THE NEVER-ENDING DROUGHT FOR BLACK FARMERS: THE LASTING EFFECTS OF *PIGFORD* AND THE CONTINUANCE OF USDA DISCRIMINATION

*Megan Buechler**

"The government may have admitted guilt and wrote a check but that is not what these farmers wanted. They wanted to be heard. They wanted their stories to be told, they wanted to protect future generations, Black and White, from ever letting this happen again."

— Greg A. Francis[1]

I. INTRODUCTION

Forty acres and a mule—William Sherman promised this redistribution of land in forty-acre plots to African Americans during the Reconstruction era in Special Field Order No. 15.[2] Shortly thereafter, the government broke that promise to African American farmers when President Andrew Johnson vetoed the congressional act which would have approved the order.[3] Ever since Abraham Lincoln founded the United States Department of Agriculture (USDA)—just years before in 1862, branding it as "the People's Department"—the black farmer in America has been trying to seek inclusion in President Lincoln's mid-19th century governmental experiment.[4] Rather than "the People's Department" that Lincoln envisioned, the USDA quickly became known to many as the "last plantation" because of its crucial role in the forcing of many minority, disadvantaged farmers out of the profession.[5] And so began a long history of broken promises relating to the USDA and the black farming community for generations to come. Today, the USDA has grown into a 21st-century behemoth with 120 billion

* J.D. Candidate, May 2023, University of Louisville Brandeis School of Law; B.A. in Public Relations, May 2020, University of South Carolina. This Note is dedicated to my parents, Joe and Nancy, my sister, Julia, my brother, Paul, and my Uncle Dave – I may not have listened to your advice, but at least I have this Note to show for it.

[1] GREG A. FRANCIS, JUST HARVEST: THE STORY OF HOW BLACK FARMERS WON THE LARGEST CIVIL RIGHTS CASE AGAINST THE U.S. GOVERNMENT 16 (2021).

[2] *See* Henry L. Gates, Jr., *The Truth Behind '40 Acres and a Mule,'* PBS, https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/the-truth-behind-40-acres-and-a-mule [https://perma.cc/PDH2-J7F4] (last visited Aug. 4, 2022).

[3] Pigford v. Glickman, 185 F.R.D. 82, 112 (D.D.C. 1999).

[4] *USDA celebrates 150 years*, USDA, https://www.usda.gov/our-agency/about-usda/history (last visited Jan. 7, 2022); Mike Epsy, *Foreword* to GREG A. FRANCIS, JUST HARVEST: THE STORY OF HOW BLACK FARMERS WON THE LARGEST CIVIL RIGHTS CASE AGAINST THE U.S. GOVERNMENT, at 11 (2021).

[5] *Pigford*, 185 F.R.D. at 85.

dollars' worth of programs and policies.[6] Nevertheless, despite having the largest civil rights settlement in U.S. history under his belt, the black farmer still must fight for recognition, respect, and literal restitution.[7]

In 1997, a class of black farmers and landowners led by Timothy Pigford sued the USDA, alleging the agency had discriminated against African Americans in the allocation of farm loans and assistance, as well as in the agency's failure to respond to discrimination complaints between 1983 and 1997.[8] Such patterns of discrimination were connected to significant losses of black-owned farmland throughout the 20th century.[9] In 2010, a second historic agreement, known as *Pigford II*, provided another avenue for farmers excluded from the initial class to bring complaints, resulting in an additional $1.25 billion for settlement payments.[10] While some cite *Pigford* as the largest and most successful civil rights case in recent decades, many viewed the settlements as a disappointment,[11] because more than a decade after *Pigford II*, black farmers continue to suffer the effects of structural inequality and racial discrimination within U.S. Agriculture.

This Note analyzes the past, present, and future of the black farming community and the modern-day significance of the *Pigford* cases within the American tort system. It seeks to uncover why black farmers are still facing similar results today that they were a century ago, even in the aftermath of the *Pigford* cases. It proposes that there is a consistent pattern of discrimination against black farmers that is intentional and rationalized by a set of ostensibly neutral policies and institutions.

The second section of this Note provides a background of the history between black farmers and U.S. agriculture, specifically black farmers' tumultuous relationship with the USDA. It discusses the historical circumstances that allowed black farmers to suffer at the hands of the U.S. government for decades, ultimately leading to the *Pigford* settlement. The third section analyzes the continued impacts of *Pigford* within modern

---

[6] EPSY, *supra* note 4, at 11.

[7] *Id.*

[8] FRANCIS, *supra* note 1, at 49.

