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“Forty Acres and a Mule” . . . Not Quite Yet: Section 14012 of the Food, Conservation, and Energy Act of 2008 Fails Black Farmers

INTRODUCTION

Timothy Pigford’s family has been farming in eastern North Carolina for four generations; his sons were supposed to be the fifth.¹ More than 130 years ago, Pigford’s great-great-grandfather was a Columbus County plantation slave who took his master’s surname and decided to begin life as a farmer.² However, Timothy Pigford’s generation will likely be the last generation of his family to make a living farming in eastern North Carolina.³

Ever since 1976, Pigford has been battling discrimination from the United States Department of Agriculture (“USDA”) because he, like many black farmers, was denied equal access to government farming aid.⁴ Despite his fight against the USDA to receive equal treatment, Pigford has been left with little land, with no farm, and on the cusp of financial ruin.⁵

Notwithstanding the *Pigford v. Glickman*⁶ settlement, a huge class action settled against the USDA in favor of black farmers in 1999,⁷ many black farmers who were intended to be part of that class action have been left without redress.⁸ After holding a hearing on the inadequacy of the notice in the class action,⁹ Congress thought that this unjust result required a remedy. After failing to pass earlier acts,¹⁰ it included section 14012, titled Determination of Merits on

1. Edward Martin, *For Land’s Sake*, BUS. N. C., Nov. 1998, at 52, 52.

2. *Id.* at 55.

3. *Id.* at 54.

4. *Id.* at 52–54; *see infra* notes 31–41 and accompanying text.

5. Martin, *supra* note 1, at 54. Pigford’s fate is not much different from other black North Carolina farmers. *See id.* (“By last official count, there were 1,866 black farmers in the state. Fewer than a third earn as much as \$10,000 a year. ‘Make sure you say that’s gross, not net,’ points out Ron Wimberly, a rural sociologist at N.C. State. . . . Nearly all farm part time, supplementing their income with outside jobs.”).

6. 185 F.R.D. 82 (D.D.C. 1999).

7. *Id.* at 86.

8. *See infra* notes 116–21 and accompanying text.

9. ‘Notice’ Provision in the *Pigford v. Glickman Consent Decree: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 1 (2004) [hereinafter ‘Notice’ Provision].

10. *See infra* note 58.

Pigford Claims, in the Food, Conservation, and Energy Act of 2008.¹¹ Section 14012 addresses the discrimination claims of the black farmers who filed the *Pigford v. Glickman*¹² class action lawsuit against the USDA in 1997. The Act allows certain black farmers who were denied access to that class action to seek damages based on the discrimination practiced by the USDA in the 1980s and 1990s;¹³ the Act apportions up to \$100 million to address these claims.¹⁴ Considering the history and discrimination underlying the legislation, section 14012 could be viewed as a reparations scheme. Assuming section 14012 is a reparations scheme, its adequacy as such deserves analysis.

In light of the nature of section 14012 as a statute compensating African Americans for discrimination, it is imperative that one examine the legislation through the lens of reparations scholarship. Such examination hopefully demonstrates that reparations are not deserving of the great public scrutiny with which they are often associated. Discussion of reparations continues to engender controversy—and relatively little public support.¹⁵ Some oppose such a program, because they view it as a giant social scheme wherein the government gives African Americans thousands of dollars in repayment for slavery.¹⁶ But this definition is limiting and requires

11. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012, 122 Stat. 1651, 2209–12. Although the provision was included in the Act, the provision's proponents purposely included a low level of funding to avoid floor debate on the provision. See *infra* note 124.

12. 185 F.R.D. 82 (D.D.C. 1999).

13. See *supra* note 11 and accompanying text; *infra* notes 31–41 and accompanying text. Section 14012, however, is only a partial remedy. The statute only gives assistance to those farmers who submitted a late filing request in the *Pigford* class action. See § 14012(a)(4). Many other black farmers will receive nothing.

14. § 14012(c)(2).

15. See Harbour Fraser Hodder, *The Price of Slavery*, HARV. MAG., May–June 2003, at 12, 13, available at <http://harvardmagazine.com/2003/05/the-price-of-slavery.html> (finding that while sixty-seven percent of African Americans support paying reparations to African Americans, only four percent of white Americans do); Walter Olson, Op-Ed., *So Long, Slavery Reparations*, L.A. TIMES, Oct. 31, 2008, at A19 (“[O]nly a very small share of whites support[] the idea [of reparations] . . . while those opposed routinely top[] 90%.”); Peter Viles, *Suit Seeks Billions in Slave Reparations*, CNN.COM, Mar. 27, 2002, <http://archives.cnn.com/2002/LAW/03/26/slavery.reparations/> (“A CNN/USA Today/Gallup poll . . . found a wide difference of opinion on the issue [of reparations] between black and white respondents. Nine out of 10 white respondents said the government should not make cash payments to slave descendants Among black respondents, 55 percent said the government should make cash payments . . .”).

16. See ALFRED L. BROPHY, REPARATIONS: PRO & CON 7, 17 (2006) (discussing how reparations advocates envision “grand programs” that are based on notions of community building and providing compensation to individuals).

broadening to redefine reparations to show that, despite popular belief, reparations have been paid to numerous groups throughout American history, including Native Alaskans, Japanese Americans, and Native Americans.¹⁷ Many of these programs have been analyzed in reparations scholarship;¹⁸ however, due to its recent enactment, section 14012 has not been analyzed. Further, section 14012 is extraordinary because it is the first major congressional reparations statute directed at African Americans. This Recent Development will argue that section 14012 of the Food, Conservation, and Energy Act of 2008 should be considered a reparations program, given its relation to both land for and compensation to African Americans. However, when evaluated as a reparations scheme, section 14012 falls short in redressing the claims of black farmers discriminated against by the USDA as it provides relief to only a small class of farmers and limits those who can seek redress.

First, this Recent Development will discuss the still largely unpublicized historical struggle of black farmers,¹⁹ culminating with the *Pigford v. Glickman* class action lawsuit and eventually the passage of section 14012.²⁰ Next, this Recent Development will demonstrate (1) that section 14012 fits into the modern reparations debate under a more expansive definition of reparations, and (2) that classification as such is important because it advances reparations scholarship.²¹ Finally, this piece will show how, in spite of some positive aspects, section 14012 falls short through its financial inadequacy and limiting provisions in redressing the harm black farmers suffered from the USDA's discrimination.²²

17. *Id.* at 9 (defining reparations broadly to cover diverse programs: “[programs] that are . . . designed to assess and correct [past] harm and/or improve the lives of victims into the future”); see also *infra* notes 67–69 and accompanying text. Some of these diverse programs include “apologies, truth commissions, civil rights legislation, community development programs, and payments to individuals.” Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 816 (2006).

18. For an overview of reparations scholarship, see generally BROPHY, *supra* note 16; Brophy, *supra* note 17; Chad W. Bryan, *Precedent for Reparations? A Look at Historical Movements for Redress and Where Awarding Reparations for Slavery Might Fit*, 54 ALA. L. REV. 599 (2003); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003).

