⁰ The United States produces more food than any other country. Yet, one in seven Americans are food inse-

ties “share the experience of living in close proximity to the historical remnants of institutions explicitly created to conquer, oppress, and maintain their subordinate position in society”).

86. JON BAILEY ET AL., *CTR. FOR SOC. DEV., WASH. UNIV. IN ST. LOUIS, WEALTH BUILDING IN RURAL AMERICA: PROGRAMS, POLICIES, RESEARCH* 48 (2006), <https://doi.org/10.7936/K7R49Q7P> [<https://perma.cc/KWE3-JGDR>]; AYAZI & ELSHEIKH, *supra* note 77, at 59. Housing quality in rural communities is also often substandard, with limited (if any) wealth-building benefits. BAILEY ET AL., *supra*, at 48–52 (describing proliferation of rural mobile homes with depreciating values).

87. Chen, *supra* note 5, at 1262; *see also* Eric Holt-Giménez, *Agrarian Questions and the Struggle for Land Justice in the United States*, in *LAND JUSTICE: RE-IMAGINING LAND, FOOD, AND THE COMMONS IN THE UNITED STATES* 7 (Justine M. Williams & Eric Holt-Giménez eds., 2017) (blaming the “US’s agrarian transition” for a host of social ills across the country).

88. *See supra* note 30 and accompanying text (discussing litany of new farmer challenges).

89. *See* Ann M. Eisenberg, *Distributive Justice and Rural America*, 61 B.C. L. REV. 189, 228–29 (2020) (outlining pattern of urban-majoritarian choices that “effectuated a grand sacrifice of rural communities”).

90. *Cf.* Chen & Adams, *supra* note 12 (suggesting industrialization of agricultural is natural, even desirable, evolution).

cure—and people of color, women, children, and those working in the food sector are among the most impacted.⁹¹

There are two other key facts essential to this conversation: First, the age of current (white) farmers and landowners is increasing, and experts estimate that 10% of U.S. agricultural land—or roughly 100 million acres—will change hands over the next five years based on natural aging events.⁹² Other estimates suggest nearly two-thirds of farmland will “need a new farmer over the next two and a half decades as older farmers retire.”⁹³ This transition—from current owners to new owners—is going to happen no matter what the law does or does not do. Our choice is whether this transition is an opportunity to build something new or a ramp to more of the same.⁹⁴

Second, there are a lot of people who want to farm but are locked out by a range of factors, especially by the current land system.⁹⁵ The National Young Farmers Coalition (NYFC) recently surveyed 3,517 “aspiring, current, and former farmers” under 40 years old in the United States; 60% were women and 75% were from nonfarming families.⁹⁶ These young farmers are also disproportionately farmers and ranchers of color and Indigenous—at nearly twice the rate of farmers in the 2012 Census of Agriculture.⁹⁷ These young farmers consistently identify access to land as their top challenge by a significant margin.⁹⁸ NYFC also identifies racial inequity in agriculture as a threshold concern that limits opportunity for young farmers in the United States.⁹⁹ This corresponds with other evidence that “[i]ncreasingly, begin-

91. Holt-Giménez, *supra* note 87, at 9; *see also* BOWENS, *supra* note 2, at 18–19.

92. ADAM CALO & MARGIANA PETERSEN-ROCKNEY, BERKELEY FOOD INST., WHAT BEGINNING FARMERS NEED MOST IN THE NEXT FARM BILL: LAND 1 (2018), <https://food.berkeley.edu/wp-content/uploads/2018/08/BFI-Beginning-Farmers-Policy-Brief.pdf> [<https://perma.cc/3DWN-T9NQ>]. The 2017 agriculture census reports there are 1.15 million producers aged 65 and over, compared to only 285,000 under the age of 35. 2017 CENSUS, *supra* note 57, at 62 tbl.52.

93. *Land Access*, NAT’L YOUNG FARMERS COAL., <https://www.youngfarmers.org/land-access/> [<https://perma.cc/PH9A-W79P>]; *see also* ACKOFF ET AL., *supra* note 23, at 18.

94. *See infra* notes 193–198 and accompanying text (discussing predictions of future inheritance and transfer patterns under current law).

95. *See, e.g.*, Jillian Forstadt, ‘Make Farmers Black Again’: African Americans Fight Discrimination to Own Farmland, NPR (Aug. 25, 2020, 5:03 AM), <https://www.npr.org/2020/08/25/904284865/make-farmers-black-again-african-americans-fight-discrimination-to-own-farmland> [<https://perma.cc/RR7K-LUE6>].

96. ACKOFF ET AL., *supra* note 23, at 9, 22–23.

97. *Id.* at 9. This survey included 12% of respondents who were farmers of color or Indigenous farmers, compared to 5% of all current farm operators. *Id.* at 23. Notably, the survey did not capture farmworkers. *Id.* This survey sample is not randomized nor modeled to represent all young farmers, only farmers connected to this membership organization, but it is evidence that there are significant numbers of farmers and ranchers of color who do aspire to farm.

98. *Id.* at 8, 10. Land access is the number-one challenge limiting young farmers’ access to farm or ranch careers—double the impact of the next most prevalent barrier, student-loan debt. *Id.* at 34.

99. *Id.* at 14, 19.

ning farmers are members of underrepresented groups (e.g., women, immigrants, veterans, racial/ethnic minorities, LGBTQ, and young farmers) who face greater barriers to securing quality and affordable farmland.”¹⁰⁰

These new, upstart farmers also tend to be creative about the kinds of farming they aspire to do, tending toward smaller scales and more diversified operations rejecting the more industrialized monocultures of modern farming.¹⁰¹ Climate change, of course, is another monumental transition on our horizon.¹⁰² These younger farmers also are more likely to focus on sustainability and to actively seek to build climate resiliency.¹⁰³ Historically, the actual relationship between farm size—or farm ownership structure—and environmental outcomes has not always been direct,¹⁰⁴ but greater operational diversity and ground-up experimentation and innovation *is* critical to creating more forward-looking resiliency and sustainability in complex systems generally.¹⁰⁵

The primary point, for now, is that the energy and the opportunity is there. Despite all the challenges—agricultural concentration, rural depopulation, environmental destruction—the U.S. countryside has a long history of resistance, from agrarian populism to current farmworker alliances.¹⁰⁶ Numerous grassroots organizations are working actively on food and land justice.¹⁰⁷ Soul Fire Farm in upstate New York, for example, has a “waiting list

100. CALO & PETERSEN-ROCKNEY, *supra* note 92, at 2.

101. ACKOFF ET AL., *supra* note 23, at 81.

102. The full scope of agriculture’s relationship to continued environmental degradation, or its potential as a source of proactive mitigation, is beyond the scope of this Article, but the sustainability of new enterprises and practices is a critical consideration. *See, e.g.*, Carrie A. Scufari, *Tackling the Tenure Problem: Promoting Land Access for New Farmers as Part of a Climate Change Solution*, 42 COLUM. J. ENV’T L. 497 (2017); Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1158–59 (2009).

103. *See* ACKOFF ET AL., *supra* note 23, at 59, 81.

104. *E.g.*, Chen & Adams, *supra* note 12, at 408 (collecting evidence that, given financing limits and capital constraints, “small farm size and family ownership represent absolutely no guarantee of agroecological integrity”).

105. *See, e.g.*, C.S. Holling & Lance H. Gunderson, *Resilience and Adaptive Cycles*, in PANARCHY: UNDERSTANDING TRANSFORMATIONS IN HUMAN AND NATURAL SYSTEMS 25, 33–40, 47–52 (Lance H. Gunderson & C.S. Holling eds., 2002) (articulating theory of bottom-up experimentation and adaptation in complex human and natural systems).

106. Holt-Giménez, *supra* note 87, at 8 (“Today the US has more people in prison than farmers working the land.”).

107. *E.g.*, Leah Penniman, *After a Century in Decline, Black Farmers Are Back and On the Rise*, YES! (May 5, 2016), <https://www.yesmagazine.org/democracy/2016/05/05/after-a-century-in-decline-black-farmers-are-back-and-on-the-rise> [<https://perma.cc/9VPY-46D7>] (collecting numerous examples); *Want to See Food and Land Justice for Black Americans? Support These Groups*, CIV. EATS (June 2, 2020), <https://civileats.com/2020/06/02/want-to-see-food-and-land-justice-for-black-americans-support-these-groups> [<https://perma.cc/VX9P-4WBC>]; *see also infra* Section IV.A.2 (collecting examples of ongoing grassroots reform efforts).

many years long for their black- and brown-farmer training programs.”¹⁰⁸ There are over 12,000 Native students involved in farm training and agricultural education programs like Future Farmers of America and supported by organizations like the Indigenous Food and Agriculture Initiative.¹⁰⁹ And throughout the country, there are numerous other stories of individuals and groups creatively pushing the boundaries of what agriculture can be and pursuing more inclusive rural futures.¹¹⁰

II. PROPERTY’S PREJUDICES: HOW RURAL LANDSCAPES GOT SO WHITE

If American farmland ownership today is so racially stratified, how did it get this way? This Part briefly recounts the most significant and explicit ways the law designed this system of almost exclusively white agricultural landownership. This Part emphasizes the racialized dimensions of original agricultural land acquisition, including specific ways false race-based hierarchies were deployed both to create a property system in the ideal of western, white property ownership and to ensure the distribution of these valuable entitlements to white landowners. This history of settlement and property development still fundamentally shapes land ownership and how we think about it.¹¹¹

108. Adam Wernick, *‘Farming While Black’: Cultivating Food- and Racial-Justice in Upstate New York*, WORLD (Dec. 4, 2018, 6:00 PM), <https://www.pri.org/stories/2018-12-04/farming-while-black-cultivating-food-and-racial-justice-upstate-new-york> [<https://perma.cc/86XC-4GQJ>].

109. See Kelsey Jones-Casey, *Food Hero: Janie Simms Hipp, Founder of the Indigenous Food and Agriculture Initiative*, FOODTANK (Aug. 2013), <https://foodtank.com/news/2013/08/food-hero-janie-simms-hipp-co-founder-of-the-indigenous-food-and-agricultur> [<https://perma.cc/6CHU-9D2W>].

110. See Mai Nguyen, *The One Thing My Farm Training Never Covered: Racism*, NAT’L YOUNG FARMERS COAL. (July 3, 2017), <https://www.youngfarmers.org/2017/07/the-one-thing-my-farm-training-never-covered-racism> [<https://perma.cc/6M8T-Z962>]; Leah Penniman, *A New Generation of Black Farmers Is Returning to the Land, YES!* (Nov. 19, 2019), <https://www.yesmagazine.org/social-justice/2019/11/19/land-black-farmers-reparations> [<https://perma.cc/G49E-PZFD>]; BOWENS, *supra* note 2, at 160–64.

111. Sonya Salamon, *Cultural Dimensions of Land Tenure in the United States, in WHO OWNS AMERICA? in SOCIAL CONFLICT OVER PROPERTY RIGHTS* 159, 160 (Harvey M. Jacobs ed., 1998). As a point of clarification, focusing on areas of concentrated rural poverty, the mostly white Appalachian region also deserves attention. A large part of this regional poverty is also attributable to disproportionate distributions of power, with fossil fuel industries often blamed for inequitable extraction of wealth and resources while intense environmental and health costs are borne by local communities. Although racially predominantly white, it is startling how similar strategies for constructing racial difference—including, fundamentally, narratives of essentializing a group’s “otherness”—have also been deployed against Appalachians to (at least implicitly) justify and perpetuate these disparities. Nicholas F. Stump & Anne Marie Lo-faso, *De-essentializing Appalachia: Transformative Socio-legal Change Requires Unmasking Regional Myths*, 120 W. VA. L. REV. 823 (2018). Full analysis of this subject is beyond the scope of this Article but is an important topic for continued conversation and exploration.

A. Indigenous Land Acquisitions and Conversions

All real property titles in this country ultimately trace back to European colonization of this country and, more particularly, the Supreme Court's opinion in *Johnson v. M'Intosh*.¹¹² In *Johnson*, the Court held that the Indigenous peoples of this continent did not hold full title to their lands—at least as could be as recognized in U.S. courts—because of their Indigeneity.¹¹³

Prior to European arrival, Indigenous peoples operated in multiple self-sustaining and interlocking societies, each with their own independent land-tenure systems and political territories.¹¹⁴ Many of these Indigenous societies operated rich and diverse agricultural systems, often deploying innovations tied to the specific physical landscapes in which they operated.¹¹⁵ U.S. settlers, of course, learned from, traded with, and in numerous ways depended on these preexisting Indigenous farming, fishing, and hunting operations.¹¹⁶ But U.S. settlement also ultimately depended on the displacement of these Indigenous systems and the dispossession of original Indigenous owners. By legal magic act, and with no Indigenous representation or engagement in the process, the *Johnson* decision transformed Indigenous peoples' legal relationships to land and territory to one explicitly based on universalized assumptions of European superiority and the ideal of "civilized," Christian explorers. Where Indian possessors had once been full owners of title to land and sovereigns over territory, settlement of this continent by Christian Europeans changed the nature of their claims to the entire continent—a form of conquest by law as much as by force in many cases.¹¹⁷

After *Johnson*, Indigenous nations and landowners still had a recognized right of occupancy in the lands they continuously possessed—so-called Indian or Aboriginal title—but they could only transfer their rights by federal purchase or conquest.¹¹⁸ The federal government then set to work using the power of the federal purse to acquire original Indigenous lands and relocate Indigenous peoples to the West—with policies including sequential treaty-based reservation creations, forced removal, and even outright termination of tribal recognition and status. These efforts involved some transactional

112. 21 U.S. (8 Wheat.) 543, 592 (1823).

113. *Johnson*, 21 U.S. at 593.

114. Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1571–94 (2001).

115. E.g., Holt-Giménez, *supra* note 87, at 4; *Readjustment of Indian Affairs: Hearing on H.R. 7902 Before the H. Comm. on Indian Affs.*, 73rd Cong. 431 (1934) (statement of D.S. Otis) (describing historic Indigenous agricultural economies based both on systems of individualistic effort and reward and more cooperative, pooled resource and effort sharing).

116. Holt-Giménez, *supra* note 87, at 4.

117. STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005); LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005).

118. *Johnson*, 21 U.S. at 592 (preserving Indian right of occupancy but imposing federal restraint on alienation).

exchanges, but the construction of a system in which Indigenous nations could only transfer their rights to a single U.S. purchaser deflated economic values.¹¹⁹ In addition, many transfers were forced and not at all consensual.¹²⁰

Even after relocating Indigenous peoples to smaller, formal reservations of land, with treaty promises that these spaces would be reserved for exclusive and continuous Indigenous use, the federal government frequently reversed course and took more Native lands. In particular, the federal allotment policy not only broke up tribes' reserved landholdings in favor of individual tribal citizen "allotments" but also forced sales of any euphemistically entitled "surplus lands" to non-Indian settlers within reservation boundaries.¹²¹ In all, between 1887 and 1934 when the allotment policy officially ended, Indigenous peoples lost another ninety million acres—or 60%—of their remaining land base, predominantly from forced surplus sales.¹²² Ironically, allotment was framed as an effort, in part, to promote more productive Indigenous agriculture—using the individualistic incentives of private ownership as a carrot to produce more productive agricultural enterprise. But by permitting the leasing of allotments and otherwise forcing an inefficient system of federally managed land tenure on Indian people, allotment instead *reduced* the number of Indians farming and their productivity.¹²³

Allotment also introduced a special federal trust status on reservation lands that not only prohibits alienation without federal consent but also cements a significant federal management role over Indigenous land-use choices.¹²⁴ Today, despite original claims to the entirety of the continent, Indigenous tribes and citizens in the lower forty-eight states share only fifty-six

119. Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1114–15 (2000).

120. E.g., Jessica A. Shoemaker, *An Introduction to American Indian Land Tenure: Mapping the Legal Landscape*, 5 J.L. PROP. & SOC'Y 1, 19, 87–88 (2020) (describing, for example, history of forced removals and government taking of lands, including the Black Hills).

121. General Allotment (Dawes) Act, ch. 119, § 5, 24 Stat. 388, 389–90 (1887) (codified at 25 U.S.C. § 331 et seq.) (repealed 2007); see also Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10–12 (1995); Katherine R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 605 & n.43 (2000); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 132–34, 138 (Rennard Strickland et al. eds., 1982). In many instances, an initial protective trust status preventing alienation was also removed prematurely from individual Indians' allotments, resulting in almost every case in immediate transfer to unscrupulous non-Indian speculators. See LEONARD A. CARLSON, INDIANS, BUREAUCRATS, AND LAND: THE DAWES ACT AND THE DECLINE OF INDIAN FARMING 13 (1981).

122. See FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 121, at 138; CARLSON, *supra* note 121, at 18.

123. CARLSON, *supra* note 121, at 155, 159. "[A]llotment was followed by a dramatic decline in Indian farming" in the first three decades of the twentieth century. *Id.* at 155.