[9] A 1997 Civil Rights Actions Team Report found that "minority and limited resource customers believe USDA has not acted in good-faith on the complaints. Appeals are too often delayed and for too long. Favorable decisions are too often reversed." CIVIL RIGHTS ACTION TEAM, U.S. DEP'T OF AGRIC., CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE 30–31 (1997).

[10] Emma Lietz Bilecky, Assessing the Impacts of USDA Civil Rights Settlements: Pigford in Advocacy and Context (April 26, 2019) (Master's Project, Duke University) (https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/18439/ELB_MP_revised201910.pdf?sequence=5&isAllowed=y [https://perma.cc/B6AV-NG3Q]).

[11] *See* Mark A. Bunbury Jr., *Recent Development: 'Forty Acres and a Mule' … Not Quite Yet: Section 14012 of the Food, Conservation, and Energy Act of 2008 Fails Black Farmers*, 87 N.C. L. REV. 1230, 1251 (2009); Kindaka Jamal Sanders, *Re-Assembling Osiris: Rule 23, the Black Farmers Case, and Reparations*, 118 PENN. ST. L. REV. 339, 373 (2013).

American jurisprudence. The fourth section addresses issues left unanswered by *Pigford* and seeks to uncover why black farmers are still facing issues today similar to those they faced a century ago, even in the aftermath of the *Pigford* cases. Utilizing Daria Roithmayr's Lock-In Model as a guiding framework, this Note proposes an expansion of the regulatory definition of discrimination amongst government agencies, such as the USDA, and making small but effective changes to USDA policies and procedures to regulate discriminatory practices. Finally, the Note's conclusion reaffirms that the settlement process did not adequately reform the culture of the USDA to curtail ongoing discrimination and suggests that the USDA needs a structural remedy to dismantle inequality and address inevitable future harms.

II. BACKGROUND

The connection between land and the black community is a deep and, sadly, recurring wound in the black community. One of the first large-scale opportunities for African Americans to own land came in early 1865, when President Lincoln's Secretary of War, Edwin M. Stanton, and Union General, William T. Sherman, met with leaders of the black community in Savannah, Georgia.[12] This meeting led to the issuance of Special Field Order No. 15, which, among other things, confiscated confederate land along a strip of coastline and ordered 400,000 acres of land to be redistributed to newly freed black families in forty-acre segments.[13] However, the order was a short-lived promise for African Americans.[14] Following Lincoln's assassination, President Andrew Johnson reversed the order, and the land was returned to white confederate landowners.[15] Black labor in slavery made the land of the South one of the most prosperous agricultural empires of all time, but black laborers were denied any right to the ground their labor had made bountiful.[16]

Nevertheless, despite the obstacles posed by the failure of the land redistribution program and navigation of a maze of racist laws and customs, by 1910, African Americans had acquired between 16 and 19 million acres of land and nearly 17% of southern farm owners were black.[17] The number of black

---

[12] Gates, *supra* note 2.

[13] Barton Myers, *Sherman's Field Order No. 15*, NEW GA. ENCYCLOPEDIA (Sep. 25, 2005), https://www.georgiaencyclopedia.org/articles/history-archaeology/shermans-field-order-no-15.

[14] *Id.*

[15] *Id.*

[16] CLAUDE F. OUBRE & KATHERINE C. MOONEY, FORTY ACRES AND A MULE: THE FREEDMEN'S BUREAU AND BLACK LAND OWNERSHIP 3 (2012).

[17] Angela Harris, *[Re]Integrating Spaces: The Color of Farming*, 2 SAVANNAH L. REV. 157, 179 (2015).

farmers in the U.S., primarily concentrated in the South, peaked in 1920 at approximately 926,000, becoming one of the most successful examples of entrepreneurialism the U.S. has ever seen.[18] However, the number of black farmers has continuously declined—between 1920 and 1969, there was a 90% decrease, and a 98% decrease by 1997.[19] Shortly after the end of the twentieth century, black farm operators lost more than 9F0% of their predecessors' land.[20] Although all farmers, regardless of race, encountered trouble maintaining their farms at the turn of the twentieth century due to economic factors, it became apparent that numbers were dropping at an alarmingly faster rate within the black farming community.[21] Black farm ownership declined two and a half times faster than white ownership.[22] Studies show that from the late 1970s until the turn of the century, no other minority group has experienced a loss of farm operations at a rate comparable to that of the African American population.[23] The number of black-operated farms fell to a mere 44,629 by 2012.[24] As the amount of black farmers shrunk, so did the size of their farms.[25] There were many reasons for this decline, most of which were largely based on the racism that circulated through federal, state, and county USDA offices.[26] Employees at every level bent civil rights laws and subverted government programs in order to punish black farmers.[27]

---

[18] *Id.*; FRANCIS, *supra* note 1, at 16.