19. For other works discussing the struggle of black farmers and the USDA's role in perpetuating this struggle, see generally Monica M. Clark, *So Near, Yet So Far: The Past, Present, and Future of the Complaints Process Within the USDA*, 32 S.U. L. REV. 139 (2005); Kristol Bradley Ginapp, Note, *Jim “USDA” Crow: Symptomatic Discrimination in Agriculture*, 8 DRAKE J. AGRIC. L. 237 (2003).

20. See *infra* Part I.

21. See *infra* Parts II.

22. See *infra* Part III.B.

I. THE CONTINUING STRUGGLE OF THE AFRICAN AMERICAN FARMER

"Forty acres and a mule"—William Tecumseh Sherman promised this to African Americans during the Reconstruction era in Special Field Order No. 15.²³ However, President Andrew Johnson broke this promise when he vetoed the congressional act that would have approved the order.²⁴ After Reconstruction, famous African American civil rights leaders called on African Americans "to buy land and to cultivate it thoroughly."²⁵ Booker T. Washington believed that "the more land African Americans owned and cultivated the sooner they would get their rights."²⁶ However, because of a lack of capital, most newly freed slaves became trapped in a system of sharecropping where they often found themselves in the same state they were in prior to Reconstruction—at the mercy of racist and manipulative landowners.²⁷ Fortunately, between 1900 and 1910, African Americans began making incredible strides in landownership.²⁸ Although many hoped that this trend would continue, the obstacles placed before African Americans from the early 1900s to the late 1990s, such as lack of credit and succession

23. W.T. Sherman, Special Field Order No. 15: "Forty Acres and a Mule" (Jan. 16, 1865), *reprinted in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* 365, 365–66 (Roy L. Brooks ed., 1999); *see also* An Act to Establish a Bureau for the Relief of Freedmen and Refugees, ch. 90, § 4, 13 Stat. 507, 508 (1865) (codifying the language used by General Sherman). Many attribute the start of the notion of reparations for African Americans to this very statement. *See* David Hall, *The Spirit of Reparation*, 24 B.C. THIRD WORLD L.J. 1, 3–4 (2004) ("Formal discussion about reparations for African Americans dates as far back as 1865 when General William Tecumseh Sherman issued a special field order that set aside tracts of land in the sea islands and around Charleston, South Carolina for the exclusive use of Black people who had been enslaved."). Interestingly, Judge Friedman, who affirmed the *Pigford* class action settlement agreement, began his opinion with the phrase "Forty acres and a mule." *See* *Pigford v. Glickman*, 185 F.R.D. 82, 85 (D.D.C. 1999).

24. *See* Waymon R. Hinson & Edward Robinson, "We Didn't Get Nothing:" *The Plight of Black Farmers*, 12 J. AFR. AM. STUD. 283, 286 (2008).

25. *Id.* at 288.

26. *Id.*

27. *Id.* ("[Hampered] by ever-increasing debts, trapped by a legal system which severely restricted their every movement, weakened by malnutrition and disease, and violently denied access to legal relief, black tenant farmers labored under a weight of oppression which offered virtually no escape.").

28. *See* CHARLENE GILBERT & QUINN ELI, *HOMECOMING: THE STORY OF AFRICAN-AMERICAN FARMERS*, 37–47 (2002). In 1900 there were only 158,479 black farms and 1,078,635 white farms. Hinson & Robinson, *supra* note 24, at 288. However, within ten years, much progress was made. GILBERT & ELI, *supra*, at 37. By then, nearly 200,000 blacks had purchased farms, totaling fifteen million acres of land. *Id.*

difficulties, only made the situation worse.²⁹ This eventually led to a ninety-eight percent decrease in the number of black farmers from 1900 to 1999.³⁰

The USDA was central to much of the misfortune which befell African American farmers.³¹ Despite its pledge to be non-discriminatory,³² the USDA failed black farmers by interfering with their loan applications and government benefits.³³ After Congress revamped the department's infrastructure following the Great Depression, farmers were left with a new USDA system controlled by local county committees and county supervisors; however, this system

29. See ROBERT S. BROWNE, BLACK ECONOMIC RESEARCH CENTER, ONLY SIX MILLION ACRES: THE DECLINE OF BLACK OWNED LAND IN THE RURAL SOUTH 29, 51–57 (1973) (citing a variety of factors including lack of access to credit, tax laws, intestate death of landowners, and other devious strategies as reasons for why black land loss affected so many); see also Leo McGee & Robert Boone, *Black Rural Land Ownership: A Matter of Economic Survival*, 8 REV. OF BLACK POL. ECON. 62, 64–65 (1977) (discussing the economic and psychological impact of loss of land due to tax sales, partition sales, mortgage foreclosures, absence of wills, limitations on welfare recipients, lack of financial and/or technical skills in developing land as resources, eminent domain, and voluntary sale).

30. See BRUCE J. REYNOLDS, U.S. DEP'T OF AGRIC., BLACK FARMERS IN AMERICA, 1865–2000: THE PURSUIT OF INDEPENDENT FARMING AND THE ROLE OF COOPERATIVES 24 (2002), available at <http://www.rurdev.usda.gov/rbs/pub/rr194.pdf> (noting the decline of black farmers by nearly ninety-eight percent and whites by almost sixty-three percent from 1900 to 1997); Jess Gilbert et al., *The Decline (and Revival?) of Black Farmers and Rural Landowners: A Review of the Research Literature 2* (Univ. of Wis.-Madison, Land Tenure Ctr., N. Am. Series, Working Paper No. 44, 2001), available at <http://purl.umn.edu/12810> (“African-Americans as a group went from owning almost no land in the United States after the Civil War to peaking at 15 million acres by 1920. In that year, 14% of all US farmers were black. Of these 926,000 black farmers, all but 10,000 were in the South. By 1997, fewer than 20,000, or 1% of all farmers, were black, and they owned only about two million acres.”). Although the amount of white farmers decreased from 5,498,454 to 1,864,201 between 1920 and 1997, white farmers represented nearly ninety-eight percent of all farmers in 1997. REYNOLDS, *supra*, at 24.

31. See *Pigford v. Glickman*, 185 F.R.D. 82, 87 (D.D.C. 1999) (“The denial of credit and benefits has had a devastating impact on African American farmers.”).

32. See Nondiscrimination in Federally-Assisted Programs of the Department of Agriculture—Effectuation of Title VI of the Civil Rights Act of 1964, 7 C.F.R. § 15.1(a) (2008) (“[N]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity of an applicant or recipient receiving Federal financial assistance from the Department of Agriculture . . .”).