124. See generally *United States v. Navajo Nation*, 537 U.S. 488 (2003) (discussing the scope of secretarial discretion and trust responsibility in Indian Country).

million acres of land in this now-permanent federal trust status.¹²⁵ Although much of this land is agricultural, the trust status, with its continued federal bureaucratic control, makes these Indian lands less efficient and flexible to use. It is also blamed for continued poverty and lack of development in many reservation communities—even as it does preserve remaining legal landownership for the future.¹²⁶ Today, on many reservations, the majority of agricultural lands are rented to non-Indian producers, if they are used at all—locking many current Indigenous landowners out of their own lands for use as farmers or for other purposes.¹²⁷

B. Denying Lands to Original Mexican Owners

California, Nevada, Utah, and portions of Colorado, New Mexico, Arizona, and Wyoming were all created after a territorial land cession from the Republic of Mexico memorialized in the 1848 Treaty of Guadalupe Hidalgo, which ended the Mexican-American War.¹²⁸ In this Treaty, the United States solemnly promised that, as the new territorial sovereign, “it would ‘inviolably respect’ the established private property rights of Mexican citizens in the conquered territory.”¹²⁹ Specifically, the Treaty promised that Mexicans in the ceded territory would be “maintained and protected in the free enjoyment of their liberty and property.”¹³⁰

Families and communities who trace titles to original Mexican grants protected under the Treaty, however, regularly found themselves frustrated in their land claims.¹³¹ Numerous factors conspired against Mexican land claimants.¹³² For example, U.S. courts required formal documentation to

125. Jessica A. Shoemaker, *No Sticks in My Bundle: Rethinking the Indian Land Tenure Problem*, 63 U. KAN. L. REV. 383 (2015).

126. Terry L. Anderson & Dean Lueck, *Land Tenure and Agricultural Productivity on Indian Reservations*, 35 J.L. & ECON. 427 (1992).

127. See JESSICA A. SHOEMAKER, FARMERS’ LEGAL ACTION GRP., FARM AND RANCH ISSUES IN INDIAN COUNTRY (2006), <http://www.flaginc.org/publication/farm-and-ranch-issues-in-indian-country> [https://perma.cc/Y45L-QGRE]; Shoemaker, *supra* note 125.

128. U.S. GEN. ACCT. OFF., GAO-04-59, TREATY OF GUADALUPE HIDALGO: FINDINGS AND POSSIBLE OPTIONS REGARDING LONGSTANDING COMMUNITY LAND GRANT CLAIMS IN NEW MEXICO 25–31 (2004).

129. Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 202 (1996).

130. See Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922, 930. For one view of the difference between Indigenous land claims after *Johnson* and the civil-law rights of former Mexican citizens under the Treaty of Guadalupe Hidalgo, see Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1629–31 (2000).

131. See, e.g., Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a “Naked Knife,”* 4 MICH. J. RACE & L. 39, 87–125 (1998); Tsosie, *supra* note 130, at 1631–32.

132. The land-claims process was complex, but several analyses have emphasized its racial bias. E.g., Richard Griswold del Castillo, *Manifest Destiny: The Mexican-American War and the Treaty of Guadalupe Hidalgo*, 5 SW. J.L. & TRADE AMS. 31, 37 (1998) (articulating how

prove one's claim under the Treaty, but many of these records had been deliberately destroyed by the U.S. military.¹³³ At the same time that Mexican land claims were being denied for lack of documentation, white claimants who lacked similar documentation were frequently granted exceptions.¹³⁴ Language and other barriers also created obstacles for Mexican claimants.

In general, "the legal system . . . had a great deal of sympathy for the rights of settlers to vacant lands in the West, and had little sympathy for the Mexican landowner as against white squatters who had cultivated and improved the land for the statutory time under the doctrine of adverse possession."¹³⁵ After the completion of the federal claims process, many individuals and communities still claimed that their rights under Mexican law were disregarded in the United States.¹³⁶ Moreover, those who were able to preserve claims frequently lost their property after so-called range wars, in which "[u]ltimately, the Anglo Texans won the battle, not with bullets but with their control of the courts, the territorial legislature and the local peace officers."¹³⁷ At the end of these conflicts, "thousands of former Mexican property owners lost their lands to speculators, banks, and lawyers," in Texas alone, contributing to a "pattern of economic subordination" along racial and ethnic lines that persists in the Southwest today.¹³⁸

Later, while World War II sent much of the U.S. workforce to the military, U.S. agriculture welcomed thousands of Mexicans to work in our fields.¹³⁹ After the war, the U.S. government initiated the Bracero Program by which another four million Mexican workers came to American fields; today peasants and Indigenous peoples of Mexico, Central America, and the Caribbean remain at the center of farm and food work and struggles for justice in the United States—but not in a landowner role.¹⁴⁰

racism of the time advantaged white landownership); Kim David Chanbonpin, *How the Border Crossed Us: Filling the Gap Between Plume v. Seward and the Dispossession of Mexican Landowners in California After 1848*, 52 CLEV. ST. L. REV. 297 (2005) (focusing on racialized dispossession in California specifically).

133. Tsosie, *supra* note 130, at 1629–30.

134. *Id.*; see also Luna, *supra* note 131, at 91, 94 (describing case of California senator whose claim to gold mines was approved although he had "lost" the necessary granting papers, in light of additional evidence of his admirable personal character); *id.* at 97–98 (describing similar exception for Texas ranger and soldier "who would not have committed fraud").

135. Tsosie, *supra* note 130, at 1630.

136. *E.g.*, *id.* at 1619 (describing case of one Hispanic community in Costilla County, Colorado, which has been fighting for thirty years to confirm rights to 77,000 acres of mountainous land that they claim to have used in common for nearly 150 years).

137. Griswold del Castillo, *supra* note 132, at 38.

138. *Id.*; see also Tsosie, *supra* note 130, at 1631.

139. Holt-Giménez, *supra* note 87, at 6.

140. *Id.*

C. Slavery and Black Land Loss

Prior to the abolition of slavery in 1865, plantation owners in the American South enslaved millions of people taken from Africa for forced farm labor. This racialized slave labor resulted in the accrual of enormous wealth for the mostly white, male landowners.¹⁴¹ The math of accounting for slavery's effects is difficult. On some conservative estimates, if former slaves were paid for their agriculture labor outside of the institution of slavery, the debt would be \$6.4 trillion today.¹⁴²

Treating human beings *as* property not only increased the wealth and power of slave-owning white “farmers” but also, of course, cemented and stabilized a parallel race-based hierarchy in land ownership. Slaves very rarely owned, or had the opportunity to own, their own farmland.¹⁴³ Upon the abolition of slavery, part of the expectation for a federal repairing of these historic harms included land-redistribution promises—the popularly imagined “40 acres and a mule.”¹⁴⁴ In fact many of these efforts, including the Southern Homestead Act, resulted in more distributions to white farmers than freed slaves, as the Act allowed distribution to pardoned Southerners and anyone else who claimed he had not supported the Confederacy.¹⁴⁵ Although African Americans did acquire land after emancipation, it was “almost completely through private purchase, overcoming discriminatory credit practices, violence perpetuated by anti-black groups, and the refusal of many whites to sell to black people.”¹⁴⁶ And the lands they did purchase were often suboptimal, “with less fertile soil, perhaps tucked away in the hills, not too close to the main highways or railroads, nor to white schools or churches.”¹⁴⁷

Still, by 1890 African Americans represented 14% of all farmers and owned roughly 15 million acres.¹⁴⁸ According to the U.S. Census of Agricul-

141. Horst & Marion, *supra* note 49, at 3; JOE R. FEAGIN & KIMBERLEY DUCEY, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* (4th ed. 2019).

142. *E.g.*, Jeff Neumann & Tracy Matsue Loeffelholz, *40 Acres and a Mule Would Be at Least \$6.4 Trillion Today—What the U.S. Really Owes Black America, YES!* (May 14, 2015), <https://www.yesmagazine.org/issue/make-right/2015/05/14/infographic-40-acres-and-a-mule-would-be-at-least-64-trillion-today> [<https://perma.cc/3EJ5-KC8F>].

143. *See* Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 523–24 (2001).

144. *Id.* at 525–26 (describing policy's evolution and limited implementation).

145. *But see* RICHARD EDWARDS, JACOB K. FRIEFELD & REBECCA S. WINGO, *HOMESTEADING THE PLAINS: TOWARD A NEW HISTORY* (2017) (emphasizing egalitarian ideals of homesteading); Neil Canaday, Charles Reback & Kristin Stowe, *Race and Local Knowledge: New Evidence from the Southern Homestead Act*, 42 REV. BLACK POL. ECON. 399, 411 (2015) (interrogating success rates for Black homesteaders).

146. Mitchell, *supra* note 143, at 526.

147. *Id.* (quoting PAMELA BROWNING, U.S. COMM'N ON C.R., *THE DECLINE OF BLACK FARMING IN AMERICA* 22–23 (1982)).

148. Horst & Marion, *supra* note 49, at 3.

ture, African American farmland ownership “peaked in 1910 at 16–19 million acres.”¹⁴⁹ By 1997, however, this number was down to just 1.5 million acres.¹⁵⁰ The causes of Black land loss are myriad but track a dramatic decline in the number of Black farmers in the United States, far outpacing declining farmer numbers among other groups.¹⁵¹ One clear contribution is a blatant—and well-documented—history of racial discrimination against Black farmers by USDA officials and local loan-granting committees (commissioned at the county level to administer these federal farm programs), including particularly in the granting and dissemination of essential farm operating loans.¹⁵² Exclusion of Black landowners from New Deal farm programs is another documented source.¹⁵³ Finally, land insecurity generated by lack of probate access and generational intestacy and heir property also contributes to continuing land loss.¹⁵⁴

D. *Mostly White (and Mostly Male) Homesteading*

Meanwhile, westward settlers sought to claim lands for themselves, often for privatized farming. These settlers were primarily white and European and sometimes sought to adversely possess or otherwise take even those lands that had been reserved for other racial and ethnic groups.¹⁵⁵ Many white land titles trace back more directly to official homesteading policies. Between 1863 and 1939, some 1.5 million households received 246 million acres of land via homesteading.¹⁵⁶ This widespread distribution of roughly

149. Gilbert et al., *supra* note 55, at 55.

150. Antonio Moore, *Who Owns Almost All America's Land?*, INEQUALITY.ORG (Feb. 15, 2016), <https://inequality.org/research/owns-land> [<https://perma.cc/XCS8-M8QZ>]. By 1992, the number of Black farmers in America had declined by 98%. Natasha Bowens, *The Color of Food: America's Invisible Farmers*, CIV. EATS (Apr. 14, 2015), <https://civileats.com/2015/04/14/the-color-of-food-an-introduction> [<https://perma.cc/62TM-2MKA>]. In 2012, there were only 44,000 Black farmers in the United States, or 1.6% of farmers. *Id.*

151. Mitchell, *supra* note 143, at 527.

152. *Id.* at 528–29; *see also* Joshua Ulan Galperin, *The Life of Administrative Democracy*, 108 GEO. L.J. 1213, 1243–47 (2020) (outlining how locally elected, majoritarian county committee systems employed by the USDA resulted in widespread, race-based discrimination in federal farm programs); *see infra* note 249 (discussing civil rights settlements with USDA).

153. AYAZI & ELSHEIKH, *supra* note 77, at 25 (detailing, for example, exclusion of Black landowners from Agricultural Adjustment Administration support in the 1930s).

154. *See* Mitchell, *supra* note 143, at 517. Other sources of blame include the boll weevil infestations in cotton, postwar mechanization, and “the lure of jobs and relative safety in the North.” AYAZI & ELSHEIKH, *supra* note 77, at 54; *see* Jess Gilbert, Gwen Sharp & M. Sindy Felin, *The Loss and Persistence of Black-Owned Farms and Farmland: A Review of the Research Literature and Its Implications*, 18 S. RURAL SOCIO., no. 2, 2002, at 1; *see also infra* Section III.C.3.

155. *E.g.*, Ann M. Eisenberg, *Land Shark at the Door? Why and How States Should Regulate Landmen*, 27 FORDHAM ENV'T L. REV. 157, 179 (2016); *see infra* Section II.E.

156. Trina R. Williams Shanks, *The Homestead Act of the Nineteenth Century and Its Influence on Rural Lands 3* (Wash. Univ. in St. Louis Ctr. for Soc. Dev. Working Paper, Paper No. 05-52, 2005), <https://doi.org/10.7936/K77S7N9W> [<https://perma.cc/ZAJ8-8KH3>].

20% of the federal public domain at this time yielded significant economic benefits for the country and for the homesteaders themselves.¹⁵⁷

The “vast majority” of homesteaders were white households, resulting in redistribution of farmlands taken from Native Americans and Mexican owners.¹⁵⁸ Title also predominantly went to men, although some women were able to acquire title if they were “single, widowed, divorced, or deserted.”¹⁵⁹ Married women, however, were generally ineligible to take land in their own name as the Act was limited to the “head of [a] household.”¹⁶⁰

Notably, the 1862 Homestead Act had no explicit racial restrictions, and by 1866, it was clear that Black Americans were recognized as U.S. citizens, making them eligible for their 160 acres of western public lands if they paid the small fee and lived continuously on the property for five years.¹⁶¹ The Black Homesteaders in the Great Plains project at the University of Nebraska has identified several African American homesteading communities that once existed in the Great Plains with several hundred likely living in these “colonies,” but the number of descendants still living in these places has dramatically dwindled.¹⁶² The largest of these communities—Nicodemus, Kansas—once was home to three hundred to four hundred settlers, and it is the only Black-homesteading community still occupied at all.¹⁶³ As of 2015, there were seventeen descendants of these original Black homesteaders who still owned farmland in the five-township vicinity near Nicodemus and five were still actively farming.¹⁶⁴ This history is so unique that it is preserved as a National Historic Site.¹⁶⁵

157. *Id.* at 3–7. In 1853, the United States owned 1.5 billion acres of public lands. BAILEY ET AL., *supra* note 86, at 37.

158. Horst & Marion, *supra* note 49, at 3.

159. H. Elaine Lindgren, *Women Homesteaders*, ENCYC. GREAT PLAINS, <http://plainshumanities.unl.edu/encyclopedia/doc/egg.gen.040> [<https://perma.cc/ZA5Y-TRTX>].

160. *Id.*; see also Hannah Haksgaard, *The Homesteading Rights of Deserted Wives: A History*, 99 NEB. L. REV. 419 (2020). State laws at the time also curtailed women’s property rights dramatically. See *American Women: Resources from the Law Library*, LIBR. CONG., https://memory.loc.gov/ammem/awhhtml/awlaw3/property_law.html [<https://perma.cc/3PKU-9RKF>] (providing an overview of married women’s property laws in various states).

161. Richard Edwards, Opinion, *The Disappearing Story of the Black Homesteaders Who Pioneered the West*, WASH. POST (July 5, 2018, 5:23 PM), https://www.washingtonpost.com/opinions/the-disappearing-story-of-the-black-homesteaders-who-pioneered-the-west/2018/07/05/ca0b51b6-7f09-11e8-b0ef-fffcabeff946_story.html [<https://perma.cc/N46U-BVFK>].

162. EDWARDS ET AL., *supra* note 145.

163. See, Edwards, *supra* note 161.

164. *Nicodemus: Frequently Asked Questions*, NAT’L PARK SERV., <https://www.nps.gov/nico/faqs.htm> [<https://perma.cc/Z6EP-8ENX>].

165. *Nicodemus: National Historic Site Kansas*, NAT’L PARK SERV., <https://www.nps.gov/nico/index.htm> [<https://perma.cc/EDL6-5T86>].

E. *The Closing of the Grazing Commons and Conservation*

While the Homestead Act and its contemporaries had the most impact in the Midwest where soils were richer and the 160-acre maximum allotment more sustainable, the Far West remained removed from more formalized federal land policies for some time and also, given its unique physical terrain and resource qualities, required some property adaptation.¹⁶⁶ Ranchers drove cattle west in the 1870s and 1880s before the existence of any formal government distribution system and divided grazing rights largely based on local customs of first possession, with future entry and use of rangeland constrained through informal—but highly effective—local livestock associations.¹⁶⁷ Around this time, many firstcomer ranchers also marked their claims with barbed wire fencing, even contrary to federal law.¹⁶⁸

By 1934, at the time of the Taylor Grazing Act, while ranchers continued to assert informal claims to grazing lands, the federal government held approximately eighty million acres of western lands.¹⁶⁹ Today, the Bureau of Land Management alone administers approximately 155 million acres of federal rangeland.¹⁷⁰ Initial grazing allotments favored those who were already grazing and also favored owners of so-called base ranch lands adjacent to the federally owned range on which the grazing would occur.¹⁷¹ Throughout the process of federal grazing management, existing claims have been grandfathered and preserved, privileging historical acquisitions of white ranchers over and over.¹⁷² These ranching operations on public lands have “remarkable staying power” and, even though permits are theoretically terminable and not formally recognized as a property right, they are regularly and reliably renewed—so routinely that “banks customarily capitalize the permits’ value into the ranches to which they are adjacent.”¹⁷³

This parallels numerous instances in federal conservation and public lands policy in which federal laws actively “eliminated indigenous presence in order to preserve landscapes for non-Indians.”¹⁷⁴ Conservation efforts, alongside the goals of extraction and settlement, also drove Indigenous peoples out of landscapes, including through the designation of forest reserves,

166. Gary D. Libecap, *The Assignment of Property Rights on the Western Frontier: Lessons for Contemporary Environmental and Resource Policy*, 67 J. ECON. HIST. 257, 265 (2007).

167. *Id.* at 271–72.

168. Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163, 172 (1975).