[19] Harris, *supra* note 17, at 179.

[20] *Id.*

[21] Spencer D. Wood & Jess Gilbert, *Returning African American Farmers to the Land: Recent Trends and a Policy Rationale*, REV. OF BLACK POL. ECON. 44, 44–45 (2000).

[22] Todd Lewan & Dolores Barclay, *'When they Steal Your Land, They Steal Your Future,'* L.A. TIMES (Dec. 2, 2001), https://www.latimes.com/archives/la-xpm-2001-dec-02-mn-10514-story.html [https://perma.cc/B6V9-AK8G].

[23] David Buland, *NRCS Support of Hispanic Farmers: By the Numbers*, USDA-NRCS NATURAL RESOURCES CONSERVATION SERVICE (June 23, 2002, 8:29 PM), https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_009843.pdf [https://perma.cc/VHG9-BAKU].

[24] *See* Vera J. Banks, *Black Farmers and Their Farms*, USDA ECON. RES. SERVICE (July 1986), https://static.ewg.org/reports/2021/BlackFarmerDiscriminationTimeline/1982_USDA-History.pdf [https://perma.cc/5VG8-QCFG]; *See also 2012 Census of Agriculture Highlights*, USDA NAT'L AGRIC. STAT. SERV., (May 2014), https://www.nass.usda.gov/Publications/Highlights/2014/Farm_Economics/Highlights_Farm_Economics.pdf [https://perma.cc/SY9V-8V85].

[25] Abril Castro & Caius Z. Willingham, *Progressive Governance Can Turn the Tide for Black Farmers*, CTR. FOR AM. PROGRESS 2 (Apr. 2019), https://americanprogress.org/wp-content/uploads/2021/08/Black-Farmers-report1.pdf?_ga=2.15207029.298990037.1645632237-1419626745.1644864669 [https://perma.cc/J98S-WMDW].

[26] Pete Daniel, *African American Farmers and Civil Rights*, 73 THE J. OF S. HIST. 3 (Feb. 2007), https://www.jstor.org/stable/27649315 [https://perma.cc/TK8B-3G4G].

[27] *Id.*

A. Black-owned farmland and the USDA

Until the federal government got involved, there seemed to be an air of cooperation between farmers, both black and white.[28] The real problems began when government employees became involved—discrimination perpetrated by the federal government itself was a significant issue that led to the exponential loss of black-owned farmland.[29] Discrimination by the USDA in connection with farm loans and other credit or benefit programs made it incredibly difficult for black farmers to gain access to land, credit, or assistance programs.[30] In 1946, the Farmers Home Administration (FmHA) was created to provide and guarantee loans for rural families and farmers.[31] The FmHA was the principal public lending institution for the nation's rural communities and had the capability to provide immediate, direct assistance to black farmers to prevent further loss of their land.[32] As the "lender of last resort," the goals of the FmHA appear to be clear: to provide subsidies to help small farmers, minorities, and others increase their stake in society by gaining access to the land.[33]

Due to the historical circumstances that have militated against the survival of black farm operators, black farmers were in particular and disproportionate need of the assistance that the FmHA was created to provide.[34] However, according to a 1982 report issued by the U.S. Commission on Civil Rights, in terms of the size of loans, loan use purposes, and technical assistance, the FmHA did not provide services to black farmers comparable to those provided to similarly situated whites.[35] In addition, a USDA-commissioned study in 1994 analyzed complaints of discrimination and overwhelmingly concluded there was unfair treatment of minority farmers, finding that from 1990 to 1995, minorities received less than their fair share of USDA money for crop payments, disaster payments, and loans.[36] Other findings showed that: (1) the largest USDA loans (the top 1%) went to corporations (65%) and white male farmers (25%); (2) loans to black males averaged $4,000 (or 25%) less than those given to white males;

---

[28] FRANCIS, *supra* note 1, at 17.

[29] *Id.*

[30] *Id.*

[31] James Chen, *Farmers Home Administration (FmHA)*, INVESTOPEDIA, https://www.investopedia.com/terms/f/farmers-home-administration-fmha.asp [https://perma.cc/CUK8-54EY] (last updated Oct. 11, 2021).

[32] Pamela Browning, et al., *The Decline of Black Farming in America*, COMM'N ON CIVIL RIGHTS 3–4 (Feb. 1982), https://files.eric.ed.gov/fulltext/ED222604.pdf [https://perma.cc/4HSK-PJPG] (last visited Aug. 4, 2022).

[33] *Id.* at 78.

[34] *Id.* at 96.