33. *Pigford*, 185 F.R.D. at 85 (“[T]he Department of Agriculture and the county commissioners discriminated against African American farmers when they denied, delayed or otherwise frustrated the applications of those farmers for farm loans and other credit and benefit programs. Further compounding the problem, in 1983 the Department of Agriculture disbanded its Office of Civil Rights and stopped responding to claims of discrimination.”).

was not receptive to the needs of black farmers.³⁴ The new system was the primary means by which farmers learned of special federal programs designed to assist them.³⁵ Moreover, the “county officials . . . ma[de] the decision as to who [received] the federal money and who [did] not,”³⁶ and often black farmers were not represented in the committee leadership, even in majority black areas.³⁷ Thus, although they attended meetings and voted at committee activities, the needs of black farmers were left unaddressed for decades.³⁸ Furthermore, the USDA used several other tactics to inhibit the progress of black farmers: abusing the power of supervised bank accounts, failing to look into complaints made by black farmers, and poorly processing black applications for farm aid.³⁹

After receiving numerous discrimination complaints from black farmers, the USDA launched an investigation into the practices of the Farm Service Agency, the agency that worked under the USDA in the county committee and supervisor system.⁴⁰ The study overwhelmingly concluded that minority farmers were being unfairly

34. See Hinson & Robinson, *supra* note 24, at 291–92 (“The power of the county committee system cannot be overstated in terms of offering loans to farmers, costs of transaction, information, and agency became the foundational principles upon which lending decisions were made. The asymmetrical nature of information disadvantaged the black farmer.”). The county committee and county supervisor system disfavored smaller farms in general, and black farmers knew that the system, controlled by a government employee, a supervisor, and an elected committee, would be “unsympathetic to their interests.” *Id.* “The all-white composition of those committees turned the race-neutral process of determining loan eligibility into one of domination and subordination.” Cassandra Jones Harvard, *African-American Farmers and Fair Lending: Racializing Rural Economic Space*, 12 STAN. L. & POL’Y REV. 333, 337 (2001).

35. See *supra* note 34.

36. *Pigford*, 185 F.R.D. at 87.

37. Even “in the Southeast Region, the region in the United States with the most African American farmers, just barely over 1% of the county commissioners were African American (28 out of a total of 2469).” *Id.*; see also Gilbert et al., *supra* note 30, at 9.

38. See Hinson & Robinson, *supra* note 24, at 291 (“While tenants and black farmers attended and oftentimes voted at committee meetings, the supervisor and the committee functioned to maintain the prejudices of the status quo with no oversight from Washington, DC.”).

39. See *id.* at 293 (“[Black farmers] were discouraged from applying for loans. Their figures on farm and home plans were altered. They were promised funding which was never delivered. Their equipment was over-evaluated and continuation loans were not processed.”); Stu Singer, *Black Farmers Fight Gov’t Discrimination*, MILITANT, Jan. 20, 1997, at 10 (citing a USDA report which stated that, on average, loans for white borrowers were processed in eighty-four days, while loans for black borrowers took almost 222 days).

40. TADLOCK COWAN & JODY FEDER, CONG. RESEARCH SERV., *THE PIGFORD CASE: USDA SETTLEMENT OF A DISCRIMINATION SUIT BY BLACK FARMERS 2* (2008), available at <http://www.nationalaglawcenter.org/assets/crs/RS20430.pdf>.

treated.⁴¹ Timothy Pigford, along with many other black farmers seeking redress for past discrimination committed by the USDA, filed lawsuits against the USDA.⁴² The lawsuits were consolidated into a class action, *Pigford v. Glickman*, and resulted in the largest civil rights settlement in American history.⁴³

The plaintiffs in *Pigford* claimed that the USDA racially discriminated against black farmers and failed to investigate or inquire about discrimination complaints made by black farmers between 1983 and 1997.⁴⁴ The farmers alleged, among other things, that they had to wait longer for loan approval than their white counterparts, and, as a result, many were on the brink of financial ruin.⁴⁵ Eventually, the USDA and the black farmers reached a settlement and the court approved a consent decree.⁴⁶ Shortly thereafter, a notice campaign began to inform black farmers of their rights under the settlement.⁴⁷

Many black farmers, however, did not join the class.⁴⁸ Although the court extended the deadline to join and permitted late-filing requests,⁴⁹ many black farmers failed to receive adequate notice⁵⁰ or were not allowed to join the class for procedural reasons.⁵¹ The court-

41. *Id.* ("The final report found that from 1990 to 1995, minority participation in FSA programs was very low and minorities received less than their fair share of USDA money for crop payments, disaster payments, and loans.").

42. *Id.* at 3. Initially two cases were filed: *Pigford v. Glickman*, No. 97-1978 (D.D.C. 1997), and *Brewington v. Glickman*, No. 98-1693 (D.D.C. 1998). However, the court consolidated the two cases. *See Pigford*, 185 F.R.D. at 90-91. On another note, both of these lawsuits addressed discrimination claims beginning in 1981 only. *See id.* at 89.

43. *See Pigford*, 185 F.R.D. at 95 (estimating, based on the plaintiff's brief, that the settlement would likely be worth \$2.25 billion).

44. COWAN & FEDER, *supra* note 40, at 1.

45. *Id.* at 2.

46. *Pigford*, 185 F.R.D. at 90-91.

47. *Id.* at 91.

48. COWAN & FEDER, *supra* note 40, at 5.

49. *Id.*

50. 'Notice' Provision, *supra* note 9, at 2 (statement of Rep. Steve Chabot, Chairman, House Subcomm. on the Constitution) ("The notice implemented in the *Pigford* case was either ineffective or defective as nearly two-thirds of the putative class failed to be effectively notified of the case requirements."). The court in *Pigford* stated that when settlement is proposed in a class action, the parties are required to provide "the best notice [that is] practicable under the circumstances." *Pigford*, 185 F.R.D. at 101 (quoting FED. R. CIV. P. 23(c)(2)). Although the court found the notice to be adequate, the Chairman of the House Subcommittee on the Constitution disagreed. 'Notice' Provision, *supra* note 9, at 2.

51. FED'N OF S. COOPS. / LAND ASSISTANCE FUND, POSITION PAPER ON PIGFORD LEGISLATION 4 (2008), available at <http://www.federationsoutherncoop.com/pigford/pigfordexplain08a%20.pdf>.

appointed facilitator who was charged with providing notice of the class action settlement failed to provide proper notice to many farmers because of the means by which the agency tried to give notice.⁵² However, it was not only the facilitator who had a duty to communicate information about the class action settlement.⁵³ The USDA had an obligation to communicate to class members information about the settlement,⁵⁴ but it also failed to sufficiently notify black farmers. For example, although the USDA had the names and addresses of people who sought government assistance, they failed to use direct mail to inform these farmers about the *Pigford* class action.⁵⁵ The same notice agency also used primarily urban media that was not targeted toward rural black farmers.⁵⁶

Examples abound of technical issues that unfairly prevented individuals from prevailing in the case, such as: the year the similarly situated white farmer received a loan was not correct; the box stating that the farmer was Black was not checked; the post office was late sending the claim; claim not signed by claimant; claim was not signed by an attorney; some claimants who were denied did not petition the Monitor for reconsideration within the 120 days, due to difficulties in securing advice and help from attorneys.

Id.

52. See '*Notice*' Provision, *supra* note 9, at 2 (statement of Rep. Steve Chabot, Chairman, House Subcomm. on the Constitution) ("Although the notice campaign design was deemed to be effective by the court in a fairness hearing held on April 14, 1999, the determination was made using advertising industry tools designed to measure the likely effectiveness of a campaign, not the actual effectiveness of a campaign.").