169. Libecap, *supra* note 166, at 274; Taylor Grazing Act of 1934, ch. 865, 48 Stat. 1269 (codified as amended at 43 U.S.C. §§ 315–315r).

170. See HARDY VINCENT, *supra* note 48.

171. Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991, 1029 (2014).

172. See *id.* at 1002.

173. *Id.* at 1004–05.

174. Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. C.R.-C.L. L. REV. 213, 215 (2018).

national parks, and national monuments on tribal lands.¹⁷⁵ This system still dramatically limits opportunities for new entrants to public land grazing—despite the ideal that these spaces be public and subject to adaptive management and other reflective land-use choices and designs for public purposes.¹⁷⁶ Instead of providing open and equitable access, “public regulation of land access erected barriers to entry that secured existing claimants’ hold on their preferred resources,” even while “spar[ing] these claimants the need for capital outlays for the purchase of property.”¹⁷⁷ This is particularly true for the grazing rights allocation process under the Taylor Grazing Act, which “made it exceedingly unlikely that newcomers to ranching would succeed in obtaining access to public lands previously claimed by existing ranchers.”¹⁷⁸

F. Alien Property Acts

Finally, specific legislation directly barred many Asian American immigrants from owning land well into the twentieth century.¹⁷⁹ Moreover, during World War II, many Japanese Americans incarcerated in internment camps lost their farms and homes.¹⁸⁰

III. DECONSTRUCTING THE FEE SIMPLE

With these and other acts, America constructed a *legal* system that allocated land to its white citizens, to the exclusion of people of color. These choices radically transformed the American landscape and dispersed nearly exclusive white agricultural landownership. This history of racism, however, might be confined to the past if everyone had equal opportunity to acquire land today—if labor and hard work were rewarded fairly and parallel opportunities for land access distributed equally. In that just world, current dispar-

175. *Id.*

176. Huber, *supra* note 171, at 1037.

177. *Id.*

178. *Id.* at 1037 n.251 (citing WESLEY CALEF, PRIVATE GRAZING AND PUBLIC LANDS: STUDIES OF THE LOCAL MANAGEMENT OF THE TAYLOR GRAZING ACT 62–66 (1960)). In addition to the allocation of durable rights to claim continued privileges and the preferencing of existing permittees, the Taylor Grazing Act also “created Grazing Advisory Boards, comprised of ranchers themselves, which were responsible for managing the local range allocation process.” Huber, *supra* note 171, at 1038 n.255. All this has also taken on racial overtones, with numerous commentators noting narratives of white domination in federal grazing, including standoffs and protests opposing ongoing federal oversight. *E.g.*, Anne Bonds & Joshua Inwood, *Beyond White Privilege: Geographies of White Supremacy and Settler Colonialism*, 40 *PROGRESS HUM. GEOGRAPHY* 715 (2016); Kimmel & Ferber, *supra* note 85, at 586; Ann M. Eisenberg, *Alienation and Reconciliation in Social-Ecological Systems*, 47 *ENV’T L.* 127 (2017).

179. *E.g.*, Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943); Webb-Haney Act (Alien Land Law) of 1913, 1913 Cal. Stat. 260, *invalidated by* Sei Fujii v. State, 242 P.2d 617 (Cal. 1952). In general, these laws barred land ownership without legal citizenship and were consistently upheld.

180. *See, e.g.*, Keith Aoki, *No Right to Own? The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 40 *B.C. L. REV.* 37 (1998).

ities in wealth and land ownership would reflect the logical consequence of unequal effort and skill, rather than the compounding effects of historic exclusion. But, instead, we live in a world built to perpetuate original exclusions and racialized wealth distributions.

Part of this reflects the general truth that owning and then transferring property within a family is an efficient means of generational wealth accumulation. Nonwhite citizens locked out of original property ownership started at a disadvantage, and this disadvantage continued over generations and now still impacts who can—and cannot—competitively access land markets.¹⁸¹ But this is not the full story. This Part argues that our most fundamental property-law choices—including the design of the fee simple itself—also actively privilege the original acquirers of land and facilitate wealth concentration in ways that disproportionately impact people of color. First-generation property rights did not end at the first generation but rather, by design, continued perpetually. We also decided that landholding does not require active use and caretaking but can be commodified into an abstract (and ultimately concentrated) investment vehicle. Meanwhile, farm policy inflates the value of agricultural land and encourages land retention over transfer, limiting even further the opportunities for new entrants. This Part explores these and other mechanisms in more depth, but the result is clear. We have created an agricultural land-tenure system that shut the door on people of color and keeps that door shut. The surprise is not that this racialized exclusion continues but that these same property choices are now backfiring against even their original white beneficiaries, facilitating both the industrialization of American agriculture and the depopulation and decline of so many rural communities.

A. *Forever Rights*

Perpetual duration is a core feature of fee simple ownership. The fee simple estate is endless. Fee title bestows rights to control and exclude others from agricultural land into eternity.

Although the fee's perpetual nature now seems inevitable and essential to American property, this is a choice that deviates from other land-tenure organizations. Numerous Indigenous governance structures recognized individual, exclusive use and possession rights but only so long as the possessor was actually actively using and maintaining the land.¹⁸² Abandonment, nonuse, or violation of community-imposed limitations could all result in forfeiture of the land to the community, permitting redistribution consistent

181. See Rosser, *supra* note 32, at 133–40 (collecting examples of generational effects of historically racist property distributions); cf. Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL'Y 53, 59 (2006) (arguing that federal policies facilitating middle-class homeownership and wealth accumulation “have traditionally reinforced residential segregation”).

182. E.g., Bobroff, *supra* note 114, at 1584; Stacy L. Leeds, *The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law*, 10 KAN. J.L. & PUB. POL'Y 491, 496 (2000).

with group needs.¹⁸³ Some modern water rights and civil law usufructs also contain similar conditions requiring active use and care.¹⁸⁴ Even Thomas Jefferson saw the earth as fundamentally a “usufruct to the living” and believed, at least on some level, that the “portion occupied by any individual ceases to be his when himself ceases to be, and reverts to the society.”¹⁸⁵ The initial homesteading program in America also required active, direct possession and improvement—although only for a short initial prove-up period and, once the initial conditions were met, the actually issued fee patent was again a perpetual grant.¹⁸⁶

The fundamental endlessness of American property design has important benefits, including allowing an owner to securely choose to hold on-to or conserve resources until a later date without fear that another user will swoop in and take that resource first.¹⁸⁷ In this way, perpetual, secure ownership is designed very specifically (and beneficially) to avoid the overconsumption tragedies of some common resources and to encourage secure investment in and stewardship of land for the long term.¹⁸⁸ It also facilitates the kind of identity-reinforcing community and family ties to specific places, including over generations, that build valuable social attachments. Durable connections to place do matter.¹⁸⁹

But an initial allocation of perpetual rights also has enormous, lasting distributional effects. The original westward expansion of white landownership did not leave a reserve of open spaces on which future generations could spread more equitably. Now, new farmers not lucky enough to inherit farmland have to acquire that land from someone else; by design, the current owners get to trade not only the value of that land in some time-limited parcel—as they would if their rights were measured by one’s life or one’s active

183. *Id.*

184. See, e.g., Ellickson, *supra* note 7, at 1364 (“[A] classic usufruct can be defined as an immutable package of land-use rights that are not transferrable and that terminate when the usufruct’s owner dies or ceases the use.”); Scott A. Clark & Alix L. Joseph, Commentary, *Changes of Water Rights and the Anti-speculation Doctrine: The Continuing Importance of Actual Beneficial Use*, 9 U. DENV. WATER L. REV. 553, 555 (2006) (discussing water law requirement of demonstrated ability to use water at specified place as prerequisite to obtaining right).

185. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON, 27 MARCH 1789 TO 30 NOVEMBER 1789, at 392, 392 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958) (emphasis omitted).

186. See Homestead Act of 1862, ch. 75, § 2, 12 Stat. 392, 392 (repealed 1976); cf. di Robilant, *supra* note 6, at 954 (discussing an alternative, failed proposal that would have imposed a continuing “duty to reside on and cultivate the land”).

187. See Fennell, *supra* note 35, at 1480 (discussing fee simple’s fundamental endlessness).

188. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 355 (1967) (describing how private property owner is uniquely suited to balance “competing claims of the present and the future”).

189. See, e.g., Eduardo M. Peñalver, *Property’s Memories*, 80 FORDHAM L. REV. 1071, 1078–79 (2011) (exploring property’s role in storing collective and individual memories).

use, for example—but also the value of the land for perpetuity.¹⁹⁰ All of this maximizes wealth, as well as political and social power and privilege, in the first generation of owners. As detailed further below, these original distributions are sticky. Even if original landowners' descendants no longer hold the land itself, the value of those forever rights was realized to their ancestors. It will take a jolting event (or major legal change) for the initially dispossessed to catch up.

B. *Abstract Estates*

The second land-tenure feature that negatively impacts equity on rural landscapes is the construction of the fee simple as a divisible set of legal rights that can be commodified and separated from the physical land itself.¹⁹¹ By separating legal investment rights from labor and possession, we facilitate the exchange and consolidation of abstract profit privileges, concentrating both wealth and agricultural control in those who may have no actual knowledge of or connection with the land and its surroundings. This conception of property as a divisible and disembodied bundle of legal rights perpetuates our racialized agricultural system in at least three ways. First, it facilitates persistent claims of absentee heirs of original owners, even when they do not remain to farm. Second, it allows the concentration of land ownership beyond what a single farmer could actively possess and manage. This concentration further limits new entrants' market access. Finally, by sanctioning the depopulation that coincides with this concentrated and absentee ownership, we further obscure the on-the-ground, material, and deleterious effects of modern (and often industrial) agriculture into a distant, shadowed place—where, for example, the disproportionate tax on the natural world and mostly Black and brown farmworkers is conveniently out of sight.

1. The Privilege of Absent Heirs

By allowing the separation of rights to capital and income from the obligations of actual caretaking and labor, the fee simple fails to impose any

190. Other property scholars have critiqued property's original role in distributing the most basic elements required for life in an inequitable fashion. *E.g.*, LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 120 (2003) (articulating the most fundamental truth that by granting some people's claims to universal human needs, property law necessarily denies the claims of others); Laura S. Underkuffler, Essay, *The Politics of Property and Need*, 20 CORNELL J.L. & PUB. POL'Y 363, 369 (2010) (arguing need should be part of property's social calculation); Singer, *supra* note 15, at 778 (connecting property access to social demands for equality and human dignity).

191. *E.g.*, Charles F. Wilkinson, *Law and the American West: The Search for an Ethic of Place*, 59 U. COLO. L. REV. 401, 401–02, 505–06 (1988) (reflecting on shift from natural boundaries of ecosystems and landscapes into artificial legal boxes of property ownership and “the evolution of land from matter to property” (quoting PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* 27 (1987))).

meaningful limit on an owner's absenteeism.¹⁹² Instead, property law has allowed an increasing separation of ownership as investment from ownership as possession and material caretaking.

As a practical matter, this divisibility allows land to remain in current white families, even when heirs and other next-generation landowners are far removed from farming. Overall, the turnover rates for farmers—including older farmers exiting and new farmers entering—are low. As of 2014, the vast majority of private farmland (69%) is owned by people over 65, and about a third of principal farm operators are over 65.¹⁹³ This suggests that, at some point in the relatively near future, a significant amount of farmland will have to transfer (at least upon the death of the current owner).¹⁹⁴ Yet the USDA has predicted that these acres are three times as likely to be sold to a relative, put in a trust, or transferred via a will or gift as they are to be sold on an open market.¹⁹⁵ This likely reflects historic practice as well, because most acres that are purchased in arm's length transactions are "recycled"—or were themselves originally purchased from a nonrelative—"suggesting that the supply of land available for purchase on the open market may not vary much over time."¹⁹⁶

Understandably, many existing farmers desire to keep land in their families, and the law facilitates this by allowing distant children who no longer live on or near the property to maintain ownership and remaining absentee owners of farmlands, often renting their inheritances to tenant farmers.¹⁹⁷ Today, roughly 40% of farmland is rented out,¹⁹⁸ and the majority of these agricultural landlords (54%) inherited or received the land they rent as a gift.¹⁹⁹ This has significant wealth-distribution consequences. Nearly all agricultural landlords (disproportionately the beneficiaries of gifts and inher-

192. *But see* Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1173 (1999) (discussing how, on the opposite end of the spectrum, property system features like property taxes and registration fees do deter excessive fragmentation of ownership).

193. BIGELOW ET AL., U.S. FARMLAND OWNERSHIP, *supra* note 48, at 33, 36.

194. ACKOFF ET AL., *supra* note 23, at 7.

195. In the five-year period following 2014, the USDA predicted only 2.3% of farmlands (or about twenty-one million acres) would be sold on the open, competitive market. BIGELOW ET AL., U.S. FARMLAND OWNERSHIP, *supra* note 48, at 33. In the same timeframe, 7.8% of farmlands (or more than seventy-one million acres) were expected to be sold to a relative, put in a trust, or transferred via a will or gift. *See id.* at 34 tbl.5; Daniel Bigelow & Todd Hubbs, *Land Acquisition and Transfer in U.S. Agriculture*, U.S. DEP'T AGRIC.: AMBER WAVES (Aug. 25, 2016) <https://www.ers.usda.gov/amber-waves/2016/august/land-acquisition-and-transfer-in-us-agriculture> [<https://perma.cc/WEM6-BMFF>].

196. Bigelow & Hubbs, *supra* note 195.

197. *See* Ed Maixner & Sara Wyant, *Big Changes Ahead in Land Ownership and Farm Operators?*, AGRI-PULSE (Feb. 5, 2019, 12:41 PM), <https://www.agri-pulse.com/articles/11869-big-changes-ahead-in-land-ownership-and-farm-operators> [<https://perma.cc/L2V8-73EQ>].

198. CALO & PETERSEN-ROCKNEY, *supra* note 92, at 2.

199. BIGELOW ET AL., U.S. FARMLAND OWNERSHIP, *supra* note 48, at 32. Another 11% of these agricultural landlords purchased the land from a relative. *Id.* Only 30% purchased from a nonrelative, with another 2% indicating they purchased land at an auction. *Id.*

itances) report that they own their lands free and clear of any debt or other obligations.²⁰⁰ And of course the tenants renting these farmlands are disproportionately members of minority groups.²⁰¹

There is nothing intrinsically wrong with making some farmland available for rent, especially insofar as it provides lower-stake opportunities for new entrants to begin farming. But these tenancies are often insecure and financially unstable.²⁰² The land has a limited potential for producing income; splitting the returns on that resource—requiring both the producer-farmer and the landowner-landlord to receive financial return on it—necessarily diminishes revenues for farmers, pinching what are often already tenuous start-up operations.²⁰³ Absentee landownership also negatively affects rural communities' cohesion. Sociologists regularly emphasize the close connection between locally owned and operated farms and rural community welfare.²⁰⁴ Active, local farm ownership and operation corresponds to greater community engagement and a healthier local economy, while communities with larger-scale corporate farms demonstrate a loss of local dollars and greater economic and social stratification.²⁰⁵

2. Concentration and Financialization

This system of abstract property rights also allows the consolidation of land beyond what one person or family could ever directly farm, use, or reasonably maintain. That neither property nor any other legal rule has imposed meaningful limits on this concentration means that smaller-scale farms—including farms owned and operated by white farmers—face significant pressure in their efforts to maintain their farm livelihood and lifestyles.²⁰⁶

200. Fully 94% of nonoperator landlords' rented lands are completely paid for, and 89% of lands rented by operator landlords are owned free and clear. NAT'L AGRIC. STAT. SERV., *supra* note 54, at 2.

201. See *infra* Section III.C.3.c (discussing disproportionate minority leasing rate).

202. See *infra* Section III.C.3.c.

203. Neil D. Hamilton, Essay, *The Role of Land Tenure in the Future of American Agriculture*, 22 DRAKE J. AGRIC. L. 349, 356 (2017).

204. See, e.g., Conner Bailey, Abhimanyu Gopaul, Ryan Thomson & Andrew Gunnoe, *Taking Goldschmidt to the Woods: Timberland Ownership and Quality of Life in Alabama*, 86 RURAL SOCIO. 50 (2021) (extending prior body of sociological work tying absentee and corporate ownership of agricultural operations to poor community welfare outcomes to timberland ownership in South).

205. See, e.g., Linda Lobao & Curtis W. Stofferahn, *The Community Effects of Industrialized Farming: Social Science Research and Challenges to Corporate Farming Laws*, 25 AGRIC. & HUM. VALUES 219, 225–26 (2008); Stephanie A. Malin & Kathryn Teigen DeMaster, *A Devil's Bargain: Rural Environmental Injustices and Hydraulic Fracturing on Pennsylvania's Farms*, 47 J. RURAL STUD. 278, 278; see also Thomas A. Lyson & Charles C. Geisler, *Toward a Second Agricultural Divide: The Restructuring of American Agriculture*, 32 SOCIOLOGIA RURALIS 248 (1992) (analyzing trends in agricultural organization).