[35] *Id.* at 4, 9.

[36] TADLOCK COWAN & JODY FEDER, CONG. RES. SERV., THE PIGFORD CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 2 (May 29, 2013), https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf [https://perma.cc/T3RK-YQUQ].

and (3) 97% of disaster payments went to white farmers, while less than 1% went to black farmers.[37]

Black farmers additionally struggled to obtain credit, considered to be the lifeblood of farming and ranching, from the FmHA.[38] Successful farms must have access to timely credit—at fair terms—in adequate amounts, because virtually every producer uses short-term operating credit to purchase production inputs.[39] Without credit, many purchases are not possible.[40] For example, credit is used to purchase seed, fertilizer, machinery, equipment, livestock, and livestock feed.[41] Because of the seasonal nature of farming, it is of the utmost importance that credit and benefit applications are processed quickly, or the farmer may lose all or most of his anticipated income for an entire year.[42] Without ongoing access to credit, farmers simply cannot operate.[43] The FmHA acknowledged that small family farmers and minorities had been unable to obtain sufficient credit in the past.[44] As a result, many black farmers had mounting debt approaching the 1930s, and because of these debts, they very rarely received any form of reasonable credit to maintain their operations.[45] Further, because of their low incomes, limited off-farm employment, and small landholdings, black farmers were disproportionately unable to obtain credit elsewhere.[46] Even though the program was designed for farmers who are unable to get loans from other financial institutions, poor credit is the most common reason FmHA cited for rejecting black farmers' direct loan applications.[47] Studies show that minority borrowers were often given smaller loan amounts with higher interest rates because they had poorer results in credit scoring models.[48]

As for farm loans, black farmers were often denied timely loans and debt restructuring or forced to wait longer for loan approval than non-minority

---

[37] *Id.*

[38] Stephen Carpenter, *The USDA Discrimination Cases: Pigford, In Re Black Farmers, Keepseagle, Garcia, and Love*, 17 DRAKE J. AGRIC. L. 1, 11 (2012).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Pigford*, 185 F.R.D. at 86.

[43] Carpenter, *supra* note 38, at 11.

[44] Browning, *supra* note 32, at 79.

[45] Jordan D. Nickerson, Note, *America's Invisible Farmers: From Slavery, To Freedmen, to the First on the Land*, 23.2 DRAKE J. AGRIC. L. 253, 259 (2018).

[46] Browning, *supra* note 32, at 96.

[47] Ximena Bustillo, *'Rampant issues:' Black farmers are still left out at USDA*, POLITICO (July 5, 2021, 7:00 AM), https://www.politico.com/news/2021/07/05/black-farmers-left-out-usda-497876 [https://perma.cc/L7FG-9HKY].

[48] Jyotsna Ghimire & Cesar L. Escalante, et al., *Do farm service agency borrowers' double minority labels lead to more unfavorable loan packaging terms?*, 80 AGRIC. FIN. REV. 633, 638–39 (Mar. 20, 2020), https://www.emerald.com/insight/content/doi/10.1108/AFR-03-2020-0038/full/pdf [https://perma.cc/5HFN-V7MS].

farmers.[49] In several southeastern states, for instance, it took three times as long on average to process the application of a black farmer as it did a white farmer.[50] Loan applications were delegated to the small, local county offices and supervisors, which were—and still are—the primary point of contact for most rural individuals and organizations seeking FmHA assistance.[51] At the county level, the county committees determine the eligibility of individual applicants and the limits of credit to be extended; thus, most individual loans are approved or disapproved at this level.[52]

Regulations governing loan eligibility did not provide specific criteria concerning farm size, income, or assets, thus leaving room for a wide range of subjective interpretation when making eligibility determinations.[53] The lack of specific criteria for determining farm loan eligibility created loopholes that allowed for, and resulted in, discriminatory treatment.[54] This subjectivity left black farmers at the mercy of FmHA officials,[55] who, armed with taxpayers' dollars, could pick and choose which farmers received assistance.[56] Many of these local officials were alleged to be biased against black farmers and were therefore incapable of objectively evaluating loan applications.[57] These concerns were only exacerbated by the racial makeup of FmHA county committees at the time, as the county committees were far less diverse than the communities they served.[58] In 1979, just 7.2% of all FmHA county committee members were black, a number which would drop to 4.3% in 1980.[59] It was clearly understood that the black FmHA employees moved on a different track from white personnel—black FmHA employees in southern states worked out of segregated offices, served only African American farmers, were barred from county FmHA committee meetings, and were told to avoid civil rights issues.[60] The appointment of committee members was structured to ensure very few new directorates were coming in and out; the preserving of the same office personnel worked to maintain and expand the legacy of segregation and discrimination.[61]