53. *Pigford*, 185 F.R.D. at 91.

54. *Id.*

55. '*Notice*' Provision, *supra* note 9, at 277 (statement by Rep. John Conyers, Jr., Member, House Subcomm. on the Constitution) (stating that a direct mailing is quite often a regular manner in which to give notice to potential members of a class action).

56. Editorial, *Hearings for Farmers Help Right a Wrong*, CINCINNATI ENQUIRER, Mar. 6, 2005, at 2E; see also '*Notice*' Provision, *supra* note 9, at 175 (statement by Thomas Burrell, President, Black Farmers and Agriculturalists Association, Inc.) (noting the disappointment in the notice agency for using media that was "not culturally and occupationally attuned to [black] farmers"). The facilitator ran a print advertisement in twenty-six mainstream newspapers for only one day, and it ran advertisements for two weeks in 100 African American newspapers. *Pigford*, 185 F.R.D. at 91. The facilitator also ran ads in some TV Guides and in *Jet Magazine* and aired ads on Black Entertainment Television (BET) and the Cable News Network (CNN) during a two week period. *Id.* Furthermore, the media outlets used were not considerate of the economic hardships faced by many black farmers. See '*Notice*' Provision, *supra* note 9, at 278 (statement of Rep. John Conyers, Jr., Member, House Subcomm. on the Constitution) ("[T]he only television broadcasts of the notice were on cable TV channels: Black Entertainment Television and Cable News Network. Paid cable television may not [be] available in many rural areas, and is generally considered costly for the average citizen. This is especially true for family farmers who must extend every resource to maintain the farm.").

Due to this inadequate notice, a large percentage (ninety-seven percent) of African American farmers who intended to be a part of the class were left without redress.⁵⁷ With such a large percentage of African American farmers left out of the settlement, and in consideration of the historical plight of many African American farmers, several legislators proposed acts to offer assistance to the black farmers' cause.⁵⁸ Eventually these proposals were consolidated into section 14012 of the Food, Conservation, and Energy Act of 2008. Section 14012 allows those farmers whose late-filing requests were denied an opportunity to have their claims heard by courts.⁵⁹ The legislation, similar to the class action, allowed "claimants to seek expedited damages of \$50,000 under a lower threshold of proof than a typical civil case—essentially by showing they applied for and were denied department farm assistance. Claimants also can bypass the expedited process and pursue larger damages"⁶⁰

II. SECTION 14012'S POSITION IN THE REPARATIONS DEBATE

A. *Section 14012 Is a Reparations Scheme*

Section 14012 has a place in reparations scholarship. Although it is not the windfall package that many envision reparations to be,⁶¹ section 14012 does have a place amongst more modern definitions of reparations because of the current trend to widen the scope of what

57. See COWAN & FEDER, *supra* note 40, at 5 ("Approximately 73,800 petitions (66,000 before [the] September 15, 2000 late filing deadline) were filed under the late filing procedure, of which 2,116 [2.8%] were allowed to proceed."). In an effort to expedite claims, the court appointed an arbitrator and gave him broad discretion to determine when a claimant had "extraordinary circumstances" which justified a late filing request. 'Notice' Provision, *supra* note 9, at 4. As evidenced, few farmers satisfied this standard. See *id.* (statement of Rep. Robert C. Scott, Member, House Subcomm. on the Constitution) ("[T]he Arbitrator established a process that resulted in virtually no one being able to show that they did not file on time due to extraordinary circumstances.").

58. See, e.g., African-American Farmers Benefits Relief Act of 2007, H.R. 558, 110th Cong. (2007) (introduced by Rep. Artur Davis and co-sponsored by Rep. John Conyers, Rep. Bennie Thompson, Rep. G.K. Butterfield, Rep. David Scott, Rep. Sanford Bishop, Rep. Wm. Lacy Clay, Rep. Dennis Moore, and Rep. Steve Cohen); see also Pigford Claims Remedy Act of 2007, H.R. 899, 110th Cong. (2007) (introduced by Rep. Bobby Scott and co-sponsored by Rep. Steve Chabot); Pigford Claims Remedy Act of 2007, S. 515, 110th Cong. (2007) (introduced by Sen. Chuck Grassley with the co-sponsorship of Sen. Barack Obama, Sen. Joseph Biden, and Sen. Ted Kennedy).

59. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012(b), 122 Stat. 1651, 2210.

60. *Bias Suits By Farmers Could Cost Billions*, N.Y. TIMES, June 29, 2008, at A18 [hereinafter *Bias Suits*].

61. See *supra* note 16 and accompanying text.

qualifies as reparations.⁶² Certain reparations scholars have advocated for a broader definition of the term “reparations” to provide for a more functional analytical tool.⁶³ These scholars have defined reparations generally as measures “designed to address historic injustices . . . includ[ing] a broad range of programs such as apologies, truth commissions, civil rights legislation, and payments to communities and individuals.”⁶⁴ Reparations have also been defined as “programs designed to repair past injustice, but that need not focus on the exact amount of harm or repair the exact nature of that harm.”⁶⁵ Using these broader definitions, some scholars have argued that, in spite of popular conceptions of reparations as payment to African Americans for slavery,⁶⁶ “reparations” have been given out by the federal government numerous times throughout American history: the Civil Liberties Act of 1988,⁶⁷ the Native American Graves Protection and Repatriation Act,⁶⁸ and the Alaska Native Claims Settlement Act.⁶⁹

As legislation authorizing payments due to discrimination against black farmers between January of 1981 through December of 1997, section 14012 is consistent with the notion of a “civil rights legislation”⁷⁰ that is “designed to repair past injustice.”⁷¹ In addition, the payment scheme sets aside \$100 million for the 2008 fiscal year.

62. See *infra* notes 63–65.

63. See Brophy, *supra* note 17, at 814; see also Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for African American Reparations?*, 19 B.C. THIRD WORLD L.J. 429, 432, 437 (1998) (defining reparations as including everything from a “return of sovereignty” to “money or property transfers . . . due to the wrongdoing of the grantor”).

64. See Brophy, *supra* note 17, at 817.

65. *Id.* at 816–17.

66. See *supra* note 16.

67. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified as amended at 50 U.S.C. app. § 1989 (2000)). The Civil Liberties Act of 1988 was primarily designed to compensate Japanese Americans interned during World War II, and the government allocated 1.6 billion dollars to achieve this goal. See BROPHY, *supra* note 16, at 43.

68. Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C. §§ 3001–3013 (2006)). The Native American Graves Protection and Repatriation Act required all agencies and federal institutions receiving federal funds to return any artifacts of Native American culture to their respective peoples. *Id.* at § 3005.

69. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601–1629 (2000)). The Alaska Native Claims Settlement Act provided Native Alaskans with nearly one billion dollars and the return of a considerable amount of land, nearly forty-four million acres. See BROPHY, *supra* note 16, at 42 for a general discussion of the Alaska Native Claims Settlement Act.

70. See *supra* notes 63–65 and accompanying text.

71. *Id.*

The Act itself is also designed to give “a full determination on the merits for each *Pigford* claim previously denied that determination.”⁷² Inherently, this scheme is primarily about making payments to individuals based on previous discrimination.