206. Increasingly, members of this very group—struggling white farmers—are recognizing this unique convergence: being both a victim of modern farm policy and the beneficiary of generations of white privilege, particularly through original land-based distributions. See, e.g.,

The story of horizontal agricultural concentration—or the consolidation of ownership and control within one sector of the agriculture system—is well rehearsed. Between 1982 and 2007, for example, the midpoint acreage doubled from 589 acres to 1,105 acres.²⁰⁷ These farms have also become more specialized.²⁰⁸ Between 1935 and 2012, the number of farms shrank from 6 million to 2 million, and while the majority of Americans at one time farmed self-sufficiently, today less than 2% of Americans farm at all.²⁰⁹ Within the farms that remain, there is also a concentration of production by a few large-scale producers. As of 2014, 49.7% of agricultural production value was attributed to “large-scale family-owned and non-family-owned operations” that make up only 4.7% of U.S. farms.²¹⁰ In other parts of the food chain, as of 2007, four corporations owned 85% of soybean processing, 82% of beef packing, 63% of pork packing and manufacture, and 50% of the milk industry.²¹¹

A related trend is vertical integration of food production, particularly in swine and poultry production. Vertical integration, as the name implies, describes the consolidation of ownership and control at multiple links in the food supply chain, such as the integrated control of both livestock production and meat processing by companies like Tyson and Smithfield Foods. Much of the initial investment and the production risks are born by the producers, with profits flowing to corporate shareholders who are physically removed from the direct impacts (environmental, economic, and social) of this intensive production.

There have been numerous attempts to enforce antitrust-like protections, including those contained in the Packers and Stockyards Act of 1921, without much success.²¹² This is a legal debate both about the degree to

SARAH SMARSH, *HEARTLAND: A MEMOIR OF WORKING HARD AND BEING BROKE IN THE RICHEST COUNTRY ON EARTH* 102 (2018) (“We thus benefited from our skin color in ways that are hard to perceive by three white people working a field together, no other human being, town, or structure in sight to the horizon—a complicated mix of privilege and disadvantage.”); Neil Hamilton, *Iowa’s White Privilege Has a Billion Dollar Price Tag*, BILLMOYERS.COM (Aug. 17, 2020), <https://billmoyers.com/story/iowas-white-privilege-has-a-billion-dollar-price-tag> [<https://perma.cc/A4VG-5HE3>] (“My so-called white privilege was growing up in an ill-heated farm house without running water watching my parents eke out our living on a small farm. . . . If we are honest with ourselves white privilege is all around us—in fact it is almost foundational to our state.”).

207. AYAZI & ELSHEIKH, *supra* note 77, at 51.

208. *See id.* (describing change from diversified farms of 1900 to the more typical monocrop operations of 2010).

209. Scrufari, *supra* note 102, at 502.

210. AYAZI & ELSHEIKH, *supra* note 77, at 21.

211. *Id.* at 21.

212. *See, e.g.,* William E. Rosales, Comment, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening*, 2004 WIS. L. REV. 1497, 1522–24 (discussing challenges to captive supply issues in livestock markets).

which the law permits (or does not) this kind of monopolistic consolidation *and* the ability of courts and litigants to enforce those boundaries, if they exist.²¹³

Although these figures relate more to the ownership of farm wealth and farm businesses, the same trends are happening with land. For example, all rural landownership has grown more concentrated in recent years, not just agricultural land. Since 2008, the hundred largest private landowners have increased their collective holdings from fewer than thirty million acres to forty million acres (an area just about the size of Florida).²¹⁴ According to one report, “[t]he five largest landowners in America, all white, own more rural land than all of black America combined.”²¹⁵ Ted Turner owns two million acres alone—a landmass three times greater than the state of Rhode Island²¹⁶—and he’s not even the largest private landowner in the United States. That distinction belongs to John Malone, who owns 2.2 million acres.²¹⁷

For farmland more specifically, a parallel trend is occurring with the financialization of ownership. Farm properties in the United States and globally are increasingly being purchased directly by investors and various farmland investment vehicles, such as private equity funds and real estate investment trusts (REITs).²¹⁸ Exact numbers of investor-owned acres are dif-

213. See Peter C. Carstensen, *The Packers and Stockyards Act: A History of Failure to Date*, CPI ANTITRUST J., Apr. 2010, at 1, 4–5, <https://www.competitionpolicyinternational.com/the-packers-and-stockyards-act-a-history-of-failure-to-date> [<https://perma.cc/KZ67-X5DV>]; Michael Sykuta, *Concentration, Contracting and Competition: Problems in Using the Packers and Stockyards Act to Supplement Antitrust*, CPI ANTITRUST J., Apr. 2010, at 1, 2, <https://www.competitionpolicyinternational.com/concentration-contracting-and-competition-problems-in-using-the-packers-stockyards-act-to-supplement-antitrust> [<https://perma.cc/B254-BF4H>]; Geoffrey A. Manne & Joshua D. Wright, *A First Principles Approach to Antitrust Enforcement in the Agricultural Industry*, CPI ANTITRUST J., Apr. 2010, at 1, <https://www.competitionpolicyinternational.com/a-first-principles-approach-to-antitrust-enforcement-in-the-agricultural-industry> [<https://perma.cc/DA65-ZYEL>].

214. Dave Merrill, Devon Pendleton, Sophie Alexander, Jeremy C.F. Lin & Andre Tartar, *Here’s Who Owns the Most Land in America*, BLOOMBERG (Sept. 6, 2019), <https://www.bloomberg.com/graphics/2019-largest-landowners-in-us> [<https://perma.cc/5EFF-7E82>]; Christopher Ingraham, *American Land Barons: 100 Wealthy Families Now Own Nearly as Much Land as That of New England*, WASH. POST (Dec. 21, 2017, 6:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2017/12/21/american-land-barons-100-wealthy-families-now-own-nearly-as-much-land-as-that-of-new-england> [<https://perma.cc/LQ8N-3W54>].

215. Moore, *supra* note 150.

216. *Id.*

217. *Land Report 100*, LAND REP., <https://landreport.com/americas-100-largest-landowners> [<https://perma.cc/5W3J-7M2K>].

218. Madeleine Fairbairn, ‘Like Gold with Yield’: *Evolving Intersections Between Farmland and Finance*, 41 J. PEASANT STUD. 777, 778–79, 787–88 (2014) (detailing U.S. trends of increasing external investments in farmland and a move to the “financialization”—or the “tendency for profit making in the economy to occur increasingly through financial channels rather than through productive activities”—of agriculture (quoting GRETA R. KRIPPNER, CAPITALIZING ON CRISIS: THE POLITICAL ORIGINS OF THE RISE OF FINANCE 4 (2011)); see also Saturnino M. Borrás Jr., Ruth Hall, Ian Scoones, Ben White & Wendy Wolford, *Towards a Better Understanding of Global Land Grabbing: An Editorial Introduction*, 38 J. PEASANT STUD.

difficult to find.²¹⁹ But, the trend is clear and is radically transforming agriculture again.²²⁰ Foreign interest in agricultural landownership has also increased. In 2019, foreign investors owned 35.2 million acres of U.S. agricultural land—a figure that doubled in just two decades.²²¹ This is true even though several states have sought to prohibit foreign (non-U.S.-citizen) ownership of agricultural land.²²²

In all of these contexts, the resulting consolidation in markets is complex, with cascading effects, but two facts are clear: (1) property law imposes no limits on this extreme land and market consolidation, and (2) when more land is grabbed and held by fewer and more powerful investors, there is less for small-scale producers to access and use.

3. Agriculture in the Shadows

Finally, the disconnect between land as a legal commodity and land as a physical place has important downstream consequences. As agricultural landownership becomes increasingly concentrated and absentee, rural landscapes empty out. There are simply fewer people (especially people with relative privilege and social, political, and economic power) to bear witness to the world in which our food is produced. This has numerous consequences, including a series of racialized repercussions.

As land is increasingly reduced to an abstract investment and wealth vehicle, it becomes divorced from local relationships and place-based knowledge. Australian scholar Nicole Graham has emphasized the phenomenon of “dephysicalisation of property” and powerfully tied this transition to

209 (2011) (situating farmland financialization in context of larger global land grab); Marcello De Maria, *Understanding Land in the Context of Large-Scale Land Acquisitions: A Brief History of Land in Economics*, 8 LAND, no. 1, 2019, at 1, <https://doi.org/10.3390/land8010015> [<https://perma.cc/LL22-CRV4>] (tracing historical evolution of land in economics toward commodification, as an asset right for large-scale investment and acquisitions).

219. See, e.g., Megan Horst, *Changes in Farmland Ownership in Oregon, USA*, 8 LAND, no. 3, 2019, at 1, <https://doi.org/10.3390/land8030039> [<https://perma.cc/P2R8-6PU3>] (describing study methodology that required obtaining and assessing individual land transfer records from numerous county assessor offices).

220. See generally MADELEINE FAIRBAIRN, *FIELDS OF GOLD: FINANCING THE GLOBAL LAND RUSH* (2020). More popular discussions of these coming changes are emerging across the political spectrum. E.g., LUKAS ROSS, OAKLAND INST., *DOWN ON THE FARM: WALL STREET; AMERICA'S NEW FARMER* (2014), https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Report_Down_on_the_Farm.pdf [<https://perma.cc/77D3-QSS8>]; Maixner & Wyant, *supra* note 197.

221. TRICIA BARNES, MARY ESTEP, VERONICA GRAY, CATHERINE FEATHER & PHIL SRONCE, U.S. DEP'T OF AGRIC., *FOREIGN HOLDINGS OF U.S. AGRICULTURAL LAND THROUGH DECEMBER 31, 2019*, at 1, <https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/EPAS/PDF/afida2019report.pdf> [<https://perma.cc/EX8S-L2NF>]; see also Renee Wilde, *'American Soil' Is Increasingly Foreign Owned*, NPR (May 27, 2019, 4:17 PM), <https://www.npr.org/2019/05/27/723501793/american-soil-is-increasingly-foreign-owned> [<https://perma.cc/F92X-PVK4>].

222. Wilde, *supra* note 221.

anthropogenic environmental change.²²³ By disconnecting property rights from the material constraints of physical places, we create “diasporas and deforested, mined and drained landscapes of dephysicalised property” that she, building on prior work, terms “shadow places.”²²⁴ Shadow places—like many of America’s agricultural landscapes and abandoned rural places—become dumping grounds for society’s externalities, out of sight and out of mind from majoritarian and mostly urban experience.²²⁵ American scholar Ann Eisenberg, meanwhile, identifies rural America as a zone of “sacrifice.”²²⁶

America has very little idea of where its food comes from. Because the industrialized realities of many agricultural operations are not well understood—operating, instead, in the shadows as they do—the romantic ideal of a traditional (red barn, green tractor, white skin) farm still has enormous power in our collective cultural and political imagination.²²⁷ Farms, many imagine, are still small, independent, agrarian stewards.²²⁸ So, for example, rhetoric about “saving the family farm” is still so powerful. Yet, as explained above, many of these farms are much more industrialized and concentrated than this image suggests, and even family ownership does not, by itself, reduce absenteeism or ensure any particular ecological commitments.

Moreover, to the extent this language is about *preserving* existing family farms, this is coding a specific protection for existing land allocations to mostly white owners. Generational farms represent a significant source of inherited wealth. And not just any inherited wealth but wealth inherited through a very specific history of racism and, in some cases, on the backs of mostly nonwhite farmworkers.²²⁹ On one level, efforts to “save the family

223. Nicole Graham, *Dephysicalised Property and Shadow Lands*, in HANDBOOK ON SPACE, PLACE AND LAW 281, 281–82 (Robyn Bartel & Jennifer Carter eds., 2021); see also NICOLE GRAHAM, *LAWSCAPE: PROPERTY, ENVIRONMENT, LAW* (2011); cf. Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 329, 333–40 (1980) (discussing the history of dephysicalization of property in U.S. context).

224. Graham, *Dephysicalised Property*, *supra* note 223, at 281 (quoting Val Plumwood, *Shadow Places and the Politics of Dwelling*, AUSTRALIAN HUMS. REV., 2008, at 139, 139). Graham and others have also emphasized that these property choices are neither natural nor universal. See *id.* at 288 (“No property regime lasts forever.”); GRAHAM, *LAWSCAPE*, *supra* note 223, at 204–06; Margaret Davies, *Can Property Be Justified in an Entangled World?*, 17 GLOBALIZATIONS 1104, 1111 (2020) (“Despite the pretence at universality, it is therefore impossible and even deceptive to think about property abstractly, as though there is some rightness underlying it in the fabric of human co-existence and relationship with the physical world.”).

225. Loka Ashwood & Kate MacTavish, *Tyranny of the Majority and Rural Environmental Injustice*, 47 J. RURAL STUD. 271 (2016).

226. Eisenberg, *supra* note 89.

227. See Chen & Adams, *supra* note 12, at 371.

228. See Brief of *Amici Curiae* Nat’l Farmers Union et al. in Support of Appellants and in Support of Reversal of the Judgment Below at 3, *Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006) (No. 06-1308).

229. See, e.g., Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO

farm” have not only failed to address concentration and scale issues but also, perhaps, diverted attention from the access needs of new entrants, especially people of color. Why should we promote inheritance of agricultural operations in particular? What do we do with emerging racialized rural ghettos while other white, rural residents complain unironically about declining populations in their own communities? If the concern is maintaining local control of local lands, or even just a local population base in many rural communities, why not allow new farmers in? Because of the shadowed nature of many of these landscapes, these are the hard questions we have largely avoided asking—to our detriment.

C. *Allocating Land Retention and Land Loss*

Finally, numerous other legal choices impact the value of farmland and directly influence owners’ decisions about when to hold and when to sell. Certainly, many existing landowners desire to keep specific legacy properties in their families for reasons not shaped by any particular legal or economic incentive, and there is social value in supporting some of these positive place-based attachments.²³⁰ The laws influencing land markets, however, do not attempt to distinguish the kinds of land retention that are desirable over time (because they reinforce positive geographic connections and family legacies, for example) and those that produce negative externalities across rural landscapes (like disproportionate exclusion of new farmers and ranchers, monopolistic land control by anonymous investors, and increasing wealth concentration). Instead, the relevant variable seems to be that more wealthy (and therefore often white) landowners are supported in keeping their lands—in whatever ownership form and for whatever use—while more vulnerable landowners (and therefore disproportionately people of color) are more likely to lose their land through legal process.

This Section analyzes both ends of this spectrum: how policy drives land retention for some and racializes land insecurity for others. It covers policies that support land retention, including choices that inflate land values and policies that encourage existing owners to retain valuable land as long as possible. Finally, this Section concludes with examples of how land *insecurity*, by contrast, remains racialized to the detriment of farmers and ranchers of color.

1. *Inflating Land Values*

The law reinforces existing owners’ retention by actively subsidizing land values. Numerous farm policies, from subsidized crop insurance to federal biofuel incentives, distort farmland values.²³¹ Indeed, farmland values

St. L.J. 95, 118 (2011); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987).

230. See *supra* note 204 and accompanying text.

231. This raises the question of whether these land values can be maintained or are a bubble preparing to pop, especially with falling or at least volatile prices for many farm products.

have increased exponentially in recent decades. In Iowa, for example, a typical \$419 acre in 1970 skyrocketed to \$7,183 in 2016—a 1,600% increase.²³² By 2019, Iowa farmland averaged \$7,432 per acre.²³³ On average, an acre of farmland in the United States cost \$3,160 in 2020.²³⁴ Nationally, agricultural realty values doubled between 2004 and 2013 and, in many places, are still rising.²³⁵ In 2014, the *Economist* determined that farmland had outperformed most other asset classes for the previous 20 years and had delivered average U.S. returns of 12% a year with low volatility.²³⁶ Some farmland values have increased more than twice as fast as the Dow Jones Industrial Average, and in addition to appreciation, farmland ownership comes with a potential steady annual return, including from rents.²³⁷ So, why sell?

The law also indirectly inflates values by failing to preserve a stable land supply. Urbanization alone accounts for approximately one million new acres of farmland lost each year—“the equivalent of adding new urban area the size of Los Angeles, Houston and Phoenix combined.”²³⁸ Other forces, such as climate change and desertification, also reduce arable land bases. California, for example, lost 1.4 million acres of arable land between 1984 and 2010.²³⁹ Whether via zoning or effective climate regulation, the law has not had a sufficient response, making remaining farmland all the more precious—and therefore, for some, difficult to acquire.

2. Wealth-Retention Policies

The next category of policies includes a host of financial incentives that actively encourage and support landholding by current-generation owners

232. Katy Keiffer, *Who Really Owns American Farmland?*, COUNTER (July 31, 2017, 9:31 AM), <https://thecounter.org/who-really-owns-american-farmland> [<https://perma.cc/W7SP-GCSS>].

233. Wendong Zhang, *2019 Iowa State University Land Value Survey: Overview 2* (Iowa St. Univ., Ctr. for Agric. & Rural Dev. Working Paper No. 19-WP 597, 2019), <https://www.card.iastate.edu/farmland/isu-survey/2019/2019-ISU-Land-Value-Survey-Overview.pdf> [<https://perma.cc/JHU2-VQ3G>].

234. Econ. Rsch. Serv., *Farmland Value*, U.S. DEP'T AGRIC. (Nov. 2, 2020), <https://www.ers.usda.gov/topics/farm-economy/land-use-land-value-tenure/farmland-value> [<https://perma.cc/4LBN-QP4M>].

235. ACKOFF ET AL., *supra* note 23, at 37 (citing NAT'L AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., *LAND VALUES 2016 SUMMARY* (2016), <https://downloads.usda.library.cornell.edu/usda-esmis/files/pn89d6567/w6634626d/9019s523z/AgriLandVa-08-05-2016.pdf> [<https://perma.cc/MBT7-JRG4>]).

