

PRACTICAL & LEGAL CONSIDERATIONS

Justice on the Menu

*Legal & Policy Strategies to Address Structural Discrimination
in the US Food System*



ChangeLab Solutions

Practical & Legal Considerations for Policymaking to Promote Food Justice, Health Justice & Racial Justice

The information in this section is for informational purposes only and does not constitute legal advice. Individuals working on policy change should always consult an attorney licensed to practice in their own jurisdiction for guidance on specific legal questions.

Practical Considerations

When it comes to advancing racial justice, policies are only as effective as the processes used to develop and implement them. In other words, the process is just as important as the content. Even a policy that is racism-conscious will fall short in reaching its goals if the process used to develop and implement it is inequitable. This section maps out common themes or principles for addressing structural racism in the food system, which were drawn from engagements with food system scholars and advocates during the policy scan process and from the community spotlights in the previous section.

Center People with Lived Experience in the Policy Process

In the end, even the most well-intentioned policies will fail to advance racial justice in the food system if they are done *to* or *for*, rather than *by* the people closest to the problems the policies are trying to address. People with lived experience – specifically, BIPOC groups, who experience a disproportionate burden of harms related to racial inequities in the food system – should lead and be at the forefront of any policy development and advocacy efforts seeking to advance racial justice in the US food system. Leadership should include defining the vision and goals; selecting, analyzing, and designing specific policy solutions; strategizing and organizing on the ground; and implementing and evaluating policies once they

are adopted. Policymakers and other changemakers with power and privilege can work in solidarity and partnership with people with lived experience to support policy change efforts. As demonstrated by the community spotlight on Charlottesville, Virginia, people with lived experience may also be more successful than large, intermediary organizations at persuading policymakers to take certain actions, making their leadership key to successful organizing.

Pursue Advocacy Through Multiple Avenues

Policy wins can be achieved through multiple pathways:

- Grassroots advocacy “on the streets” (e.g., peaceful protests, strikes, boycotts)
- Legal advocacy through the courts (e.g., lawsuits to challenge government policies or private conduct)
- Legislative and administrative advocacy to influence adoption of new public policies (e.g., statutes adopted by legislative bodies, regulations adopted by administrative agencies)

When seeking policy changes to promote food justice, health justice, and racial justice, it can be helpful to strategically pursue all three approaches at once and sometimes also at multiple government levels. These different avenues for advocacy can be interconnected, and wins in one forum can prompt change in another. For example, litigation can often spur legislative action. This was the case in the community spotlight on Washington’s law granting overtime wages to agricultural workers, which was motivated by successful litigation concluding that the failure to provide overtime pay to farmworkers was discriminatory. Similarly, policy wins at local and state levels can often help to make the case for federal policy changes, especially when structures to measure policy impacts over time and show success are already in place.

Pursuing advocacy via multiple avenues can also be strategic when one branch of government is less open to change than another. For example, tribal hunting and fishing agreements restoring access to traditional foodways, discussed in the community spotlight on tribal food sovereignty, have sometimes been mandated by courts as a result of litigation when the executive branch has failed or refused to recognize these rights! Alternatively, sometimes people in government and non-government roles already share common goals. In these cases, strategic cross-sector partnerships between government officials and community-based groups – also known as an *inside-outside strategy* – can help the cause and provide mutual benefit. Community-based groups may be able to act more nimbly than their government partners or engage in lobbying activities that government partners cannot.

LEARN MORE

To learn more about community leadership and partnerships, see [Principles for Equitable and Inclusive Civic Engagement: A Transformative Guide](#) from the Kirwan Institute at The Ohio State University.

LEARN MORE

To learn more about strategic advocacy approaches, see [Using an Inside-Outside Strategy to Build Power and Advance Equity](#) from Human Impact Partners.

Assess Racial Equity Impacts

A broad national policy scan like the one conducted for this project cannot capture jurisdictional-level considerations or foresee unintended consequences that may be unique to a community. When advocating for policies to promote racial justice through the food system, it can be helpful to use a racial equity assessment tool to help identify community-specific factors at the outset of the policy development process. Based on the findings, policy options can be prioritized and tailored to unique contexts. These assessments can also be used after a policy has been adopted, to evaluate its impact over time and adjust as needed. Race Forward explains:

A Racial Equity Impact Assessment (REIA) is a systematic examination of how different racial and ethnic groups will likely be affected by a proposed action or decision. REIAs are used to minimize unanticipated adverse consequences in a variety of contexts, including the analysis of proposed policies, institutional practices, programs, plans and budgetary decisions. The REIA can be a vital tool for preventing institutional racism and for identifying new options to remedy long-standing inequities.²