B. Labeling Section 14012 a Reparations Statute Advances Reparations Scholarship

Labeling section 14012 as a reparations scheme is important not for the sake of giving it a title but rather because of what section 14012 adds to current reparations scholarship. First, section 14012 possesses a unique subject matter, because it stands as the only congressional statute compensating African Americans for historical discrimination. Second, section 14012 possesses several characteristics of reparations schemes, and proper classification as such could allow for greater acceptance of reparations in general. Third, as a legislative reparations scheme, section 14012 strengthens the argument that the future of reparations lies with the legislature and not the courts.

Although Congress had previously acted to provide large scale reparations to other minority groups,⁷³ section 14012 is unique in reparations scholarship because it is specifically for African American farmers. Additionally, it relates to compensation not only for fairly recent discrimination against blacks but also in consideration of historical discrimination. The beginning of any discussion about reparations for African Americans likely finds itself at General Sherman’s Field Order No. 15.⁷⁴ Sherman’s Field Order set aside the now famous forty acres of land for newly freed African Americans. However, the Field Order failed to provide any sort of true compensation for African American farmers,⁷⁵ and since then, black farmers have been left to fend for themselves. The importance of section 14012 as a reparations scheme, which traces its roots back to the very beginnings of the reparations movement, cannot be

72. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012(c)(2), (d), 122 Stat. 1651, 2210.

73. See *supra* notes 67–69.

74. See Sherman, *supra* note 23, at 365–66. The Sherman Field Order set aside 400,000 acres of land in and around Georgia. BROPHY, *supra* note 16, at 25. Specifically, it said that each family should get forty acres of land and that the Army should lend mules for the use of tilling the land. *Id.*

75. See BROPHY, *supra* note 16, at 25; Brophy, *supra* note 17, at 826 (noting that the Sherman Act represents only a limited form of reparations because President Andrew Johnson later revoked the order and used military force to remove all freed slaves who had settled on the land).

overstated. At the least, the legislation was proponed because the many late-filing *Pigford* claimants who were discriminated against by the USDA between 1980 and 1997 did not have a hearing on the merits of their cases.⁷⁶ Even more, section 14012 should also be read in consideration of the historical discrimination that black farmers faced, especially with regard to their lack of access to government resources.⁷⁷ In 2004, when Congress held a hearing on the adequacy of the notice in the *Pigford* class action, statements were made not only in reference to the USDA discrimination but also to the failure of the U.S. government since Reconstruction to fulfill its promise of assistance to black farmers.⁷⁸ Thus, although the legislation was limited to discrimination that occurred within a sixteen year period, it was motivated by a desire to correct a wrong that had spanned decades.

Labeling section 14012 as a reparations scheme also further demonstrates that reparations are not as uncommon as the American public may believe. The topic of reparations is one of the most racially divisive issues of our time.⁷⁹ Reparations discussions are often divisive because reparations discussions relate to “how we view U.S. history” and whether the United States is “a place of opportunity or oppression.”⁸⁰ However, as more and more forms of reparations are analyzed and presented to the American public as reparations, the public perception of reparations as “problematic” may change.⁸¹

By generating broad definitions and defining characteristics for reparations, scholars have been able to include numerous programs

76. See *supra* note 57 and accompanying text.

77. Section 14012, much like the original consent decree settling *Pigford v. Glickman*, could even be premised on the government fulfilling the promise made to African Americans during Reconstruction of “forty acres and a mule.” See *supra* note 74 and accompanying text.

78. Evidence that Congress was well aware of the historical discrimination and broken promises to black farmers can be found in the records of the Subcommittee on the Constitution. See ‘Notice’ Provision, *supra* note 9, at 2 (statement of Rep. Steve Chabot, Chairman, House Subcomm. on the Constitution) (stating that a proper remedy to correct the inadequate notice in the *Pigford* litigation should be considered with “Abraham Lincoln’s vision that every black American who wants to farm has the tools available to do so”).

79. See *supra* note 15 and accompanying text.

80. BROPHY, *supra* note 16, at 6.

81. See Brophy, *supra* note 17, at 815 (stating that when reparations are presented as rarely happening in American history, discussion of reparations in America becomes more problematic).

under the umbrella of “reparations.”⁸² For example, the Civil Liberties Act of 1988 involved the transfer of funds from taxpayers to Japanese Americans who lived past 1986 and were placed in internment camps during World War II.⁸³ In addition, the Alaska Native Claims Settlement Act allowed the government to distribute land and more than \$960 million in taxpayer money to native tribes because “there [was] an immediate need for a fair and just settlement of *all claims* by Natives and Native groups of Alaska.”⁸⁴ Even the granting of money to families of women killed during the Salem witch trials and apologies for slavery made by both government and private officials are included under these broader definitions of reparations.⁸⁵ Because section 14012 fits within these more modern and broader definitions of reparations⁸⁶ and also deals with a subject matter that traces back to the beginning of reparations, it adds much to current reparations scholarship. Most significantly, as a form of reparations, it adds another important legislative scheme into the mainstream debate on reparations and, consequently, makes reparations programs appear less problematic to the American public.

Of equal importance, section 14012 adds more credibility to the argument that the future of reparations rests with the legislature and not with courts. “[S]ignificant reparations are going to come—if at all—through legislation [because] [l]egislative bodies, such as the U.S. Congress . . . can move with flexibility that courts do not have.”⁸⁷ Numerous reparations scholars have advocated for the importance of

82. See *id.* at 816 (defining reparations as “programs designed to repair past injustice, but that need not focus on the exact amount of harm or repair the exact nature of that harm”). But see Posner & Vermeule, *supra* note 18, at 691 (stating that reparations schemes possess four specific traits: “(1) provide payment (in cash or in kind) to a large group of claimants, (2) on the basis of wrongs that were substantively permissible under the prevailing law when committed, (3) in which current law bars a compulsory remedy for the past wrong (by virtue of sovereign immunity, statutes of limitations, or similar rules), and (4) in which the payment is justified on backward-looking grounds of corrective justice, rather than forward-looking grounds such as the deterrence of future wrongdoing”).

83. See *supra* note 67.

84. Alaska Native Claims Settlement Act, 43 U.S.C. § 1601(a) (2000) (emphasis added). The Act permitted the Natives to receive nearly 40 million acres of land that would be dispersed among more than 200 Native villages. §§ 1610–1613. In addition, the Act authorized a transfer of more than \$462 million to be distributed among Native groups over an eleven year period. § 1605.