Moreover, the USDA was not responsive to discrimination complaints.[62]

---

[49] COWAN & FEDER, *supra* note 36, at 1.
[50] *Pigford*, 185 F.R.D. at 87.
[51] Browning, *supra* note 32, at 71–72.
[52] *Id.* at 71–72, 92.
[53] *Id.* at 79–82.
[54] *Id.* at 80–81.
[55] Daniel, *supra* note 26, at 12.
[56] FRANCIS, *supra* note 1, at 17.
[57] Browning, *supra* note 32, at 90.
[58] *Pigford*, 185 F.R.D. at 86.
[59] Browning, *supra* note 32, at 92.
[60] Daniel, *supra* note 26, at 12–13.
[61] *Id.* at 16.
[62] Browning, *supra* note 32, at 84–87.

Since 1964, the USDA has officially prohibited discrimination in the administration of its loan programs.[63] Any farmer who believed that his application was denied on the basis of his race or for other discriminatory reasons theoretically had a process open to file a civil rights complaint, either with the Secretary of Agriculture or with the Office of Civil Rights Enforcement and Adjudication ("OCREA") at the USDA.[64] An administrative complaint process was in place for farmers to submit claims to the USDA regarding discrimination in connection with its loan programs.[65] USDA regulations set forth a detailed process by which these complaints were supposed to be investigated and conciliated, and ultimately a farmer who was unhappy with the outcome was entitled to sue in federal court under the Equal Credit Opportunity Act (ECOA).[66]

Despite the theoretical availability of a USDA complaint system, the OCREA (where complaints were filed) was essentially dismantled in 1983, and complaints that had been filed were never processed, investigated, or forwarded to the appropriate agencies for conciliation.[67] As a result of the office closing, a massive agency backlog of unresolved complaints began to build, and farmers who had filed complaints of discrimination never received a response, or if they did receive a response, it was a cursory denial of relief.[68] In some cases, USDA staff simply threw discrimination complaints in the trash without ever responding to or investigating them.[69]

In 1980, there were 85 equal opportunity complaints filed concerning farm operating and ownership loans.[70] After an investigation into an FmHA office conducted by the USDA's Office of Equal Opportunity, multiple equal opportunity violations were found, including: discrepancies in the real estate appraisal of farmland owned by blacks; inordinate waiting periods between application and loan approval for black farmers; absence of deferred loan payment schedules for black farmers; requirements that some black farmers agree to voluntary liquidation as a condition to obtaining loans; and disparities in the number and amounts of loans made to black farmers.[71] Further data gathered in the investigation indicated that in 1979, the rural population in the area served by the FmHA office was 54.8% black, yet black farmers received only 28.7% of the

---

[63] 29 Fed. Reg. 16,966 (Dec. 7, 1964) (promulgating 7 C.F.R. §§ 15.51–52).

[64] *Pigford*, 185 F.R.D. at 88.

[65] *See* 31 Fed. Reg. 2,645 (Feb. 11, 1966) (promulgating 7 C.F.R. § 15.52 ("Any person…subjected to discrimination [by the USDA may]…file directly with the Secretary or any agency a written complaint…")).

[66] *Pigford*, 185 F.R.D. at 88.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] Browning, *supra* note 32, at 84–85.

[71] *Id.* at 86–87.

farm loans awarded.[72]

The FmHA was abolished in 1995, and its functions were transferred to the USDA's Farm Service Agency (FSA).[73] In 1996, then-Secretary of Agriculture Dan Glickman ordered a suspension of government farm foreclosures across the country pending an investigation into racial discrimination in the agency's loan program and later announced the appointment of a USDA Civil Rights Task Force.[74] The Civil Rights Task Force recommended 92 changes to address racial bias, and while the plan acknowledged past problems and offered solutions for future improvements, it did not satisfy those seeking redress.[75] On August 28, 1997, Timothy Pigford led a class of black farmers seeking redress for past discrimination committed by the USDA and filed suit against the USDA and Secretary Dan Glickman in the U.S. District Court for the District of Columbia, resulting in the largest civil rights settlement in American history.[76]

B. The Pigford Cases

The class action discrimination suit between the USDA and black farmers alleged racial discrimination in the agency's allocation of price support loans, disaster loans, farm ownership loans, and operating loans, as well as the agency's failure to investigate or properly respond to complaints from 1983 to 1997.[77] Three African-American farmers filed the original complaint, representing a putative class of 641 African American farmers.[78] Although the lawsuit was specific to actions that took place during the 1980s and 1990s, the plaintiffs claimed that the USDA—"a racist plantation, disguised as a government agency—had discriminated against black farmers and had done so since the Civil War."[79]