236. *Barbarians at the Farm Gate: Hardy Investors Are Seeking a Way to Grow Their Money*, *ECONOMIST* (Dec. 30, 2014), <https://www.economist.com/finance-and-economics/2014/12/30/barbarians-at-the-farm-gate> [<https://perma.cc/R4WU-MHJX>].

237. Keiffer, *supra* note 232.

238. Dave Merrill & Lauren Leatherby, *Here's How America Uses Its Land*, *BLOOMBERG* (July 31, 2018), <https://www.bloomberg.com/graphics/2018-us-land-use> [<https://perma.cc/4CM9-UDKA>].

239. CALO & PETERSEN-ROCKNEY, *supra* note 92, at 3.

and their next-generation heirs. There are numerous examples of this policy, but in this Section I focus briefly on two: (1) tax policy preferencing owners' choices to hold onto land until their death and (2) property reforms to allow more dynastic control of landed wealth.

First, the tax treatment of agricultural lands is designed to encourage owners to hold lands as long as possible. Selling appreciated agricultural property results in taxable capital gains, but heirs and devisees receive a "stepped-up" basis if the land passes through the owner's estate at death, effectively erasing any tax liability on that appreciation. The exemption of a person's first \$11.7 million in assets—or \$23.4 million for a married couple—from any federal estate tax under current law also, for those without the most extreme wealth, creates no incentive to divest assets before death.²⁴⁰ Collectively, these policies encourage current-generation owners to hold land until death so it can pass through their estates without tax.²⁴¹

Likewise, Section 1031 of the Federal Tax Code excludes certain like-kind exchanges of real property from immediate tax liability.²⁴² These 1031 exchanges allow taxpayers to exchange "like-kind" property—usually investment real estate—without immediate tax consequences, allowing the deferral of any otherwise recognized tax gains at the time of the exchange until a later sale or non-like-kind exchange.²⁴³ These tax-deferred exchange vehicles tend to privilege existing real-property owners as beneficiaries of unique tax advantages that encourage ongoing real property ownership—including farmland.²⁴⁴

Next, the Rule Against Perpetuities has traditionally prevented people from tying up their property too long after their death by requiring living owners to have full control over property decisions. Another recent dramatic change has occurred in the realm of perpetuities reform, with many states

240. Rocky Mengle, *Estate Tax Exemption Amount Goes Up for 2021*, KIPLINGER (Oct. 27, 2020), <https://www.kiplinger.com/taxes/601639/estate-tax-exemption> [<https://perma.cc/2P9F-9T4M>].

241. ACKOFF ET AL., *supra* note 23, at 64. Of course, this does not explain next-generation choices. Some proposals for improving land access for next-generation farmers include creating capital gains tax exclusions for farmers who sell farmland, during life, to qualified young, beginning, socially disadvantaged, or veteran farmers. *Id.*

242. I.R.C. § 1031.

243. See Bradley T. Borden, *The Like-Kind Exchange Equity Conundrum*, 60 FLA. L. REV. 643, 646 (2008) (describing popularity of these exchanges).

244. See, e.g., Roger A. McEowen, *Like-Kind Exchange Issues*, AGRIC. L. & TAX'N BLOG (June 5, 2017), <https://lawprofessors.typepad.com/agriculturalaw/2017/06/like-kind-exchange-issues.html> [<https://perma.cc/2GYS-ESKQ>] ("Like-kind exchanges are very popular in agriculture."); see also Roger McEowen, *Like-Kind Exchange Treatment Allowed for Transfer of Farmland Held in Trust*, IOWA ST. UNIV. CTR. AGRIC. L. & TAX'N (May 21, 2009), <https://www.calt.iastate.edu/article/kind-exchange-treatment-allowed-transfer-farmland-held-trust> [<https://perma.cc/UN5B-LV59>]; Marjorie E. Kornhauser, *Section 1031: We Don't Need Another Hero*, 60 S. CAL. L. REV. 397 (1987) (critiquing purpose and effect of 1031 exchange benefits).

weakening the Rule Against Perpetuities or abolishing it altogether.²⁴⁵ These reforms allow, for example, so-called dynasty trusts, which generally permit more strategic long-term control and maintenance of wealth within generations of families.²⁴⁶ Perhaps unsurprisingly, one recent Iowa study showed a trend toward more trust ownership of Iowa farmland.²⁴⁷

And while these trusts could include provisions directing the trustee to make decisions promoting conservation or sustainability, most do not. USDA data show that 14% of rented farm acres were owned and controlled by a trust in 2014, and of all the lands anticipated to be transferred outside of a will instrument between 2014 and 2019, USDA estimated another 37% (or 34.5 million) would be put into a trust.²⁴⁸

3. Racialized Insecurity

Both categories of policies—inflating land values and incentivizing land retention over multiple generations—operate to keep land in its existing class of (predominantly white) owners. They also increase the cost of new land acquisition in a way that privileges purchases, when they occur, by wealthy buyers and investors, to the disadvantage of undercapitalized new market entrants. By keeping land in existing (white) families or in new investment vehicles, we keep other emergent farmers and ranchers out.

But this Section highlights another difficult truth. Even when minority farmers do acquire land, they are more likely to lose it than their white counterparts, and the lands they do retain tend to get weaker and more fragmented over time. Part of this history of modern land loss by farmers and ranchers of color is the result of explicit discrimination, including systematic discrimination against African Americans, Hispanics, Native Americans, and women in USDA farm programs.²⁴⁹ Despite resolution of these past claims, today

245. Eric Kades, *Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (and Beyond)*, 60 B.C. L. REV. 145, 178–79 (2019) (collecting examples of “over half the states” that have abolished, effectively, the Rule Against Perpetuities).

246. *Id.* at 147. In most cases, the land itself (the trust corpus) must be alienable by the trustee, but as a valuable investment, *see supra* Section III.C.2, it can be more easily maintained over generations in this dynastic trust, *cf.* Kades, *supra* note 245, at 147 n.6 (noting sample requirements that trustee maintain powers of alienation).

247. WENDONG ZHANG, ALEJANDRO PLASTINA & WENDIAM SAWADGO, IOWA ST. UNIV. EXTENSION & OUTREACH, IOWA FARMLAND OWNERSHIP AND TENURE SURVEY, 1982–2017: A THIRTY-FIVE YEAR PERSPECTIVE 4 (2018), <https://store.extension.iastate.edu/product/6492> [<https://perma.cc/UR88-99FL>] (“In particular, trusts accounted for 20 percent of all acres in Iowa as of July 2017, while three decades ago almost no land was owned in that fashion.”).

248. BIGELOW ET AL., U.S. FARMLAND OWNERSHIP, *supra* note 48, at 17 tbl.2, 34 tbl.5.

249. *See, e.g.*, *Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009); *Love v. Connor*, 525 F. Supp. 2d 155 (D.D.C. 2007); *Keepseagle v. Johanns*, 236 F.R.D. 1 (D.D.C. 2006); *Pigford v. Glickman*, 185 F.R.D. 82, 82–86 (D.D.C. 1999). For analysis of these cases, *see* Stephen Carpenter, *The USDA Discrimination Cases: Pigford*, In re Black Farmers, *Keepseagle*, *Garcia*, and *Love*, 17 DRAKE J. AGRIC. L. 1 (2012). Both the *Pigford* (African American) and *Keepseagle* (Native American) cases successfully resulted in significant settlements for class members. TADLOCK COWAN & JODY FEDER, CONG. RSCH. SERV., RS20430, THE PIGFORD CASES: USDA SETTLEMENT OF

97.8% of all farm program payments still go to white farmers, with white farmers receiving an average payment of \$10,022 per farm while Black farmers, for example, receive an average payment of only \$5,509 per farm.²⁵⁰ Ongoing but difficult-to-police private discrimination in agricultural and real-estate markets also creates unique obstacles for farmers and ranchers of color,²⁵¹ and this may also impact access to other rights and relief provided by law, with access to justice generally already a concern for many rural residents.²⁵²

Implicit in all of these variables, however, is one final dimension of American property design that should not be overlooked: it takes wealth and, often, social capital to maintain owner status. Title maintenance, property taxes, and probate proceedings all require money. These costs are neutral in that they are universally applied, and they can sometimes serve as beneficial and intentional “boundaries” built into the land system to reduce risks of overfragmentation in land and to facilitate the movement of valuable resources to best users in efficiently sized bundles of ownership.²⁵³ But the reality is that these rules as we have designed them disproportionately impact minority owners who are more likely to be undercapitalized or underre-

DISCRIMINATION SUITS BY BLACK FARMERS 2–4 (2013); Bill Chappell, *U.S. Reaches \$680M Deal with Native American Farmers*, NPR (Oct. 19, 2010, 3:53 PM), <https://www.npr.org/sections/thetwo-way/2010/10/19/130678317/u-s-reaches-deal-with-native-american-farmers> [<https://perma.cc/C4R9-9DKW>]. The female and Hispanic plaintiffs did not succeed in court but were made part of the statutory claims resolution process created by Congress, with \$1.33 billion in relief to these groups. JODY FEDER & TADLOCK COWAN, CONG. RSCH. SERV., R40988, *GARCIA V. VILSACK: A POLICY AND LEGAL ANALYSIS OF A USDA DISCRIMINATION CASE* 5, 11–12 (2013); OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF AGRIC., *HISPANIC AND WOMEN FARMERS AND RANCHERS CLAIM RESOLUTION PROCESS* 1–2 (2016), <https://www.usda.gov/sites/default/files/50601-0002-21.pdf> [<https://perma.cc/D6XH-8K62>]; see also Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 14011, 122 Stat. 923, 1447.

250. AYAZI & ELSHEIKH, *supra* note 77, at 51. As this Article was being finalized for publication, President Biden signed COVID-related stimulus legislation that includes approximately \$5 billion in spending to directly support minority farmers, including significant debt relief and other assistance to redress some of this history of discrimination and unequal farm-program support. See Laura Reiley, *Relief Bill Is Most Significant Legislation for Black Farmers Since Civil Rights Act, Experts Say*, WASH. POST (Mar. 8, 2021, 8:15 PM), <https://www.washingtonpost.com/business/2021/03/08/reparations-black-farmers-stimulus> [<https://perma.cc/XNV7-DDBQ>].

251. See Adam Calo & Kathryn Teigen De Master, *After the Incubator: Factors Impeding Land Access Along the Path from Farmworker to Proprietor*, J. AGRIC. FOOD SYS. & CMTY. DEV., Winter 2015–2016, at 111.

252. See generally Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-state Perspective on Rural Access to Justice*, 13 HARV. L. & POL’Y REV. 15 (2018) (providing a survey of rural communities’ access to justice across six states). There are simply fewer lawyers in rural spaces, and where they do exist, their interactions with rural residents are often punitive, involving criminal proceedings or possibly tax assessments. See, e.g., JACOB KANG-BROWN & RAM SUBRAMANIAN, VERA INST. OF JUST., *OUT OF SIGHT: THE GROWTH OF JAILS IN RURAL AMERICA* 12 fig.3 (2017), <https://www.vera.org/downloads/publications/out-of-sight-growth-of-jails-rural-america.pdf> [<https://perma.cc/G4AL-GWC8>] (finding pretrial incarceration rates in rural counties rose 436% between 1970 and 2013, outpacing urban and suburban incarceration areas).

253. Heller, *supra* note 192, at 1165–82.

sourced.²⁵⁴ The legal obligations placed on landowners are a public choice, and to the extent the law creates burdens that dispossess minority landowners in particular, that is a problem that can be fixed.²⁵⁵ This Section very briefly notes three specific examples of racialized land insecurity created by the size of legal obstacles and costs.

a. Informal Ownership

First, minority landowners are most likely to claim real property without a clear marketable title.²⁵⁶ These unrecorded claims to property arise perhaps most commonly when a record owner passes away and the heirs do not formalize a transfer of title, either by failing to access probate procedures or other incomplete legal steps.²⁵⁷ The result is that heirs in possession have a claim to property but not a perfected legal title, which in turn impacts their ability to access numerous benefits of property ownership, from credit based on the security of title to federal farm or disaster assistance programs, which require record proof of ownership. For example, many of the informal “colonias” settlements along the border with Mexico contain untitled claims to property.²⁵⁸ Many residents purchased property (or attempted to purchase property) through installment contracts, which require the buyer to bear the full risk of loss.²⁵⁹ If the buyer defaults under the contract, the seller can cancel the contract, keep title, recover possession, and retain past payments as liquidated damages—with no equity to the buyer.²⁶⁰

Informality has its benefits, including low transaction costs, general flexibility, and more space for adherence to local community norms. But it also poses the tremendous risk that one’s rights will not be recognized into the future and that the benefits of property ownership—including the ability to use one’s property as collateral to access credit or to prove ownership for federal programs—may be denied. These informal settlements are often “ra-

254. See Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855.

255. Although this Section focuses on racialized insecurity, it is important to note the unique (and in some ways opposite) challenges of hyperregulated and largely inalienable property rights in modern American Indian reservations. I have written about this unique challenge separately. See generally Jessica A. Shoemaker, *Complexity’s Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487 (2017).

256. Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL’Y REV. 137, 158 (2002) (showing that informal property—driven in part by its inherently hidden nature—disproportionately affects nonwhites, non-English speakers, and females).

257. See Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 151 (2009).

258. See Guadalupe T. Luna, “Facts Are Stubborn Things:” *Irregular Housing in the Texas Colonias*, 28 WIS. J.L. GENDER & SOC’Y 121, 142–43 (2013); Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179 (1995).

259. Way, *supra* note 257, at 128–30; see also PETER M. WARD, *COLONIAS AND PUBLIC POLICY IN TEXAS AND MEXICO* 91 (1999).

260. Way, *supra* note 257, at 128–31.

cially obvious,” with nearly exclusive Latino or African American residents, and the law has not addressed either the roots of peoples’ need for these informal claims or the ways in which our land governance system facilitates these dynamics by design.²⁶¹

b. Heir Property and Co-ownership Risks

Second, heir property is a general term that refers to two separate but related problems: (1) lack of title in inherited property if the land was not formally probated and (2) co-ownership among multiple heirs, which requires coordination among numerous owners for many land-use decisions and transactions. Both co-ownership or lack of title can create challenges for accessing farm programs.²⁶² For example, two sisters farming on family land in North Carolina described how their farm needed drainage work, but they were unable to apply for federal drainage support programs because nephews in New York City refused to consent to the land changes, although they had no real interest in or connection to the land.²⁶³

Co-ownership, however, also produces unique forms of insecurity. Professor Thomas Mitchell, for example, has documented how the design of co-ownership rules—and the power of any single owner to force a partition sale of heir property in particular—has dramatically increased Black land loss.²⁶⁴ The pervasiveness of these co-ownership issues among African American farmers in the South in particular is well documented, and the design of co-ownership rules dictate how challenging this status is.²⁶⁵

261. See Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1097 (2008) (describing sample settlements of this type as “racially obvious” with nearly exclusive Latino or African American residents).

262. See Lizzie Presser, *Kicked Off the Land: Why So Many Black Families Are Losing Their Property*, NEW YORKER (July 15, 2019), <https://www.newyorker.com/magazine/2019/07/22/kicked-off-the-land> [<https://perma.cc/KZH8-9DPC>].

263. Natasha Bowens, *The Color of Food: These Sisters Are Building a Second Career as Farmers*, CIV. EATS (Apr. 24, 2015), <http://civileats.com/2015/04/24/the-color-of-food-these-sisters-are-building-a-second-career-as-farmers> [<https://perma.cc/7YM5-8BY4>].

264. See Mitchell, *supra* note 143. Co-ownership (or, in this context, fractionation) in American Indian trust allotments is a related, but differently managed, concern. See Shoemaker, *supra* note 125.

265. See, e.g., B. James Deaton, Jamie Baxter & Carolyn S. Bratt, *Examining the Consequences and Character of “Heir Property,”* 68 ECOLOGICAL ECON. 2344 (2009); B. James Deaton, *Land “in Heirs”: Building a Hypothesis Concerning Tenancy in Common and the Persistence of Poverty in Central Appalachia*, J. APPALACHIAN STUD., Spring/Fall 2005, at 83; B. James Deaton, *Intestate Succession and Heir Property: Implications for Future Research on the Persistence of Poverty in Central Appalachia*, 41 J. ECON. ISSUES 927 (2007).

c. Disproportionate Leasing Rates

Finally, minority farmers are also more likely to lease land to farm than own it.²⁶⁶ Most tenant farmers rent lands on short-term cash leases.²⁶⁷ Two Iowa studies, for example, revealed that one-third of farm leases were oral, and 81% of leases failed to set a fixed term, making them a default year-to-year tenancy in most cases.²⁶⁸ Short-term leases limit farmers' production choices, precluding crops—like asparagus or ginseng, for example—that require multi-year growing seasons, and also impede, in some cases, credit access.²⁶⁹ Unlike leases with longer terms or crop-share payment agreements, short cash leases place more economic risks on the farmer,²⁷⁰ and in any lease arrangement, the tenant always risks the landlords changing their minds and ending land access, including after a tenant has made uncompensated improvements to the property.²⁷¹

Some leasing of farmland has advantages, including lower-stakes opportunities to begin initial farming endeavors, but the law currently does not support tenant farmers in all the ways it could to make these tenure arrangements as equitable and secure as possible.²⁷²

266. See *supra* notes 67–68 and accompanying text.

267. E.g., Hamilton, *supra* note 203, at 353.

268. MICHAEL DUFFY, DARNELL SMITH, WILLIAM EDWARDS & BECKY JOHNSON, IOWA ST. UNIV. EXTENSION, SURVEY OF IOWA LEASING PRACTICES, 2007, at 2 (2008), <http://econ2.econ.iastate.edu/faculty/duffy/documents/c2-15.pdf> [<https://perma.cc/DFV6-6VFR>] (reporting that 67% of all leased acres in Iowa in 2007 were under a written lease); MICHAEL DUFFY, WILLIAM EDWARDS & ANN JOHANNIS, IOWA ST. UNIV. EXTENSION & OUTREACH, SURVEY OF IOWA LEASING PRACTICES, 2012, at 2 (2013) http://www2.econ.iastate.edu/faculty/duffy/documents/c2-15_2012.pdf [<https://perma.cc/E89N-39UH>] (reporting that 19% of all leased acres in Iowa in 2012 were under fixed-term leases); see also Jesse J. Richardson Jr., *Land Tenure and Sustainable Agriculture*, 3 TEX. A&M L. REV. 799, 806 (2016) (discussing these data and clarifying that when there is no fixed term in a lease, the default is a year-to-year term).