85. See Brophy, *supra* note 17, at 820–21.

86. See *supra* notes 63–65 and accompanying text.

87. BROPHY, *supra* note 16, at 141 (finding that the more flexible legislature can provide rights for compensation where none would have existed before, especially if these rights are claimed in court).

the legislature in future reparations models because of its ability to go outside of the limitations imposed by a court.⁸⁸

One of the greatest obstacles is the statute of limitations.⁸⁹ The Civil Liberties Act of 1988 provides a cogent example of the inadequacy of courts in addressing historical wrongs. The Act addressed the claims of Japanese Americans who were interned in camps during World War II. Although Japanese Americans tried to file suit against the U.S. government for their internment,⁹⁰ the courts barred their lawsuits due to the statute of limitations.⁹¹ In spite of the fact that the Justice Department hid evidence that Japanese internment was unnecessary, the court ruled that during the statutory time period it was still possible for Japanese Americans to discover these facts, and thus, they could have brought viable claims.⁹²

Just as the statute of limitations was a bar to Japanese Americans, the court's determination that notice in the *Pigford* class action was adequate legally barred many black farmers from joining

88. See, e.g., *id.* at 98 ("The U.S. courts are designed to handle only limited claims. Those are claims by plaintiffs against other defendants for very well-identified harm."); Tuneen E. Chisolm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 708 (1999); Rhonda V. Magee, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 907 (1993).

89. Reparations lawsuits have been dismissed over statute of limitations claims. See, e.g., *In re African-American Slave Descendants Litigation*, 471 F.3d 754, 762 (7th Cir. 2006) (concluding that descendants of slaves claiming injuries from over 100 years ago as grounds for a lawsuit are barred by statutes of limitation); see also BROPHY, *supra* note 16, at 102 (referring to the statute of limitations as "the most difficult hurdle" in filing a claim in court for reparations). Even in the case of black farmers, many would not have been able to file the original *Pigford* class action suit were it not for Congress extending the statute of limitations for claims under the Equal Credit Opportunity Act ("ECOA"), the basis for the suit. See *Pigford v. Glickman*, 185 F.R.D. 82, 88 (D.D.C. 1999) ("ECOA has a two year statute of limitations. If the underlying discrimination alleged by the farmer had taken place more than two years prior to the filing of an action in federal court, the government would raise a statute of limitations defense to bar the farmer's claims." (internal citation omitted)). Congress, accordingly, passed a measure that waived the statute of limitations on civil rights cases for complaints made against the USDA between January, 1, 1981, and December 31, 1996. Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, Pub. L. No. 105-277, § 741(e), 112 Stat. 2681 (1998) (codified at 7 U.S.C. § 2279 note (2006)).

90. See *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), *aff'd*, 847 F.2d 779 (Fed. Cir. 1988). For a general discussion of the history of the Japanese Americans' struggle to obtain reparations, see BROPHY, *supra* note 16, at 43-45, 117.

91. See BROPHY, *supra* note 16, at 43.

92. *Hohri*, 586 F. Supp. at 786-88.

the class.⁹³ In finding this notice adequate,⁹⁴ the court overlooked the large amount of potential class members who failed to join⁹⁵ and the questionable notice given to class members.⁹⁶ Thus, any possible claim by other members who were denied access was barred and no recourse was available to question the court's judgment. Once again, the courts failed to provide an adequate remedy to those injured. And, as it had done in the past, the legislature intervened, through section 14012, to provide many of the African American farmers denied redress a right to have their claims heard and determined on their merits.⁹⁷

Section 14012 is more proof that where the court fails in reparations schemes the legislature provides another option. Perhaps for future cases the legislature is the most viable option for assistance to those seeking reparations. However, as will be discussed, simply because the legislature is the most viable option does not mean that it always provides adequate relief to those in need.⁹⁸

Thus far, this Recent Development has considered section 14012's place amongst contemporary theories and definitions of reparations. It has also analyzed what section 14012 adds to the current trend of seeking reparations through the legislature, rather than the courts. However, the success of section 14012 has yet to be

93. See *Pigford*, 185 F.R.D. at 101 ("The Court concludes that class members have received more than adequate notice and have had sufficient opportunity to be heard on the fairness of the proposed Consent Decree.").

94. *Id.*

95. See *supra* note 57 and accompanying text.

96. See *supra* notes 50–55 and accompanying text; 'Notice' Provision, *supra* note 9, at 2 (statement of Rep. Steve Chabot, Chairman, House Subcomm. on the Constitution).

It is hard for many of us to accept that 66,000 farmers would consciously wait to file a claim that would impact their right to life, liberty, and property, knowing that they were required to do so earlier. Further investigation into the circumstances surrounding the late claims reveals that many farmers failed to get any notice whatsoever or failed to understand the contents of the notice if they did receive the notice. These facts lead this Subcommittee to conclude that the notice implemented in the *Pigford* case was either ineffective or defective as nearly two-thirds of the putative class failed to be effectively notified of the case requirements.

Id.; see also Editorial, *supra* note 56 (noting the use of primarily urban media to give notice to black farmers who lived in predominantly rural areas); Desiree Evans, *Black Farmers Still Waiting for Justice*, FACING SOUTH, June 30, 2008, <http://southernstudies.org/2008/06/black-farmers-still-waiting-for-justice.html> (restating that potential *Pigford* claimants did not get notice through the media and "should be given another chance to obtain relief for the USDA discrimination").

97. See *supra* note 59 and accompanying text.

98. See *infra* Part III.B.

evaluated. In spite of its contribution to modern theories of reparations, section 14012 must also be analyzed in terms of its effectiveness as a reparations statute for black farmers. In conducting this analysis, however, it becomes clear that section 14012 has not done all that many black farmers hoped it would do.

III. SECTION 14012: ONE STEP FORWARD BUT TWO STEPS BACK

Although section 14012 of the Food, Conservation, and Energy Act of 2008 has a unique place amongst contemporary theories of reparations scholarship, it falls short in redressing the claims of black farmers discriminated against by the USDA because it provides relief to only a small class of farmers and limits those who can seek redress. First, this Part will discuss the potential of some of the Act's provisions to effectuate great change. Then, it will examine the shortcomings, and ultimate failure, of section 14012. Finally, it will offer suggestions for making the section more equitable.

A. *Section 14012 Effectuates Some Positive Change*

Section 14012, as a whole, is a reparations scheme that seeks to redress a historical injustice that goes back to the roots of all reparations scholarship.⁹⁹ Its subject matter presents an extremely unique opportunity to discuss numerous areas of interest to scholars today: the failed effects of Reconstruction, the importance of the post-Reconstruction black farmer, and the federal government's attempts to make up for failing African Americans during Reconstruction. Section 14012 also provides an opportunity to engage in a greater dialogue about additional large scale reparations schemes as a way to help other African Americans who, much like the black farmer, continue to suffer due to the historical injustices that they have encountered since slavery ended.

Section 14012 presents several other positive features as well. Congress provides a framework to have the Act interpreted broadly: "It is the intent of Congress that this section be liberally construed so as to effectuate its remedial purpose of giving a full determination on the merits for each *Pigford* claim previously denied that determination."¹⁰⁰ Liberal construction statutes can be "imperative

99. See *supra* note 77 and accompanying text.

100. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012(g), 122 Stat. 1651, 2211.

rule[s] of construction.”¹⁰¹ The presence of this liberal construction provision provides guidance to the courts in case there are any challenges made under section 14012 as to the rights of *Pigford* claimants. A similar provision is not included in either the Civil Liberties Act of 1988,¹⁰² the Native Americans Graves Protection and Repatriation Act,¹⁰³ or the Alaska Native Claims Settlement Act.¹⁰⁴ However, the effects of this provision on *Pigford* claims remain to be seen.