Class membership required that a member must be African American, must have "farmed, or attempted to farm," between January 1, 1981, and December 31, 1996, and must have filed a discrimination complaint on or before July 1, 1997, regarding USDA's handling of such farm treatment or benefit application.[80] In 1999, *Pigford v. Glickman* (commonly referred to as "*Pigford I*") settled out of court, which in and of itself signaled quite an admission of wrongdoing on the part of the USDA.[81]

---

[72] *Id.* at 87.
[73] Chen, *supra* note 31.
[74] COWAN & FEDER, *supra* note 36, at 2.
[75] *Id.*
[76] FRANCIS, *supra* note 1, at 49.
[77] COWAN & FEDER, *supra* note 36, at 2; FRANCIS, *supra* note 1, at 49, 53.
[78] *Pigford*, 185 F.R.D. at 96.
[79] FRANCIS, *supra* note 1, at 49.
[80] Carpenter, *supra* note 38, at 16.
[81] FRANCIS, *supra* note 1, at 54.

A federal district court judge approved a settlement agreement and consent decree, which established a two-track dispute resolution mechanism for those seeking relief.[82]

The most widely used option, Track A, provided a monetary settlement of $50,000 per claimant plus relief in the form of loan forgiveness and offsets of tax liability.[83] A Track A claimant had to present *substantial evidence* (i.e., a reasonable basis for finding that discrimination happened) demonstrating that he was a victim of race discrimination in a credit or benefit transaction with the USDA, including evidence that he was treated less favorably than a "specifically identified, similarly situated" white farmer.[84] Such claimant had a lower burden of proof than those who pursued Track B, but his recovery was limited.[85]

Alternatively, Track B claimants could seek a larger, tailored payment of an unlimited amount by showing evidence that the USDA discriminated against him in a credit transaction by a preponderance of the evidence (i.e., it is more likely than not that the claim is valid), including evidence that "he was the victim of racial discrimination and that he suffered damages therefrom."[86] Claimants were to file no later than October 12, 1999–six months after the settlements were entered.[87] Lack of notice was ruled an unacceptable reason for late filing with a few exceptions for extraordinary circumstances.[88]

Unfortunately, however, there were many issues surrounding the implementation of *Pigford I*, largely attributable to the inadequate notice to black farmers of their rights under the settlement and the gross underestimation of the number of claims that would be filed.[89] When it became clear that there were more class members than anyone had anticipated,[90] many argued that the large number of late filings indicated that the notice campaign to inform black farmers of the lawsuit was "ineffective or defective,"[91] as nearly two-thirds of the presumed class failed to be

---

[82] COWAN & FEDER, *supra* note 36, at 3.

[83] *Id.* at 3.

[84] *Pigford*, 185 F.R.D. at 105; COWAN & FEDER, *supra* note 36, at 3–4.

[85] *Pigford*, 185 F.R.D. at 89 ("Under Track A, claimants who could successfully provide the basic evidence required by the DOJ and the USDA would receive $50,000, as well as relief in the form of loan forgiveness and offsets of tax liability.").

[86] *Id.* at 106–7.

[87] *'Notice' Provision in the Pigford v. Glickman Consent Decree: Hearing before the Subcomm. on the Const.*, 117th Cong. 108 (2004) (statement of Hon. Robert C. Scott, Rep. in Cong. from the State of Va.).

[88] COWAN & FEDER, *supra* note 36, at 4.

[89] *Id.* at 8.

[90] *Pigford*, 185 F.R.D. at 105.

[91] *'Notice' Provision in the Pigford v. Glickman Consent Decree: Hearing before the Subcomm. on the Const.*, 117th Cong. 108 (2004) (statement of Hon. Steve Chabot, Rep. in Cong. from the State of Ohio

effectively notified[92] and therefore did not join the class. Many of the claimants suggested that the class counsel were responsible for the inadequate notice and overall mismanagement of the settlement agreement;[93] Judge Friedman even cautioned the farmers' lawyers for their failure to meet deadlines and described their representation, at one point, as "border[ing] on legal malpractice."[94]

Reports indicated that more than 96,000 claims were filed, but only around 22,000 of those were filed "on time" and thus slated to be considered on the merits, mainly because many black farmers did not know that they were required to submit a claim sooner.[95] Further investigation into the circumstances surrounding the late claims revealed that many farmers failed to get any notice whatsoever or failed to understand the contents of the notice if they did receive it.[96] "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."[97] Due to this inadequate notice, 97% of black farmers who intended to be a part of the class were left without redress.[98] There was also concern of "secret motives and agendas" in deciding who was eligible, determining the settlement, and administering the payout.[99] During the process, the court denied plaintiff counsel's request to name a black lawyer as the monitor who kept track of all the claims.[100] The judge overruled objections to the government paying the salaries of those who were supposed to be independent and impartial, such as the mediator and the administrative judges, as well as the court-appointed monitor.[101]

Due to concerns about the large number of applicants who did not

---

and Chairman, Subcomm. on the Const.).