In recent years, REIAs have been increasingly used in communities across the country, moving “from the margins to the mainstream of thinking about how government can serve everyone more effectively and address a history of exclusion in the process.”³ REIAs can be an opportunity to meaningfully engage community partners who can either lead or participate in the process. REIAs can also be an opportunity to build partnerships and coalitions across government agencies, sectors, and social justice movements. As noted previously, a large multisectoral and multidisciplinary coalition of partners is necessary to achieve transformational change for food justice, health justice, and racial justice. As Brookings Institution argues, “Equity impact assessment can and should be embraced by a bigger tent of allies, because it makes better, more innovative government possible.”⁴

LEARN MORE

To learn more about racial equity impact assessments, see [Racial Equity Toolkit: An Opportunity to Operationalize Equity](#) from the Government Alliance on Race and Equity.

GENERAL POLICYMAKING AND ADVOCACY RESOURCES

The following resources provide additional guidance on the policy process generally as well as within the food justice and racial justice spaces.

POLICY PROCESS

- [Strategies for Equitable Policymaking](#) (ChangeLab Solutions). This guide explores equitable policymaking frameworks and grounds the concepts in real-world examples.
- [Pathways to Policy](#) (ChangeLab Solutions). This resource is a “step-by-step playbook for young people who want to change the world.”
- [Policy Process Playbook](#) (ChangeLab Solutions and Moving Health Care Upstream). This playbook “guides partners through each step of the policy process and provides information on how and why policy can be a useful tool for addressing chronic disease,” among other issues.
- [Influencing Policy Development](#) (Community Tool Box)
- [Advocating for Change](#) (Community Tool Box)

FOOD JUSTICE ADVOCACY

- [Food Sovereignty Action Steps](#) (Soul Fire Farm and the Northeast Farmers of Color). These steps include “simple actions for individuals to end racism in the food system” and tips for building “alliances and relationships with community.”

- [Food Policy 101](#) (FoodPrint). This article explains how each branch of government, as well as non-governmental institutions, can engage in food policy.
- [Advocacy & Lobbying 101 for Food Policy Councils](#) (Harvard Law School’s Food Law and Policy Clinic and the John Hopkins Center for a Livable Future). This toolkit “explains the legal definitions and laws applicable to lobbying to help [food policy councils] understand how they can influence the decisions of local, state, and federal government officials.”

RACIAL JUSTICE ADVOCACY

- [Organizing for Racial Equity Within the Federal Government](#) (Race Forward). This resource “provides multiple actions civil servants can take to strengthen and grow the influence of our public institutions so they serve their highest purpose.”
- [Justice Action Toolkit](#) (Community Tool Box). This web page offers several resources “to support community members working towards racial justice and gender equity.”
- [Racial Equity Tools](#) has collected a number of advocacy resources.
- [Setting an Anti-Racist Table](#) offers a compendium of trainings and resources on anti-racist organizing.

Legal Considerations

When thinking about how to select, prioritize, draft, and design policies to promote racial justice in the food system, changemakers should weigh community aspirations and various feasibility and impact criteria, along with whether a policy will be legally feasible in their jurisdiction. In other words, consider this question: Which policy approaches are more or less likely to face a lawsuit?

Many possible legal considerations could apply to any particular policy approach. These will vary, depending on where the policy is being pursued and how it is drafted, among other factors. Which legal issues are relevant and how courts might resolve them is highly place- and fact-specific, making it impossible to account for all potentially relevant legal considerations in a broad national policy scan. However, when it comes to promoting racial justice, one legal consideration that may be a primary concern for advocates and policymakers is navigating civil rights protections, gaps, and opportunities.

Affirmatively advancing civil rights is a central aspect of the government's work to deliver more equitable outcomes for underserved communities, across all types of agencies and at multiple jurisdictional levels. Present-day racial and structural disparities are the result of long-term government-sponsored or government-tolerated violence and failures to protect all citizens.⁵ While civil rights protections have been promised in the US Constitution, historical advancements of civil rights have been met with legislative and judicial backlash.⁶

For example, the Fourteenth Amendment is known for its Equal Protection Clause, which establishes that a governmental body may not deny people equal protection of its governing laws. Put another way, governing bodies must treat an individual in the same manner as others in similar conditions and circumstances.⁷ Congress later passed Title VI of the Civil Rights Act of 1964 to address racial injustices, reduce health disparities, and fill in the gaps left by the Fourteenth Amendment. Title VI "prohibits discrimination on the basis of race, color, or national origin by both public and private entities that receive federal financial assistance."⁸