Section 14012 also “authorizes to be appropriated such sums as are necessary to carry out this section.”¹⁰⁵ Similar provisions have been included in other reparations schemes as well.¹⁰⁶ Because Congress provided a similar provision in a prior reparations scheme, including the Alaska Native Claims Settlement Act, which is the largest reparations scheme in American history,¹⁰⁷ this could prove to be another reparations scheme that pays out heavily to those who qualify to have their cases heard on the merits under the Act’s provisions. In spite of this language, cautious optimism should be practiced.¹⁰⁸

Section 14012 also allows for claimants to file claims based on their actual damages. Under section 14012(g), a *Pigford* claimant “who files a claim under this section for discrimination under subsection (b) [seeking a determination on the merits] but not under subsection (f) [seeking an expedited resolution] and who prevails on the claim shall be entitled to actual damages sustained by the

101. HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS § 171 (2d ed. 1911).

102. Civil Liberties Act of 1988, 50 U.S.C. app. §§ 1989b–b9 (2000).

103. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2006).

104. Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1629(h) (2000).

105. See § 14012(i)(2). At face value, this appears to allow Congress to appropriate whatever funds may be needed in order to ensure that *Pigford* claimants receive satisfactory merit determinations.

106. Both the Native Americans Graves Protection and Repatriation Act as well as the Alaska Native Claims Settlement Act include provisions allowing for further appropriations if needed. See 25 U.S.C. § 3012; 43 U.S.C. § 1623. This is especially significant because the Alaska Native Claims Settlement Act is the largest single payout of reparations in U.S. history, providing native Alaskan tribes with almost one billion dollars and forty-four million acres of land. See BROPHY, *supra* note 16, at 42.

107. See *supra* note 106.

108. See Evans, *supra* note 96 (quoting a lead sponsor of the bill as stating that “[t]here’s no doubt that there will have to be more money in the future”). “Lawyers involved in the case acknowledge that it is unclear where the money will come from once claims exceed \$100 million.” *Id.*

claimant.”¹⁰⁹ No other major reparations scheme passed by Congress contains a provision allowing for a claim based on actual damages resulting from the prior discrimination.¹¹⁰ This provision would allow *Pigford* claimants who can demonstrate actual damage as a result of the USDA discrimination between 1981 and 1996 to seek significant compensation. This provision could be very beneficial, especially to those who lost their farms and property as a direct result of the lack of access to USDA loans.

B. Section 14012 Ultimately Fails Black Farmers

Although section 14012 does contain some positive traits, it also contains traits which limit many black farmers and foreclose many others from seeking assistance or having their claims determined on the merits as well. Generally, section 14012 presents both a blessing and a curse for black farmers. Considering the historical discrimination that the USDA practiced, why does section 14012 only offer assistance to those who attempted to farm between January 1, 1981, and December 31, 1996?¹¹¹ Certainly, the discrimination by the USDA in the years prior to 1981 could not have been any less harmful or apparent. This appears to be unlikely in light of the history of USDA discrimination.¹¹² Considering this discrimination, Congress’s choice to limit the number of African American farmers able to seek redress to this small number is baffling. A similar limiting provision¹¹³ is found in the Civil Liberties Act of 1988, where compensation was restricted to only those Japanese Americans who

109. § 14012(g).

110. Included in this definition of major reparations schemes passed by the U.S. Congress are the Alaska Native Claims Settlement Act, the Civil Liberties Act of 1988, and the Native American Graves Protection and Repatriation Act. *See supra* notes 67–69. All of these acts have been treated as reparations schemes. *See Brophy, supra* note 17, at 820–21.

111. In the original *Pigford* litigation, the court certified the class as:

[A]ll African American farmers who (1) farmed, or attempted to farm, between January 1, 1981 and December 31, 1996; (2) applied to the United States Department of Agriculture (USDA) during that time period for participation in a federal farm credit or benefit program and who believed that they were discriminated against on the basis of race in USDA’s response to that application; and (3) filed a discrimination complaint on or before July 1, 1997, regarding USDA’s treatment of such farm credit or benefit application.

Pigford v. Glickman, 185 F.R.D. 82, 101 (D.D.C. 1999).

112. *See supra* notes 31–39 and accompanying text.

113. The term “limiting provision” is used to refer to the provisions in many reparations acts which seek to limit those who can seek redress under the Act.

survived after the enactment of the Act.¹¹⁴ In spite of the opportunity that Congress had to help correct grave historical injustice, it chose to ignore the losses suffered by black farmers since the beginning of Reconstruction.¹¹⁵

Section 14012 also fails to provide redress to those initially intended to be a part of the settlement. Section 14012(a)(4) defines those to whom the Act pertains as a "Pigford claimant."¹¹⁶ Under this section, *Pigford* claimants are any "individual[s] who previously submitted a late-filing request under section 5(g) of the consent decree."¹¹⁷ In other words, section 14012 pertains to those *Pigford* claimants who filed a late petition for extraordinary circumstances in the original *Pigford* class action. Although this includes the largest group of *Pigford* claimants who failed to have their claims heard,¹¹⁸ section 14012 fails to make amends for the hundreds of black farmers who were denied access to the class for minor procedural reasons.¹¹⁹ In addition, the Act fails to account for an additional 73,800 farmers who, due to inadequate notice, could not file before the October 2000 late claims deadline expired;¹²⁰ thus, they were denied entry into the class altogether. Furthermore, there was a large class of African American farmers who were a part of the initial class action but were excluded from the consent decree because they had filed discrimination claims against the USDA after the period for which Congress tolled the statute of limitations for original *Pigford* claimants.¹²¹ For these farmers, section 14012 offers no recourse or reconciliation of their claims.

114. Civil Liberties Act of 1988, 50 U.S.C. app. § 1989b-7(2) (2000). When Congress passed the Civil Liberties Act, it required that the Act apply to "any individual of Japanese ancestry who is living on the date of the enactment of this Act [Aug. 10, 1988]." *Id.* This limiting provision in the Act provides compensation only to living potential claimants because Congress likely sought to restrict who could seek redress under the Act. See BROPHY, *supra* note 16, 44-45.

115. See *Pigford*, 185 F.R.D. at 85.

116. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012(a)(4), 122 Stat. 1651, 2210.