269. Calo & De Master, *supra* note 251, at 111, 120.

270. See Hamilton, *supra* note 203, at 353.

271. E.g., ACKOFF ET AL., *supra* note 23, at 35 (providing a case study of female-owned farm going out of business after investing in long-term soil improvements and then having oral lease revoked).

272. E.g., ROBERT PARSONS ET AL., RESEARCH REPORT AND RECOMMENDATIONS FROM THE FARMLASTS PROJECT, at ii (2010), https://s30428.pcdn.co/wpcontent/uploads/sites/2/2019/09/FarmLASTSResearchReport_full.pdf [<https://perma.cc/5SQD-EHPM>] (suggesting both renting and owning should be pursued); Scrufari, *supra* note 102, at 513–14 (describing use of longer-term lease arrangements, including ground leases that allow the tenant to own buildings and structures and rent the underlying land on a long-term basis). Other concerns about leasing focus on tenants' lack of incentive to invest in long-term sustainability and land improvements. See Richardson, *supra* note 268, at 800 (articulating the “tenancy hypothesis,” which is the assumption that “tenants have little incentive to make long-term investments in the property since the tenant has no stake in the land beyond the term of the lease”); Edward Cox, *A Lease-Based Approach to Sustainable Farming, Part I: Farm Tenancy Trends and the Outlook for Sustainability on Rented Land*, 15 DRAKE J. AGRIC. L. 369, 370–71 (2010). A “toolbox” of materials to assist both landowners and farmers in negotiating equitable lease arrangements with an eye toward promoting sustainable agricultural practices is available. See

IV. RE-DESIGNING PROPERTY: NEW AGRARIAN FUTURES

There is something painfully familiar about the sum of all these parts: concentration of land in the hands of fewer, more powerful, and often hereditary white landowners and a sense that those not born into wealth (and landed wealth especially) cannot realistically acquire it. We creep toward the feudalism that America's agrarian property visions were determined to avoid.

Property law, and particularly the fee simple, is not to blame for all of these access issues. Society's current inequalities have many roots. Yet, agricultural lands *are* public goods with important public functions, and it warrants asking whether our systems for managing and allocating these resources are still serving the public good.²⁷³ If there is doubt about how public these lands really are, despite their private ownership, simply imagine a world in which all government subsidies currently inflating and supporting agricultural land values are eliminated. Without public support, farming would be an even more volatile endeavor and land prices would almost certainly deflate. It is nearly impossible to imagine agriculture without government support, which only underlines how public these land-tenure choices are.

This final Part provides a brief summary of current land-access policy efforts and then begins to think about new property designs that may both protect and expand minority property rights and rebuild more sustainable rural communities. In the urban context, property scholars have contributed significant creativity to property design and revealed that property is much more dynamic and pluralistic than our intuitions may first suggest.²⁷⁴ This Part ultimately argues that rural property, too, deserves this transformational work and suggests a series of sample reforms in hopes of sparking more specific creative work.

A. *Current Policy Efforts and Ideas*

Both governmental and private farm-advocacy groups have previously identified lack of affordable land access as beginning farmers' most specific obstacle.²⁷⁵ This concern has already inspired significant attention and advo-

Leasing: Farmland Access Legal Toolkit, CTR. AGRIC. & FOOD SYS., <https://farmlandaccess.org/leasing-resources> [<https://perma.cc/5LGC-LRDG>].

273. See generally ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* (2003) (arguing private landownership is a flexible institution that has been, and should be, continually reshaped for collective goals).

274. See, e.g., Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. IRVINE L. REV. 251 (2019) (recounting evolution of property law and policy changes in light of housing justice movements and suggesting incorporation in broader progressive property theory and literature); Fennell, *supra* note 35 (advancing even greater reform proposals for new property estates to advance urban-property redevelopment); Lisa T. Alexander, *Community in Property: Lessons from Tiny Homes Villages*, 104 MINN. L. REV. 385 (2019) (advancing new stewardship tenure form for cohousing rights in communities, including tiny home villages for unhoused people).

275. E.g., ACKOFF ET AL., *supra* note 23, at 38.

cacy, but most responses have been largely confined to efforts that accept the legal and property system as it currently exists and seek to facilitate more transactions within this existing framework. This Section summarizes recent federal activity on these issues and then highlights specific examples of non-profit and state-level efforts.

1. Federal Action (and Inaction)

At the federal level, during the Obama Administration, USDA Secretary Tom Vilsack appointed a Subcommittee on Land Tenure within the USDA's Advisory Committee on Beginning Farmers and Ranchers in 2014.²⁷⁶ That land-tenure subcommittee produced a report with recommendations for improving beginning-farmer land access, but the words "race," "gender," "ethnicity," and "socially disadvantaged" do not appear in the final report.²⁷⁷ Although the report did include some proposed reforms and areas for further study, it is also unclear whether any of these proposals have come to fruition. Instead, most of USDA's current efforts continue to focus on grants to support skills-training and business planning for new farmers, without specific provision for any kind of direct land access.²⁷⁸

There are a few other federal programs of note, including the Agricultural Conservation Easement Program (ACEP) and the Conservation Reserve Program/Transition Incentives Program (CRP-TIP).²⁷⁹ ACEP helps participants purchase development rights to conserve agricultural land for the future. Though this does not address new entrants' access directly, it does at least seek to preserve future supply of agricultural lands.²⁸⁰ The CRP-TIP

276. In 2014, Secretary Vilsack was serving as Secretary of Agriculture in the Obama Administration. He has since been reappointed and reconfirmed as the Secretary of Agriculture (as of this writing) under the new Biden Administration. *Secretary of Agriculture Tom Vilsack*, U.S. DEP'T AGRIC., <https://www.usda.gov/our-agency/about-usda/our-secretary> [<https://perma.cc/PCC9-JDLA>].

277. ADVISORY COMM. ON BEGINNING FARMERS & RANCHERS, U.S. DEP'T OF AGRIC., LAND TENURE, ACCESS, AND FARM BUSINESS TRANSITIONS FOR BEGINNING FARMERS AND RANCHERS (2015) [hereinafter USDA SUBCOMMITTEE REPORT]. The report does however mention the issues of heir property in "the rural southeastern portion of the United States" and highlights a "report entitled 'The Impact of Heir Property on Black Rural Land Tenure in the Southeastern Region of the United States' by the Emergency Land Fund." *Id.* at 22. There is also a final section calling for USDA to pay more attention to, and better coordinate with, producers living and farming within Indian country. *Id.* at 23–25.

278. See *Farmers Seeking Land*, U.S. DEP'T AGRIC., <https://newfarmers.usda.gov/farmers-seeking-land> [<https://perma.cc/E3TG-MRRF>]; see also BIGELOW ET AL., U.S. FARMLAND OWNERSHIP, *supra* note 48, at 40–41; FARM SERV. AGENCY, U.S. DEP'T OF AGRIC., FARM LOANS OVERVIEW: FACT SHEET (2020), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/farm_loans_overview-factsheet.pdf [<https://perma.cc/T244-D3DD>].

279. ACKOFF ET AL., *supra* note 23, at 12.

280. Nat. Res. Conservation Serv., *Agricultural Conservation Easement Program*, U.S. DEP'T AGRIC., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep> [<https://perma.cc/5VAU-RXWZ>] (outlining federal payments up to 50% of easement purchase price).

is also designed to preserve farmland through conservation measures, but it adds a financial incentive of one extra year of conservation payments if an existing owner transitions their farm to a beginning or socially disadvantaged farmer during the term of the contract.²⁸¹ Advocacy groups have argued, unsuccessfully, for significant expansion of these and related programs to encourage additional farm transfers.²⁸²

During the 2018 Farm Bill negotiations, three different bills were drafted to provide more concrete financial and other support to beginning farmers, including for land access, but these were not passed despite some early reports of bipartisan support.²⁸³ Instead, the 2018 Farm Bill required “the Secretary of Agriculture, in consultation with the Chief Economist” to make (another) publicly available report identifying barriers to farmland access for beginning and socially disadvantaged farmers, the efficacy of existing federal programs in addressing the problem, and possible legal changes to improve the situation.²⁸⁴ The Farm Bill also requires a report at least every three years on farmland ownership, tenure, transition, and entry of beginning farmers and ranchers and socially disadvantaged farmers and ranchers.²⁸⁵

Elsewhere in the USDA, there is recognition also that “[s]ocially disadvantaged farmer[s] and rancher[s]” (racial and ethnic minorities, women, and LGBTQ farmers) do face extra layers of farming challenges.²⁸⁶ As a spe-

281. *E.g.*, USDA SUBCOMMITTEE REPORT, *supra* note 277, at 4–5 (suggesting expanding existing transition incentives through CRP); *id.* at 6, 21 (proposing various federal tax incentives for farm transitions, building on state models in Nebraska and Iowa); *see also* FARM SERV. AGENCY, U.S. DEP’T OF AGRIC., LOANS FOR SOCIALLY DISADVANTAGED FARMERS AND RANCHERS: FACT SHEET (2019), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/FactSheets/2019/sda_loans-fact_sheet-aug_2019.pdf [<https://perma.cc/TXJ6-MDBZ>] (providing two additional years of CRP payments if owners sell or rent to beginning farmers or to members of a socially disadvantaged group).

282. *E.g.*, CALO & PETERSEN-ROCKNEY, *supra* note 92, at 3–5 (advocating for financial resources for farmers, legal incentives for land transfers, and more farmland-protection measures); *see supra* note 272 and accompanying text.

283. Margiana Petersen-Rockney, *Last Chance in This Farm Bill for Beginning Farmers and Our Farmland*, NAT’L YOUNG FARMERS COAL. (Oct. 8, 2018), <https://www.youngfarmers.org/2018/10/lastchance> [<https://perma.cc/J9XS-G4J5>]. These early proposed bills were H.R. 4316, H.R. 4201, and S. 2762. *Id.*; *see also* CALO & PETERSEN-ROCKNEY, *supra* note 92, at 5.

284. Agriculture Improvement Act of 2018, Pub. L. 115-334, § 12607(a), 132 Stat. 4490, 5006 (codified at 7 U.S.C. § 2204i(a)).

285. *Id.* § 12607(b) (codified at 7 U.S.C. § 2204i(b)).

286. Socially disadvantaged farmers and ranchers are farmers and ranchers who “have been subjected to racial or ethnic prejudices because of their identity as members of a group without regard to their individual qualities” and include African Americans, American Indians or Alaska Natives, Hispanics, and Asians or Pacific Islanders. *See* 7 U.S.C. § 2279(a)(5)–(6); OFF. OF P’SHPIS & PUB. ENGAGEMENT, U.S. DEP’T OF AGRIC., FARMING OPPORTUNITIES TRAINING AND OUTREACH GRANT PROGRAM, https://www.usda.gov/sites/default/files/documents/2501_FactSheet.pdf [<https://perma.cc/PB58-GF84>]; *see also* Calo & De Master, *supra* note 251, at 125; Hannah Alsgaard, *Rural Inheritance: Gender Disparities in Farm Transmission*, 88 N.D. L. REV. 347 (2012) (exploring how social and cultural “grooming” leads to assumptions that sons, not daughters, should take over farm operations); PARSONS ET AL., *supra* note 272, at 3 (noting “additional challenges in acquiring farmland” for socially disad-

cific response to racial and ethnic inequities in farming, Congress established the Outreach and Assistance for Socially Disadvantaged Farmers and Ranchers and Veteran Farmers and Ranchers Program, also known as the 2501 Program. The program is intended to provide outreach, education, and technical assistance to help these farmers access USDA programs. The 2501 Program, however, has been chronically underfunded.²⁸⁷ The USDA also accords preferential treatment to socially disadvantaged farmers in certain programs, with authority to set aside 5% of available funds for certain conservation programs and Farm Service Agency loans for farmland purchases, but these numbers have been criticized as too little and too poorly communicated to be effective.²⁸⁸

As this Article was being finalized for publication, Senator Cory Booker, along with several other cosponsors, introduced the Justice for Black Farmers Act, a bold legislative proposal that would, among other things, federally fund significant open-market purchases of farmland for redistribution to new and existing Black farmers.²⁸⁹ The mere proposal of such an Act marks a dramatic shift in political attention and thinking about the plight of farmland access, at least for Black farmers specifically, but it has also been critiqued for continuing to envision “solutions” that accept a more widely broken food and land-tenure system.²⁹⁰ The future of this proposed legislation is of course uncertain, but its introduction may have also helped spur support for the approximately \$5 billion in debt relief and other farm-support spending for socially disadvantaged farmers promised in the most recent COVID-related stimulus legislation.²⁹¹ Perhaps most importantly, the conversation continues and focus on racial equity in agriculture seems to be increasing.

vantaged populations, including “persistent discrimination, cultural and language barriers, and fractionated heir property”).

287. See AYAZI & ELSHEIKH, *supra* note 77, at 68.

288. JACOB E. GERSEN, MARGOT J. POLLANS & MICHAEL T. ROBERTS, *FOOD LAW 75–77* (2019).

289. Press Release, Sen. Cory Booker, Booker, Warren, Gillibrand, Smith, Warnock, and Leahy Announce Comprehensive Bill to Address the History of Discrimination in Federal Agricultural Policy, (Feb. 9, 2021), <https://www.booker.senate.gov/news/press/booker-warren-gillibrand-smith-warnock-and-leahy-announce-comprehensive-bill-to-address-the-history-of-discrimination-in-federal-agricultural-policy> [<https://perma.cc/X3BG-HXMZ>]; see also Tom Philpott, *Black Farmers Have Been Robbed of Land. A New Bill Would Give Them a “Quantum Leap” Toward Justice.*, MOTHER JONES (Nov. 19, 2020), <https://www.motherjones.com/food/2020/11/black-farmers-have-been-robbed-of-land-a-new-bill-would-give-them-a-quantum-leap-toward-justice> [<https://perma.cc/5D5Y-K34U>] (describing more of the political context of this effort).

290. E.g., Chris Newman, *The Justice for Black Farmers Act: A Critical BIPOC Review*, MEDIUM (Dec. 5, 2020), <https://sylvanaqua.medium.com/the-justice-for-black-farmers-act-a-critical-bipoc-review-459875f0158e> [<https://perma.cc/YBY6-SLGV>] (critiquing proposal as “a coarse attempt to add Black people to an already broken agricultural system”).

291. Reiley, *supra* note 250.

2. State and Charitable Endeavors

Other land-access policy responses tend to focus on the economics of land and credit markets, rather than proposing any changes to the ownership infrastructure itself. Generally, these reforms include modest efforts to facilitate making more farmland available for purchase and increasing the financial capacity of new farmers to purchase those lands. Sample tools in place (including many through private nonprofits and charitable land trusts) include

- loan guarantees or subsidized farm-purchase loans;²⁹²
- state tax incentives for landowners to rent their farmland to beginning farmers, with tax incentives for land actively used for farming and further incentives if that use is by a beginning farmer;²⁹³
- matchmaking programs designed to connect retiring or exiting farmers with new entrants;²⁹⁴ and
- individual development accounts designed to match, often through philanthropic efforts, savings by aspiring new farmers.²⁹⁵

Because most farmland is already owned by someone as farmland (that is, we can't and don't create much new farming capacity out of otherwise nonagricultural lands), other efforts have focused on creating incentives for farm transitions that result in land sales to new farmers. As many as 90% of farmers and farmland owners "neither have an exit plan nor know how to develop one."²⁹⁶ Only 30% of farmers planning to retire have even completed the first step of identifying a desired successor.²⁹⁷ Thus, many beginning-

292. PARSONS ET AL., *supra* note 272, at 17.

293. *E.g.*, Jordan Rasmussen, *Beginning Farmer Tax Credit Benefits New and Retiring Farmers*, CTR. RURAL AFFS. (Oct. 14, 2019), <https://www.cfra.org/blog/beginning-farmer-tax-credit-benefits-new-and-retiring-farmers> [<https://perma.cc/8FXP-2QKT>].