[92] *Id.*

[93] *See Obstruction of Justice: USDA Undermines Historic Civil Rights Settlement with Black Farmers*, ENVTL. WORKING GRP. (July 20, 2004), http://www.ewg.org/research/obstruction-justice [https://perma.cc/TME5-BQT7].

[94] COWAN & FEDER, *supra* note 36, at 5.

[95] *'Notice' Provision in the Pigford v. Glickman Consent Decree: Hearing before the Subcomm. on the Const.*, 117th Cong. 108 (2004) (statement of Hon. Steve Chabot, Rep. in Cong. from the State of Ohio and Chairman, Subcomm. on the Const.).

[96] *Id.*

[97] Mark A. Bunbury Jr., *Forty Acres and a Mule…Not Quite Yet: Section 14012 of the Food, Conservation, and Energy Act of 2008 Fails Black Farmers*, 87 N.C. L. REV. 1230, 1237 (2009) (citing *'Notice' Provision in the Pigford v. Glickman Consent Decree: Hearing before the Subcomm. on the Const.*, 117th Cong. 108 (2004) (statement by Rep. John Conyers, Jr., Member, House Subcomm. on the Constitution)).

[98] *See* COWAN & FEDER, *supra* note 36, at 5 ("Approximately 73,800 petitions were filed under the late filing procedure, of which 2,116 [2.8%] were allowed to proceed.").

[99] FRANCIS, *supra* note 1, at 55.

[100] *Id.*

[101] *Id.*

obtain a determination on the merits of their claims under the original *Pigford* settlement, the President signed the Food, Conservation and Energy Act of 2008 (appropriately labeled the "Farm Bill") following the conclusion of *Pigford I*.[102] This legislation, specifically § 14012, provided claimants with a new right to pursue their discrimination claims if they had petitioned to participate in *Pigford I* but did not have their petitions considered because they were filed late.[103] This provision did not reopen the previous *Pigford* litigation but rather provided farmers with a new right to sue.[104] Approximately 89,000 claim forms were mailed out.[105] Nearly 40,000 of them ultimately were returned and filed.[106] Of those, approximately 34,000 were deemed complete, timely, and eligible.[107] These newly filed claims were then consolidated into a single case, *In re Black Farmers Discrimination Litigation* (commonly referred to as "*Pigford II*"), which resulted in $1.15 billion in additional settlements.[108]

III. ANALYSIS

To determine the significance of *Pigford I* and *II* (hereinafter "*Pigford*") and their effect on modern-day minority farming, this section of the Note analyzes *Pigford* within modern jurisprudence. While *Pigford* led to the introduction of numerous bills,[109] this Note focuses on the significance of *Pigford* specifically within the tort system. The origins of the issues addressed in *Pigford* litigation go back much further, but the litigation against the USDA for discrimination began with *Pigford I*.[110] Although *Pigford* certainly had its shortcomings, which will be discussed later in the Note, *Pigford* brought to light a series of issues surrounding U.S. agriculture that had never before been addressed in litigation.

This section of the Note will analyze how modern courts have built

---

[102] Food, Conservation and Energy Act of 2008 § 14012(b), 7 U.S.C. § 1726c.

[103] *In Re Black Farmers Discrimination Litigation Settlement*, BLACKFARMERCASE.COM (2011), https://blackfarmercase.com/Background.aspx [https://perma.cc/N67L-GJWE].

[104] COWAN & FEDER, *supra* note 36, at 7.

[105] *Id.* at 8.

[106] *Id.* at 7.

[107] Tadlock Cowan & Jody Feder, *Introduction* to TADLOCK COWEN & JODY FEDER, THE PIGFORD CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS, CONG. RES. SERV. 2 (May 29, 2013), https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf [https://perma.cc/T3RK-YQUQ].

[108] *In re* Black Farmers Discrimination Litig., 856 F. Supp. 2d 1 (D.D.C. 2011).

[109] *See* COWAN & FEDER, *supra* note 36, at 10 (detailing legislative acts following *Pigford*, including the *Pigford Claims Remedy Act of 2007* (H.R. 899; S. 515) and the *African-American Farmers Benefits Relief Act of 2007* (H.R. 558), which were introduced to provide relief. During the 111th Congress, the Senate passed the *Claims Resolution Act of 2010* to provide the $1.15 billion appropriation.).