117. *Id.*

118. See *supra* note 57 and accompanying text.

119. See *supra* note 51.

120. COWAN & FEDER, *supra* note 40, at 5.

121. For a discussion on the tolling of the Equal Credit Opportunity Act in the *Pigford* class action, see *supra* note 89. Another lawsuit with identical claims, *Brewington v. Glickman*, was combined with the *Pigford* case. See *Pigford v. Glickman*, 185 F.R.D. 82, 90-91 (D.D.C. 1999). The *Brewington* case involved farmers who had filed discrimination claims after February 21, 1997, but before July 7, 1998; therefore, the claims filed by the *Brewington* class occurred after the period stated in the Act tolling the statute of limitations. *Id.* at 90. However, the court concluded that those who were a part of the *Brewington* litigation could not have the merits of their cases heard because the Act tolling

Section 14012 also fails to allocate sufficient financial support for the Act to be successful. Section 14012(c)(2) allows only \$100 million for the appropriation of the Act.¹²² Though Congress was aware the original *Pigford* settlement was valued at more than two billion dollars,¹²³ it approved section 14012 with limited funds in comparison to the settlement amount.¹²⁴ Considering the amount that the *Pigford* settlement has cost already,¹²⁵ courts settling *Pigford* claims will likely dispose of the \$100 million quickly.¹²⁶

Finally, section 14012 also unnecessarily terminates the ability of African American farmers to file a claim under the Act two years after its enactment.¹²⁷ Prior congressional reparations schemes have allowed for potential claimants to be able to file indefinitely.¹²⁸

the statute of limitations did not apply to them. *Id.* at 93 (“The members of the proposed *Brewington* class who are not a part of the newly certified class—that is, those who filed discrimination complaints after July 1, 1997—are on a different legal footing because the statute of limitations has not been tolled for them and resolution of their claims therefore is not appropriate in this action.”). Although Congress could have used section 14012 as a way to offer redress to these claimants, it failed to do so and has left them without recourse unless Congress acts again to toll the statute for the *Brewington* class.

122. § 14012(c)(2).

123. *See Pigford*, 185 F.R.D. at 95. Although the exact recovery amount is unclear, the *Pigford* consent decree supported Plaintiff’s notion that the settlement would be worth at least \$2.25 billion. *Id.*

124. Although section 14012 represented a step forward for black farmers, some Congressmen recognized that more funds would need to be appropriated in order to make the Act effective. *See Evans, supra* note 96 (quoting Sen. Chuck Grassley, an Iowa Republican and lead sponsor of the measure, as stating that “[t]here’s no doubt that there will have to be more money in the future African-American farmers deserve justice”); *see also Bias Suits, supra* note 60 (acknowledging that lawmakers picked the \$100 million arbitrarily with the knowledge that it would not cover the total costs because “some dollar amount [had to be fixed] to this provision because that’s what the House rules require” (quoting lead supporter of section 14012, Rep. Artur Davis)). The low dollar amount also helped ensure that the measure would cause little conflict because had the amount been higher, “lawmakers probably would have stripped the provision.” *Id.*

125. *See COWAN & FEDER, supra* note 40, at 6. The *Pigford* class action settlement has already cost upwards of \$990 million. *Id.*

126. *See Bias Suits, supra* note 60 (stating that even those in support of the bill believe that the \$100 million allocated for the section “will not come close to covering the actual cost”). Considering that nearly 22,500 farmers filed claims under the normal filing period and were awarded \$990 million, the dollar amount of the claims for the 66,000 who can now seek redress may reach up to \$2.5 billion.

127. *See* § 14012(k).

128. *See* Civil Liberties Act of 1988, 50 U.S.C. app. § 1989b-4(a)(2) (2000).

The Attorney General shall identify and locate, without requiring any application for payment and using records already in the possession of the United States Government, each eligible individual. The Attorney General should use funds and resources available to the Attorney General, including those described in subsection (c), to attempt to complete such identification and location within 12 months after the date of the enactment of this Act [Aug. 10, 1988]. . . . Failure to

However, black farmers have once again been shortchanged in their ability to seek redress.

Although another opportunity for recovery has been afforded to black farmers, section 14012 does not go far enough in redressing the claims of black farmers. The Act presents several positive qualities: assistance to black farmers denied late access to the class, a provision that allows for liberal construction, and what appears to be authorization to allocate as much funding as is necessary to make the Act effective. However, its downfalls, including the numerous ways in which it denies redress to many black farmers, ultimately make the Act a failure. Section 14012 does not address the concerns of black farmers who should be compensated, whether by limiting those who can seek redress or by initially failing to provide enough appropriations for the section to be effective.

C. *Section 14012 Can Be a More Equitable Statute*

Although the Act ultimately fails black farmers, there are several ways in which Congress could make the statute an appropriate reparations remedy and, consequently, improve how adequately section 14012 addresses historical discrimination. First, Congress could expand the class of persons that the provision helps. As stated earlier in this Recent Development, USDA discrimination prior to the time period for the original *Pigford* class was no less insidious. Expanding the legislation to offer assistance to more farmers could make the Act more effective at fulfilling "Lincoln's vision."¹²⁹ Second, at a minimum, Congress should include the members of the *Brewington* class action, those farmers who were originally a part of the *Pigford* class but were later removed for procedural reasons, in the group who can receive funds under the legislation. By denying these farmers, Congress denied redress to a class that was no less deserving of compensation than the *Pigford* class; the *Brewington* class simply was not given authority under a congressional statute to

be identified and located by the end of the 12-month period specified In the preceding sentence shall not preclude an eligible individual from receiving payment under this section.

Id. In fact, section 14012 does not require the government to locate all claimants, unlike the Civil Liberties Act, even though the USDA has the addresses and names of all claimants who filed late in the *Pigford* class action. See FED'N OF S. COOPS. / LAND ASSISTANCE FUND, *supra* note 51, at 5.

129. See 'Notice' Provision, *supra* note 9, at 2 (statement of Rep. Steve Chabot, Chairman, House Subcomm. on the Constitution) (describing Lincoln's vision as hope that "every Black American who wants to farm has the tools available to do so").

avoid the statute of limitations under the Equal Credit Opportunity Act. Lastly, Congress must appropriate more funds for the *Pigford* litigation. This Recent Development has shown that the funds currently appropriated, without a doubt, will be insufficient. Congress should act now to appropriate more funds so that black farmers do not have to engage in another struggle to receive what Congress has already determined is something that they deserve: justice.

CONCLUSION

This Recent Development demonstrates that section 14012 of the Food, Energy, and Security Act of 2008 fits within the modern definitions of reparations and also possesses many of the features that other reparations schemes possess.¹³⁰ However, section 14012 presents several limiting provisions that hinder those whom it should have helped.¹³¹ Section 14012 also provides an unsatisfactory remedy to the historical discrimination committed against black farmers, especially when compared to other major Congressional legislative reparations schemes.¹³² Perhaps the *Pigford* class action represented “a good first step towards assuring that the kind of discrimination that has been visited on African American farmers since Reconstruction will not continue into the next century.”¹³³

Section 14012 had the potential to be an effective second step. But this was not the case. Ultimately, section 14012, though it advances reparations scholarship, fails to significantly progress the cause of black farmers. Section 14012 of the Food, Conservation, and Energy Act of 2008 has a unique place amongst contemporary theories of reparations scholarship, considering its relation to both land and compensation to African Americans. However, it ultimately fails black farmers discriminated against by the USDA, because it provides relief to only a small class of farmers and limits those who can seek redress. Once more, African American farmers must continue to struggle for justice and hope that one day it will come.

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130. See *supra* Part II.

131. See *supra* Part III.B.

132. See *id.*

133. *Pigford v. Glickman*, 185 F.R.D. 82, 86 (D.D.C. 1999).