294. *See, e.g.*, PARSONS ET AL., *supra* note 272, at 19; KATHRYN RUHF, LAND FOR GOOD, DEVELOPING & STRENGTHENING FARM LINK PROGRAMS (2019), <https://landforgood.org/wp-content/uploads/LFG-Farm-Link-Guide-Developing-and-Strengthening-Farm-Link-Programs.pdf> [<https://perma.cc/WA84-WUDN>].

295. *See, e.g.*, Molly Bloom, Karen Adler & Margaret Knox, CAL. FARMLINK, A GUIDE TO DEVELOPING AND OPERATING AN AGRICULTURAL INDIVIDUAL DEVELOPMENT ACCOUNT (IDA) PROGRAM (2014), <https://drive.google.com/file/d/1PDUxhTPgO6rZLi6A7XqvrSFII-Yq7YNa> [<https://perma.cc/C4XQ-7P7B>]. Many of these programs focus on new-farmer access, regardless of status. But some states are addressing equity more directly. For example, in California, the state with the highest proportion of diversity in farmer and rancher sectors, the Farmer Equity Act is intended to create a governance framework that includes socially disadvantaged farmers and ranchers in decisionmaking, addressing both historic and ongoing racism in agriculture. CAL. FOOD & AGRIC. CODE §§ 510–514 (West 2018); *see also* CALO & PETERSEN-ROCKNEY, *supra* note 92, at 5.

296. PARSONS ET AL., *supra* note 272, at 3.

297. *Id.*

farmer discussions also focus on farm-succession planning and incentives.²⁹⁸ Some proposals have suggested requiring beginning farmers to have a will as a prerequisite for farm-program participation, but this could be extended or refined—having a will, on its own, of course has no correlation with the likelihood of land being opened for new entrants to farming.²⁹⁹

Still other efforts focus on more direct support for new farmers. For example, a handful of successful farm incubator programs exist in specific locations. In general, these incubators include direct land-access opportunities or direct subsidies for rent payments from private lands.³⁰⁰ These incubators are mostly, but not exclusively, private.³⁰¹ Many also target diverse populations explicitly, including immigrant farmworkers and refugees.³⁰² Although these are bold programs that seek to directly address land-access challenges, in many cases their impact is limited by scarce resources and perhaps a surprising degree of difficulty in transitioning new farmers out of the incubator and into any kind of stable tenure outside of the program.³⁰³ Many factors contribute to this, including the possibility of private discrimination, but the small size of these incubator projects currently means that they can typically only offer temporary access for a small number of new entrants. Upon completion of the program, these new farmers still struggle with the same access challenges outside the incubator and “in the real world,” just with perhaps more experience and sophistication in navigating agricultural markets.

Another significant charitable approach focuses on land trusts. These trusts operate in diverse ways but typically include, at a minimum, acquisition of agricultural-conservation easements by the trust to protect vulnerable lands for future agricultural uses and to secure future land supply to help

298. USDA SUBCOMMITTEE REPORT, *supra* note 277, at 2 (focusing on life cycle of farmland use and transition); *see also* Scrufari, *supra* note 102, at 507–08 (modeling sample use of LLC for gradual transition of farm from retiring farmer to new entrant); PARSONS ET AL., *supra* note 272, at 2 (emphasizing “entry/exit connection” in policy proposals).

299. USDA SUBCOMMITTEE REPORT, *supra* note 277, at 9–10 (imagining “having a will” as a factor that could reduce a beginning farmer’s origination fees on federally guaranteed farm loans).

300. For a discussion of these programs, *see*, for example, Calo & De Master, *supra* note 251, at 111–12; PARSONS ET AL., *supra* note 272, at 24–25.

301. *See, e.g.*, Jimmy Dula & Vanessa McCracken, *Access to Land: Boulder County Land Lease Program*, NAT’L FARMERS UNION (Feb. 3, 2017), <https://nfu.org/2017/02/03/access-to-land-boulder-county-land-lease-program> [<https://perma.cc/A4XG-LB8H>] (describing public land-lease option in Boulder, Colorado); Tim Faulkner, *R.I. Farm Purchase Program Targets New Farmers*, ECORI NEWS (Apr. 16, 2018), <https://www.ecori.org/farming/2018/4/16/ri-farm-purchase-program-targets-new-farmers> [<https://perma.cc/FAL7-36TR>] (describing Rhode Island plan to bond funds to purchase farmland directly, at full price, and then sell it to beginning farmers at a reduced agriculturally appraised value while retaining an agricultural-conservation easement).

302. *See* Calo & De Master, *supra* note 251, at 112.

303. *Id.* at 113.

maintain stable (and ideally more affordable) land pricing.³⁰⁴ Many of these efforts are supported by state-law tax incentives and state easement law.

A final group of efforts involve trying to combine the best of an incubator's direct land access with the conservation and financing tools of a land trust. Rather than just conserving farmland in general, these tools are intended to actually help distribute land to new entrants who meet certain organizational objectives. For example, in Fresno, California, an organization called Food Commons seeks to create a new organizational structure for localized, fair, and just food economies.³⁰⁵ This includes a "Food Commons Trust," in which a nonprofit entity or trust would own and develop land and other food-necessary facilities and then lease them at affordable rates to small farmers and food enterprises.³⁰⁶ Another group, Agrarian Trust, is similarly working toward specific instances of community ownership and governance of agricultural land through an effort to create a series of nonprofit landholding entities, including some intended to benefit new farmers.³⁰⁷

These programs are creative and important, but their influence is limited. In its survey of young farmers, the NYFC found land trusts and land-linking programs tied for last place in a list of most helpful programs or institutions.³⁰⁸ "In the past 20 years agricultural land trusts have bought and preserved 6 million acres of farmland"—just a tiny slice of the overall pie.³⁰⁹ In general, the size and scope of conservation and incubator strategies are hampered by the amount of market resources that would have to be harnessed to address this market problem and all the anti-access features of the fee simple and current land-tenure system designs.³¹⁰

304. *E.g.*, Scrufari, *supra* note 102, at 508–12 (describing use of conservation easements and state-sanctioned "Option to Purchase at Agricultural Value" (OPAV) rights to reduce and stabilize values of agricultural lands).

305. *See Summary*, FOOD COMMONS, <http://www.thefoodcommons.org/summary> [<https://perma.cc/SG6K-WZDC>].

306. *The Vision*, FOOD COMMONS, <http://www.thefoodcommons.org/the-vision> [<https://perma.cc/KFL8-3GEY>]; *Regional Food Commons as a Systemic Answer*, DAVID BOLLIER (Mar. 18, 2014, 8:22 PM), <http://www.bollier.org/blog/regional-food-commons-systemic-answer> [<https://perma.cc/APZ5-3WR5>].

307. *See About*, AGRARIAN TR., <https://agrariantrust.org/about> [<https://perma.cc/BH5B-N6T4>].

308. ACKOFF ET AL., *supra* note 23, at 50 (reporting that only 1% of respondents identified land trusts or land-linking programs as most helpful). Instead, the most helpful programs included the Affordable Care Act, student-loan forgiveness, direct farm-operating loans, and informal supports such as community-supported agriculture models and family or cultural knowledge. *Id.*

309. Holt-Giménez, *supra* note 87, at 9.

310. *See* ACKOFF ET AL., *supra* note 23, at 40 (identifying land trusts as an important tool in certain regions but noting some of these limitations and suggesting state and local governments and other nonprofits may also need to be partners for land access).

B. *Reform Approaches and Interest Convergence*

The creative and dedicated work of so many of these food and farm advocates is deeply admirable. Yet the structural problems persist. The same challenges that create barriers for new farmers and ranchers are also stacked against these current advocacy efforts—not enough available land, not enough access to capital, private and public racism, too many wealthy investors buying and consolidating agricultural real estate, and collective disregard for the natural consequences of our current system of agriculture. This next and final Section asks, fundamentally, whether it is time for more structural change: whether we can and should change the property rules that create and exacerbate these land challenges in the first place.

This may sound like a big ask—and it is—but property is dynamic and more ripe for reform than is often assumed. In the urban context, property scholars are already engaged in a robust dialogue about whether more radical reforms to the fee simple are due, particularly to allow more nimble responses to rapid neighborhood-level change and growing wealth inequality.³¹¹ Moreover, in recent housing justice campaigns, scholarship and practice have combined to deploy a host of novel property reforms to address lack of access to housing, especially among vulnerable groups.³¹² This work has already brought us implied lease terms for residential housing, inclusionary zoning reforms, rent controls, and even the evolution of new ownership forms such as condominiums and common-interest communities, which are relatively recent property innovations. Looking back, even our agricultural-land history is rife with examples of what were, at the time, radical property reforms—from the invention of Indian title to the implementation of the novel homesteading program. In every case, our legal imaginations built new systems to achieve the goals of the time. Why not use what we have learned to reimagine a more just, equitable, and sustainable agricultural land-tenure system for the world we live in now? This Section starts with a brief outline of some guiding principles for such a reform process and then sketches some early parameters for imagining these types of new property choices.

1. Guiding Principles and Grand Challenges

The goals of rural property reform warrant full public debate. Open issues include: the most desirable size and structure of farmland ownership, including whether owners are absentee or local; the types of agriculture, food system, and agricultural markets to support; and who should own land and with what responsibilities. Although more public engagement is needed, this Section proposes three initial guiding principles that I propose to center. Each has legal complexity that warrants further exploration, which I can address only preliminarily here.

311. See *supra* note 274 and accompanying text.

312. See *supra* note 274 and accompanying text.

a. Reconnect Ownership and Active Stewardship

First, active, local control of local lands—or at least *some* agricultural lands—is beneficial for communities and for the project of building a more sustainable and diversified agricultural economy and ecology. Connecting secure ownership of land back to farmers and ranchers who have local knowledge of and a physical relationship to the place serves many purposes. This physical connection can help repopulate certain vacant rural landscapes, encourage more sustainable and equitable farming practices, and reduce the social costs of far-removed wealth concentration and land control. This kind of shift in property design could be achieved in different ways, from an explicit residency requirement to a carefully defined duty to cultivate—or steward or tend or physically experience the space—as a condition of ownership. Although there are many nuances to be developed, including the precise nature of an owner’s in-person obligations, the guiding principle is that in *some* cases we should encourage reconnecting agricultural landownership (wealth and income) to use (experience and labor).

In a related but different context, nine Midwestern states sought to limit absentee *corporate* ownership of farmland.³¹³ The Eighth Circuit invalidated some of these laws under a (possibly strained) Dormant Commerce Clause analysis, emphasizing that to the extent the state required an in-state resident owner to actually possess and operate farms in a state—at least as a condition of receiving the liability shield of corporate status—it discriminated against out-of-state interests.³¹⁴ But not all of these laws have been struck down, and the analysis has not been extended outside the Eighth Circuit.³¹⁵ The corporate farming laws are also distinct because they apply categorically to all in-state versus out-of-state behavior, as opposed to more narrowly tailored, property-specific use requirements.

Despite these cases, there are certainly strategies that remain to facilitate an owner’s use requirement in certain types of agricultural tenure. Outside

313. See, e.g., Rick Welsh, Chantal Line Carpentier & Bryan Hubbell, *On the Effectiveness of State Anti-corporate Farming Laws in the United States*, 26 FOOD POL’Y 543, 544 (2001). The efficacy and design of these laws is subject to significant debate. For example, they do nothing for the increasingly common family trusts that hold legacy farmland for the benefit of absentee beneficiaries. See Neil D. Hamilton, *Reaping What We Have Sown: Public Policy Consequences of Agricultural Industrialization and the Legal Implications of a Changing Production System*, 45 DRAKE L. REV. 289, 302 (1997) (articulating anti-industrialization focus of corporate farming laws).

314. See, e.g., *Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006). For a very helpful synthesis of corporate farming measures and their constitutional issues, see Anthony B. Schutz, *Corporate-Farming Measures in a Post-Jones World*, 14 DRAKE J. AGRIC. L. 97 (2009).

315. For example, a federal judge recently upheld most of a North Dakota corporate farming and ranching law, requiring only that the state must allow equivalent entities from other states to also qualify for a family farm exception in the statute. See John Hageman, *Judge Declines to Strike Down Entire ND Anti-corporate Farming Law, but Calls One Provision ‘Discriminatory,’* GRAND FORKS HERALD (Sept. 21, 2018, 6:00 PM), <https://www.grandforksherald.com/business/agriculture/4502910-judge-declines-strike-down-entire-nd-anti-corporate-farming-law-calls> [https://perma.cc/VU5M-2W3Z].

the rural context, for example, owner-occupancy requirements in condominium associations are regularly enforced, and lease terms prohibiting a residential tenant from subleasing or assigning their tenancy (which, by default, creates an inalienable possession right) are also regularly upheld. Moreover, market-participant exceptions to Dormant Commerce Clause analysis could also provide an exception as long as the underlying title is considered public. Federal authorization through direct Commerce Clause regulation (such as a Farm Bill provision) would also authorize this change. Moreover, property tenure forms—particularly to direct real property ownership that is permanently located only within one state’s borders—are perhaps more inherently matters of state law, not interstate commerce.³¹⁶

b. Equity and Access

Second, opportunities to access agricultural land must be fair and equitable. If this Article has established anything, it must be that our current agricultural land-tenure system is built on a history of racial exclusion and that it continues to reinforce structural exclusion of people of color from farming, food systems, and land ownership. New models of agricultural land tenure can be part of a larger solution to rebuild new, racially just rural communities and food systems.

At the same time, the reality is that any land-access program that targets only farmers or ranchers of color may face delays from constitutional equal-protection challenges.³¹⁷ I am also aware that, more practically, any outsider’s definition of what solution might repair generations of racial injustice will be—and should be—met with skepticism. I hear and echo Bernadette Atuahene’s important admonishment on reconciliation and reparations that solutions must be imagined and designed by the impacted parties themselves.³¹⁸

Meanwhile, our choices about who owns rural America and agricultural land more specifically shape the fortunes of rural places—economically, ecologically, and socially. Many of the beginning farmers who are now seeking land access are immigrants, refugees, and racial and ethnic minorities.³¹⁹ Given the high (and increasing) numbers of farmworkers, existing tenant farmers, and rural residents of color, land-access programs based on race-

316. This line can become difficult to draw. *See, e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 574 (1997) (“A tax on real estate, like any other tax, may impermissibly burden interstate commerce.”). For now, however, it is enough to note that there is scope for creative solutions here.

317. *E.g.*, *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 552 (1990); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204 (1995). On other hand, some scholars very persuasively argue that racially integrative purposes are constitutional. *E.g.*, Elise C. Boddie, *The Constitutionality of Racially Integrative Purpose*, 38 *CARDOZO L. REV.* 531 (2016).

318. Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 *L. & SOC. INQUIRY* 796, 818 (2016).

319. *See supra* Sections I.A, I.C; Calo & De Master, *supra* note 251, at 112–13.

neutral factors—like preferences for former farmworkers and others with farming experience—may achieve the goal of more equitable and diverse landownership without explicitly race-based allocations. Certainly, there is broader racial reparations work to do, but more equitable access to agricultural land is also needed on its own.

c. Property System Change and Design

Finally, property change is possible but practically difficult. Property, in general, is a creature of state law. Property reforms that proceed in an iterative, experimental way through state-by-state efforts may best allow land-tenure changes to adjust to specific farming, ecosystem, and community contexts and needs. For example, land needs in the Midwest, where commodity row crops predominate, likely look very different than reforms in New England, where agricultural land is much more sparse but urban populations and consumers are in much closer proximity for food distribution.

On the other hand, this state-by-state approach may mean some reforms are slow to proceed or may not happen at all. Although I've written at length elsewhere about the actual potential and value for more local pluralism in property and the grassroots process needed to move the reform wheel,³²⁰ in general it is also true that standardization in property institutional design can be a virtue to the extent it facilitates arm's length transactions with lower information costs involving valuable resources.³²¹ Thus, it is also worth noting that the regularly renegotiated federal Farm Bill may provide another lever for pushing property reforms at the federal level. The most recent Farm Bill provides a sample of this kind of pressure for state-by-state—but uniform—property reforms. The Uniform Partition of Heirs Property Act (UPHPA) is model legislation specifically designed to address the risk of forced partition sales of heir property by strengthening partition-in-kind preferences and including more protective procedures for any actual partition sale that may occur.³²² The Farm Bill encouraged states to pass this reform by allowing for some preference in allocating federal-loan funds to relending entities where the governing state has adopted the UPHPA.³²³ A

320. Cf. Shoemaker, *supra* note 43 (exploring dynamics of property system change and range of flexible property-reform options in context of retained Indigenous lands within reservations).

321. See, e.g., Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 26–34, 38–42 (2000) (expressing concerns about too many bespoke property interests creating market confusion and instead seeking “optimal” standardization in property forms).

322. See generally Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1 (2014) (analyzing aspects of partition law that contributed to the loss of millions of acres of property and analyzing key sections of the UPHPA which seek to address those problems).

323. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, sec. 5104, § 310I(d)(2), 132 Stat. 4490, 4669–71 (codified at 7 U.S.C. § 1936c(d)(2)). This Farm Bill also references this state-level property reform by providing an option for qualifying heir property owners without

hybrid of this model—for example, Farm Bill incentives for land reforms and experiments but without the specific uniformity obligations of the UHPA example—could put us in an ideal middle ground.