While the Equal Protection Clause and Title VI have had some impact on advancing racial and health justice, their effectiveness has been limited by (1) a lack of consistent, equitable enforcement and (2) judicial interpretations of the meaning and purpose of these laws – most notably by the US Supreme Court. One significant example is the June 2023 decision in *Students for Fair Admissions v. Harvard*,⁹ which curtailed the use of affirmative action in higher education and left some open questions about whether and how courts might apply the decision in future cases, including those dealing with policies on topics like environmental, economic, and food justice.¹⁰

A successful approach to addressing structural racism in the US food system involves finding opportunities within the limitations of the prevailing legal landscape. Since the limitations on using civil rights laws to advance equity hinge largely on judicial interpretations, a deeper look at these interpretations can shed light on where opportunities may lie.

The courts have read the Equal Protection Clause's prohibition on discrimination to limit "state and local governments' abilities to confer benefits or impose burdens based on race"¹¹ and other "suspect classifications," such as ethnicity or national origin. The language of "benefits" and "burdens" means that this prohibition applies not only to discrimination against certain groups but to affirmative action or discrimination in favor of certain groups. The courts apply different legal standards depending on the class of individuals to whom a challenged policy applies, as laid out in Table 3.

Table 3. Legal Standards for Evaluating Claims of Unlawful Discrimination

Legal standard	When does the standard apply?	What is needed to meet the standard?	What does this mean in practice?	What are examples of policies that would likely be subject to the standard?	What types of data and evidence are needed to meet the standard?
Strict scrutiny	Strict scrutiny applies to laws, policies, and other government actions that make explicit distinctions based on race, ethnicity, and national origin – also known as <i>protected classes</i> .	The government must prove that the policy promotes a “compelling government interest” and that the goals cannot be achieved through less discriminatory alternatives – also known as <i>narrow tailoring</i> . The Supreme Court has recognized at least two types of “compelling government interests” that will satisfy this standard: (1) remediating “specific, identified instances of past discrimination that violated the Constitution or a statute”; and (2) avoiding “imminent and serious risks to human safety.” ⁱ	Policies that make explicit distinctions based on race and other protected classes are very likely to face a lawsuit and be struck down in court unless the government meets a very high burden of proof.	A local food procurement policy that sets aside a certain portion of contracting dollars for certified minority-owned businesses	Data that show how the policy remediates harms specifically traceable to unlawful discrimination in the geographic area covered by the policy
Intermediate scrutiny	Intermediate scrutiny applies to laws, policies, and other government actions that make explicit distinctions based on “quasi-protected classes” such as sex or gender. ⁱⁱ	The government must prove that the policy serves an important government interest using means that are substantially related to that interest. ⁱⁱⁱ	Policies that make explicit distinctions based on gender and other quasi-protected classes are likely to face a lawsuit and be struck down in court, unless the government meets a moderately high burden of proof.	A state program that prioritizes women for loans to ensure that women have access to financing for farm ownership and operating expenses	Data that show how the policy remediates harms specifically traceable to unlawful discrimination in the geographic area covered by the policy
Rational basis review	Rational basis review applies to laws, policies, and other government actions that make distinctions based on non-suspect categories such as income, veteran status, immigration status, criminal record, or disability status.	The government must prove that the policy or action is rationally related to a legitimate government interest.	Policies that make explicit distinctions based on non-suspect categories are least likely to face a lawsuit and be struck down, in comparison with the preceding two types of policies.	State-level laws expanding protections – like mandatory meal and rest breaks – for agricultural workers	If challenged, there’s a low bar here; the government can provide a “facially legitimate” reason for the policy, or sometimes the court will come up with one.

i Language taken from the majority opinion in *Students for Fair Admissions v. Harvard* (2023).

ii As of publication, the Supreme Court has not found sexual orientation or gender identity to be protected. So, at this time, those are unprotected classes and receive only rational basis review. The decision in *Bostock v. Clayton County* (2020), in which the Court recognized the inherent link between sex, sexual orientation, and gender identity, seems to leave open the opportunity for these classifications to trigger heightened scrutiny under the Equal Protection Clause, but that has yet to be decided. See also [“The US Supreme Court Can Protect the LGBTQ+ Community, But Will It?”](#)

iii See, for example, *United States v. Virginia*, 518 U.S. 515 (1996).