* * *

The ultimate goal is a series of property-law experiments that reconnect land ownership and land experience; that distribute new opportunities equitably and justly; and that allow for the kind of democratic, local engagement and imagination that can rebuild so much of what is lost. In general, the challenges of struggling rural communities, our rapidly changing climate, and the spatial dimensions of economic and racial justice are often treated discretely, but these challenges converge in this crisis of rural, agrarian land tenure.³²⁴ Fixing some of the fee simple's failures, in some places, for the sake of a more robust—and inclusive—rural prosperity has payoffs for all Americans, and this is the kind of interest convergence that may actually get essential racial justice work done.³²⁵

2. Specific Strategies

This final discussion centers on four specific strategies available to actually make these goals realities: setting new default property terms, designing inclusionary zoning for agriculture, experimenting with modest initial land distribution shifts, and imagining new off-the-shelf agricultural-tenure designs. These are not the only possible strategies, of course, but they are offered as kindling for greater consideration. Many of these following strategies are already successfully deployed, or at least considered, in other contexts and need only be reimaged for modern American agriculture.³²⁶

a. Public Good Property Defaults

Early waves of housing justice advocacy effectively pursued new default or opt-in terms for certain types of leases. The implied warranty of habitabil-

formal land titles to participate in some federal farm programs if they meet an alternative (and onerous) set of requirements. *Id.* § 12615, 132 Stat. at 5014–15 (codified at 7 U.S.C. § 6622b).

324. For example, rural development professionals tend to focus on new strategies for attracting and retaining new residents and businesses to declining rural places, but rural populations and communities are seismically shifted in large part as a result of global and macroeconomic forces beyond any one community's control. *Cf.* Ann M. Eisenberg, *Economic Regulation and Rural America*, 98 WASH. U. L. REV. 737, 780–81 (2021) (making case for new visions of agriculture for rural revitalization).

325. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

326. By design, these proposals focus on property-law innovations and options that have heretofore largely been overlooked. Other reforms—from product-labeling strategies for marketing purposes to other tax or antitrust law changes—could also, of course, be brought to bear on these larger issues of inclusion and equity in agriculture.

ity (IWH), for example, imposed mandatory housing-quality standards by implying mandatory lease terms to that effect in all residential tenancies.³²⁷ Rent-control statutes, meanwhile, set maximum rent returns for certain leased properties to ensure long-term housing affordability.³²⁸ In the context of agricultural land-tenure reforms, a parallel strategy could focus on ownership and leasing defaults to ensure more equitable and secure land access.

For example, to the extent that more minority farmers find themselves in oral leasing arrangements, property law could easily define default terms for those oral agricultural leases or, following the IWH, mandate certain provisions. These imposed terms could define the following: how and when a lease can be terminated, with secure protection for already-planted crops and recouping of certain improvements; water access; rent amounts and rent adjustments; and the allocation of various risks, from weather, disaster, insurance, or otherwise. Similarly, new defaults could be pursued for other aspects of agricultural landownership, like more expressly privileging a tenant's agricultural production when defining co-owners' rights within a default co-ownership form. There is tremendous, largely untapped, possibility for flexible adjustments of property relationships within both leases and co-ownerships.

At numerous other junctures in the legal system, there are similar opportunities to build in new incentives or policies that favor greater and more equitable land transitions. For example, specialized intestacy defaults can be created for farmland that encourage more public-good transfers—or, in the absence of a desire for such a transition, achieve more active planning by motivating farmers to plan specifically. For example, with adequate notice and opportunities to opt out, it is not unreasonable to imagine an intestacy default that includes first-refusal rights for a nonprofit or land trust with a farmland-preservation and access-supporting mission.³²⁹ Similar first-refusal or other priority rights could also be recognized in the same nonprofits or other public agencies serving socially disadvantaged beginning farmers upon any foreclosure of existing agricultural lands, whether for tax or other reasons.

Finally, an entirely different set of immediate default responses could focus not on land acquisitions but rather, at least for now, on how better to se-

327. See Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 528–29 (1982).

328. See Andrea J. Boyack, *Responsible Devolution of Affordable Housing*, 46 FORDHAM URB. L.J. 1183, 1210–12 (2019).

329. Cf. Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1032–33 (2004) (calling for more scholarly attention to system of intestacy defaults). The Supreme Court has previously rejected probate reforms that effectively abolish a landowner's entire right to descent or devise of property, but this still leaves a range of policy tools available to enhance land access through intestacy defaults. Cf. Michelle M. Lindo, Note, *Youpee v. Babbitt—The Indian Land Inheritance Problem Revisited*, 22 AM. INDIAN L. REV. 223, 239–46 (1997) (collecting range of available law reform tools). The American Indian Probate Reform Act, for example, gives tribal governments and certain others with qualifying connections to the land a right to purchase certain small interests in trust allotments that would otherwise pass via intestate succession. 25 U.S.C. § 2206(o)(5)(A).

cure and maintain what farmers and ranchers of color do currently own.³³⁰ For example, this could focus on legal reforms to reduce the “geography tax” of lack of access to legal services, which could facilitate farmers better availing themselves of estate planning, probate, formal real-estate transactions, and all the associated farm credit and support programs. For farmers, this can often require, for example, adjustments to free-legal-service eligibility guidelines because farm assets (without regard to debt) can sometimes render farmers unfairly ineligible.³³¹ Other efforts could focus on simplifying the legal processes themselves to facilitate, for example, formalization of existing informal property titles. Bold ideas include modifying adverse-possession law to allow in-possession co-owners to, with notice, extinguish the lingering claims of outsider and absentee co-owners, and more modest reforms may focus on simplifying self-help probate procedures for small or uncontested estates. Bankruptcy courts, dormant-interest registration requirements, and even stronger eviction protections for tenant farmers could also facilitate this adjacent goal of greater land security for existing but vulnerable owners.

b. Inclusive Zoning for Agriculture

In the housing justice context, inclusionary zoning has been used to ensure the creation of more affordable housing.³³² Inclusionary zoning in the housing context refers generally to programs or policies that require or incentivize the creation of new units of affordable housing—usually as a condition of a development permit when new housing is built or by requiring a payment in lieu of development along the zoning process.³³³ The basic idea is that owners who seek to benefit from a public system of city infrastructure and services, particularly at the moment of imposing a new development, should also contribute directly to the larger project of housing for all in that space. A similar model could be drafted to make farmland more accessible. For example, certain large or absentee agricultural landlords could be tasked with leasing a defined portion of their farmlands to socially disadvantaged beginning farmers at affordable rates or, at certain junctures, to contribute a land-use exaction to a public fund used to support these new farmer entrants in another way.

Many different iterations of this new program could be imagined, with variations both in terms of triggers and effects. These inclusionary obligations could kick in as conditions of participation in certain farm programs—such as the extremely valuable federally subsidized crop-insurance program—or at the time of certain changes in ownership or operation. Effects

330. See McFarlane, *supra* note 254, at 914–18 (discussing “right to keep” proposal).

331. Carpenter, *supra* note 33, at 94 n.51.

332. Emily Thaden & Ruoni Wang, *Inclusionary Housing in the United States: Prevalence, Impact, and Practices* (Lincoln Inst. of Land Pol’y, Working Paper No. WP17ET1, 2017), <https://www.jstor.org/stable/resrep18611> [<https://perma.cc/WA7Z-X6U7>].

333. See Weiss, *supra* note 274, at 263.

could range, again, from contributions to funds to an actual lease or other access mechanism for a portion of the subject land. Under Fifth Amendment principles, such a program would have to be carefully constructed. The Supreme Court has never fully resolved the exact permissible parameters of other inclusionary zoning programs, but they are prevalent in the United States, with one recent study finding more than 1,379 such policies in 791 different jurisdictions.³³⁴ Supreme Court jurisprudence on exactions generally would require both a nexus between any inclusionary agriculture policy and the impacted owners, as well as rough proportionality between the size of the demand and the magnitude of the impacted party's original development or other request.³³⁵

c. Experimental Land Reforms

The most radical reform would involve some small experiments with actual land redistribution. Although certain to provoke a political controversy, legally this option is not as outlandish as it may first seem. The Supreme Court has previously agreed that eminent domain can be used to break up consolidated land holdings “when a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices.”³³⁶ The Court in *Hawaii Housing Authority v. Midkiff* deferred to the legislative branch as “the main guardian of the public needs to be served by social legislation.”³³⁷

Others have proposed using this *Midkiff* precedent to redistribute rural property for “progressive, social justice ends.”³³⁸ Guadalupe Luna, for example, has argued for redistributing federal public lands to “Chicanas/Chicanos” to “arrest their continued alienation from the agrarian domain or rural land-ownership.”³³⁹ Her proposal includes several novel suggestions, including imposing a condition subsequent on any actual land grants requiring that the former public lands be managed by the new owners using sustainable-

334. Thaden & Wang, *supra* note 332, at 14.

335. See JULIAN CONRAD JUERGENSMEYER, THOMAS E. ROBERTS, PATRICIA E. SALKIN & RYAN MAX ROWBERRY, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* §10:5, at 421–24 (4th ed. 2018).

336. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242–43 (1984). The statute at issue in *Midkiff* was the Hawaii Land Reform Act of 1967, ch. 307, 1967 Haw. Sess. Laws 488 (codified as amended at HAW. REV. STAT. §§ 516-1 to -204 (2018)).

337. 467 U.S. at 239 (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)). More recently, in *Kelo v. City of New London*, the Court affirmed the use of eminent domain to take private property for part of a larger development plan that included transferring the acquired land to new owners, including both low-income tenants and private businesses. 545 U.S. 469, 498 (2005).

338. E.g., David Linhart, Note, *Eminent Domain Conversion of Vacant Luxury Condominiums into Low-Income Housing*, 21 B.U. PUB. INT. L.J. 129, 131–32 (2011) (citing proposal by New York City chapter of the Right to the City Alliance to use eminent domain to seize vacant residential buildings in the city and turn them into affordable housing); Eric Young & Kery Kamita, Comment, *Extending Land Reform to Leasehold Condominiums in Hawaii*, 14 U. HAW. L. REV. 681, 682 (1992).

339. Luna, *supra* note 131, at 138.

agriculture practices, building on cultural histories of place-sensitive agricultural practices.³⁴⁰ She also suggests a land trust “to offset the enormous costs of initiating an agricultural enterprise.”³⁴¹ Celebrity chef Mark Bittman also recently delivered a keynote address seeking “sweeping land-reform policy, one that would allow the federal government to appropriate farmland and redistribute it to young farmers, as part of inheritance or transfer tax reform,” and the proposal was also supported by Ricardo Salvador, a senior scientist for food and agriculture at the Union of Concerned Scientists.³⁴² Elsewhere, even without any exercise of eminent domain, many states already own land that is underutilized but has food-growing potential.³⁴³

Others have considered whether a new modern version of the historic Homestead Act might facilitate rural resettlement.³⁴⁴ Some rural towns have given land to families willing to build homes there.³⁴⁵ Federal legislation was proposed—but not passed—in the early 2000s called the New Homestead Act which, rather than actually transferring land, would have encouraged rural wealth building in counties impacted by out-migration with tools like loan forgiveness for residents, tax credits, and matched-savings vehicles, modeled on Individual Development Account ideas.³⁴⁶

Challenges to any redistribution plan would include deciding difficult questions about which lands to pursue (by what ownership characteristics, in what locations, at what stage of development, in what transition, and for what compensation) and exactly how to redistribute (which harm precisely is being addressed and who should benefit and how). In general, politically progressive subsidy or taxation or stricter enforcement of antitrust principles tends to be more palatable than actual land redistribution. Yet, elsewhere in the world, similar reforms are being explored—including, for example, a

340. *Id.* at 139–40.

341. *Id.* at 140.

342. Sam Bloch & Hillary Bonhomme, *Young Black Farmers to Mark Bittman: We Don't Need Your Land Reform*, COUNTER (Dec. 7, 2017, 7:14 PM), <https://thecounter.org/young-black-farmers-mark-bittman-land-reform> [<https://perma.cc/8YBY-THBN>]. But anger broke out in the conference when Bittman failed to answer adequately how he personally holds himself accountable to communities of color. *Id.* Related to this discussion is arguably greater attention recently to the case for African American reparations. See, e.g., Ta-Nehisi Coates, *The Case for Reparations: An Intellectual Autopsy*, ATLANTIC (May 22, 2014), <https://www.theatlantic.com/business/archive/2014/05/the-case-for-reparations-an-intellectual-autopsy/371125> [<https://perma.cc/Q5KX-SFT5>]. Another project, the Black-Indigenous Farmers Reparations Map, has sought to encourage individual “people-to-people” reparations, with at least some success. See Jean Willoughby, *A Digital Map Leads to Reparations for Black and Indigenous Farmers*, YES! (Feb. 21, 2018), <https://www.yesmagazine.org/social-justice/2018/02/21/a-digital-map-leads-to-reparations-for-black-and-indigenous-farmers> [<https://perma.cc/8MYK-BKCT>]. The project itself lists specific farms organized by people of color and seeks funding for them. See *id.*

343. ACKOFF ET AL., *supra* note 23, at 66.

344. Williams Shanks, *supra* note 156, at 10–12.

345. See BAILEY ET AL., *supra* note 86, at 8–9.

346. *Id.* at 58–59; see also New Homestead Act of 2003, S. 602, 108th Cong. (2003).

carefully constrained community-purchase option in Scotland.³⁴⁷ In the United States, small experiments with breaking up large land monopolies—or small pieces of large monopolies—could facilitate more public farm incubators and transitional new-farmer opportunities to start. For now, however, especially in the face of growing consolidation, the point is that such a legal tool—carefully and cautiously applied—is possible.

d. New Agricultural Tenures

Finally, whether post-redistribution or simply as a new default form to facilitate more expedited and efficient future private transfers, states also have wide flexibility to innovate and design new default property estates for agricultural land. Original fee simple features, from its endlessness to its abstract divisibility of profit and investment rights, have not served rural America well—at least not as the singular option and at least not from the perspective of those who are persistently excluded. Property is much more pluralistic than we may at first perceive, and there are numerous examples of adaptive property institutions based on the unique characteristics of specific resources—from intellectual property to water law to, in some cases, even agrarian lands internationally.³⁴⁸ A final set of reforms, then, would build to a new set of default property estates for some agricultural lands, reflecting the outputs of real laboratories of local democracy and the “intrinsic complexity” of land itself.³⁴⁹

For example, for any given parcel of agricultural land, a new estate could provide for an underlying public, charitable, or cooperative title with subsidiary strata-like producer rights on top. These producer rights may have a formula to limit endlessness—either a calendar period of time (such as ten-year renewable terms) or the working life of one farmer, or they could impose defeasibility on defined conditions (for instance, until the current producer stops actively using the land in an agreed manner). This estate could prohibit disaggregation and absenteeism, with active use and possession requirements also informing natural parcel-size limits and precluding over-concentration. Likewise, depending on the context of a particular land resource, overlapping or concurrent uses based on seasons, rotating crops or livestock, and multiple-yield farming practices could be coordinated and shared by a network of stakeholders. Grazing rights, forage rights, and specific crop options could be layered across numerous sequential users. The

347. UNDERKUFFLER, *supra* note 190, at 121 (expressing greater social acceptance of redistributing money through policies than of any redistribution of land).

348. See Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 912–13 (2013) (exploring history of agrarian-specific land reforms in the 1940s and 1950s in Italy); see also Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1409–27 (2009) (exploring numerous examples of potential property innovations not only with regard to exclusion but also along a spectrum of free to more restricted alienability).

349. See generally Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009) (emphasizing “intrinsic complexity” of land and need to reconcile numerous values in land decisions).

new tenure models may include cooperative or other equitable governance models for polycentric management across shared landscapes.

Various other matters need to be considered, of course. The strength and alienability of any producer rights would have to be carefully balanced—allowing transfers, for example, under conditions that allow for future maintenance of shared use and possession goals and the continuation of any valuable personal or familial attachments, while also allowing for the accumulation and “cashing out” of some portion of an owner’s wealth and equity and sufficient transferability to facilitate accessing necessary credit, including in something like a leasehold mortgage.

The primary purpose here is to begin to imagine how flexible property can be. A new estate offers flexibility but also the information-cost savings and efficiency of a new default structure. Rather than requiring individual trusts and leases or business and nonprofit entities to be created and negotiated in complex, bespoke ways, new default tenure forms allow collective choices about property values to inform how land is used and how communities are structured—even just in small, pilot parcels to start. Those value choices were critical to the original agrarian objectives, and we can still achieve a better and more inclusive version of these ideals today.

CONCLUSION

Property plays just one part in this complex system, but it is an important part. People of color are dramatically underrepresented in rural landowner classes and in agricultural landownership in particular, despite evidence that many members of these groups desire to enter farming as owners and operators. Many of these emergent new farmers also seek to innovate with smaller and more diverse operations of the kind that may be needed to transform current agriculture systems and bolster the future of otherwise dwindling rural communities and rural livelihoods. With so much land expected to transition from current-generation owners in the next decade, a fundamental reworking of these land-tenure systems may be a now-or-never opportunity.

Using the racial legacies and current systems of racial exclusion as a through thread, this Article fundamentally argues for turning our attention back to these forgotten places. The goal is not to recreate old systems or preserve the status quo. The historic origins here are not to be exalted. But at a moment of radical social, economic, and environmental change, property law has an important part to play in reimagining the future of these places. The challenge is complex, but we can imagine—and create—systems wholly different from what we have now.