Two takeaways from Table 3 may be relevant to individuals who are navigating legal standards and considerations as they seek to engage in racism-conscious policymaking:

- First, despite facing a higher legal hurdle, race-based policies, which make explicit distinctions based on race, are likely to be legally permissible as long as they remediate specific past instances of government-sponsored racial discrimination within the geographic area covered by the policy. It will be important for people pursuing these policies to partner with researchers to build the evidence base demonstrating these connections. Changemakers should also ensure that this type of evidence is introduced into the legislative record to support the policy's adoption, via public hearings, written comments, or other avenues. Policymakers can also directly cite such evidence in the text of the adopted policy – for example, in a purpose statement. Strategies like these can increase the likelihood that the policy will withstand a legal challenge.
- Second, race-neutral policies, which do not make explicit racial distinctions in their text but have a disproportionate positive impact on different racial groups – for example, laws expanding agricultural worker protections – are also likely a legally viable path forward. When such policies are adopted with the explicit purpose of remediating past instances of government-sponsored racial discrimination, they may be subject to a legal standard that is more rigorous than rational basis review, although this area of law is evolving. Such policies should be supported by evidence demonstrating the remedial effects of the policy, as described in the preceding paragraph. When such policies are not adopted with any racial purpose, they may be far less vulnerable to a legal challenge. However, they may also raise other concerns by failing to directly acknowledge or address the role of racism in policy outcomes as detailed in the discussion of color-blind approaches earlier in this resource.

In addition to being mindful of these opportunities, changemakers should also consider the ways in which different racism-conscious or race-based policy approaches may be influenced by or influence election outcomes, political discourse, budget decisions, and other aspects of the political system. These realities can vary greatly by geography, level of government, and along other dimensions. People working on the ground to advance a more racially just food system will likely be acutely familiar with the political context in their own state and communities.

It is also important to be cognizant of the risk of creating harmful precedent. Consider what courts might say in response to a given policy approach if it is subjected to litigation, and the potential long-term impact those statements could have. Would pursuing a particular policy approach pose a risk of making the future legal landscape worse for people advocating for racial justice? This is a risk, though one that should be weighed carefully against the risk of not acting. Using risk framing when talking about policies to address structural racism is complex and potentially problematic; there is a huge risk in not talking about race and racism, as well as in disguising a racism-conscious purpose or ignoring race altogether and taking a universal approach.¹² The use of the risk terminology here is meant to apply only to legal risks, which can be weighed differently, depending on an advocate's approach: courageous defiance, risk avoidance, or a middle path.

LEVELS OF RISK IN POLICYMAKING

Stephen Menendian, a legal scholar at the Othering and Belonging Institute, has outlined three paths forward in light of the Supreme Court's recent retrenchment on Equal Protection:¹³

Courageous defiance, or moving forward without fear of possible legal challenges and sometimes even contrary to prevailing law, even if it will generate backlash.

Risk avoidance, or adopting only "universalistic, class-based, or wholly race-neutral approaches that may ultimately help reduce racial disparities or inequities, but while disguising the racial purpose or goal." Menendian warns that this approach "cedes the symbolic and narrative importance of centering racial equity in policy and programming debates."

Risk aversion, or taking "a middle course" that "seeks to forthrightly advance racial equity objectives while hewing as closely as possible to prevailing legal constraints and limitations."¹⁴ This approach "seeks to place carefully designed racial equity efforts onto a firmer legal foundation and avoids obvious legal pitfalls, but it is not so fearful that it believes it must avoid any possible legal challenge."

Choosing which approach to pursue is a decision best left to advocates, policymakers, and others on the ground, who will choose according to their goals and political and legal contexts.

These considerations have not been offered to dissuade people from pursuing racism-conscious policies for fear of a lawsuit. Rather, this information is provided so that people fighting for racial justice can make their own decisions about which policies to pursue and how they want to draft and design them, given their goals, political contexts, and tolerance for legal risk. Despite the affirmative action decision and prevailing legal constraints, law and policy still offer many ways to promote racial equity in the food system and beyond. That said, this area of the law is complex and evolving. Those who wish to pursue racism-conscious policies should always partner with an attorney early in the process, to obtain assistance with formulating a legally feasible approach and evaluating legal considerations in depth.



LEARN MORE

- [Advancing Racial Equity in Rural Communities: Legal & Policy Strategies to Support Opportunity, Health & Justice](#) (ChangeLab Solutions). This resource offers a more in-depth discussion of the Equal Protection Clause and other civil rights protections, gaps, and opportunities. While focused on rural communities, its explication of civil rights legal doctrines is broadly applicable.
- [Advancing Racial Equity: Legal Guidance for Advocates](#) (Othering and Belonging Institute). This publication clarifies key terms and ideas related to race-conscious policy design and provides guidance for advocates seeking to advance racial equity within prevailing legal constraints.

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