[110] COWAN & FEDER, *supra* note 36, at 1.

upon these landmark cases and used them as a framework for their own litigation outcomes. It will specifically focus on *Pigford's* positive impacts, including being the first acknowledgement and confirmation of the rampant discrimination within the USDA, becoming a framework for evaluating the legitimacy of a class action suit, and inspiring parallel lawsuits by Native American, female, and Hispanic farmers.

A. Pigford publicized issues internal to the USDA's discrimination complaint process.

The *Pigford* class action was the first instance which publicly challenged the USDA's rampant credit and loan discrimination and gave credence to the issues plaguing the USDA's civil rights complaint process.[111] J.L. Chestnut, counsel for the plaintiff, noted that *Pigford I* was not perfect, but that the case was a beginning.[112] The settlement had confirmed that there was racism in the department and that black farmers were harmed.[113] All the evidence presented indicated to the trial court that the USDA's complaint system was "functionally nonexistent for well over a decade," rendering the process of resolving complaints a failure.[114] By acknowledging the complete failure of the complaint process, *Pigford* accredited other victims of USDA discrimination and verified their standing to take legal action against the USDA.[115] The rampant issues that plagued the USDA's loan system, and the subsequent ineffectiveness of the complaint process, was first brought to light in *Pigford I* and now provides a basis for other minority farmers to sue.[116]

In *Moralez v. Vilsack*, a 2016 case in which a Hispanic woman alleged that race and sex-based discrimination by the USDA forced her to sell her farm in 1998, the court relied on *Pigford I* to show the failures of the USDA Administrative Complaint Process.[117] The plaintiff had applied to the FmHA for an ownership loan and encountered several hardships that allegedly "no other similarly-situated white male farmer" encountered.[118] These hardships included, but were not limited to, the agency discouraging her from completing the loan application process, making her write a special essay and present it to the staff, denying her loan application twice, being

---

[111] *Pigford*, 185 F.R.D. at 85.
[112] *Id.* at 113.
[113] FRANCIS, *supra* note 1, at 55.
[114] *Pigford*, 185 F.R.D. at 88.
[115] *Id.*
[116] *Id.*
[117] *See* Moralez v. Vilsack, No. 1:16-CV-0282-AWI-BAM, 2016 U.S. Dist. LEXIS 176917, at *1–4 (E.D. Cal. Dec. 21, 2016).
[118] *Id.* at *2.

instructed to never again apply for another FmHA loan, notifying her that the agency would "make sure she never got one," and finally, telling her that "farming was 'not a proper business for a woman, much less a Mexican woman with two kids.'"[119] Although an enormous number of complaints were filed for decades, detailing similar stories about loan application discrimination faced by black farmers, the conduct was not investigated until 1996,[120] and it was not until evidence developed in the *Pigford I* litigation that the USDA publicly recognized that it failed to prevent and redress the discrimination complaints from the 1980s and 1990s.[121]

Following *Pigford*, courts have evaluated discrimination claims against the USDA as more plausible than not.[122] In a 2012 case, minority farmers brought a class action alleging that the USDA had discriminated against them on the basis of sex and race by denying their access to credit and other benefits, and they also alleged that the USDA failed to investigate complaints of discrimination properly.[123] Although the plaintiffs did not set forth any facts alleging that non-minority credit applicants were treated differently than they were treated, the plaintiffs argued that the settlement in the high profile *Pigford* class action lawsuit established that there was a pattern or practice of discrimination at the USDA, thus proving that they were treated differently than white farmers.[124] Because the plaintiffs introduced this new pattern or practice theory of the case for the first time on appeal, the court dismissed the plaintiff's discrimination claim because generally, a federal appellate court does not rule on issues not presented to the district court.[125] However, the question of whether a pattern or practice theory of evidence is sufficient for use in claims of discrimination against the USDA was introduced as a legal argument for consideration.[126]

B. Pigford acts as a framework for evaluating the legitimacy of a class action suit.

Courts have also used *Pigford* as a framework for evaluating the legitimacy of a class action suit.[127] Class action claims must have court

---

[119] *Id.* at *4.

[120] *Pigford*, 185 F.R.D. at 88 ("In 1996, Secretary of Agriculture Dan Glickman appointed a Civil Rights Action Team to investigate the allegations of ignored discrimination.").

[121] *Moralez*, 2016 U.S. Dist. LEXIS 176917 at *11.

[122] *See* Wise v. Vilsack, 496 Fed. Appx. 283 (4th Cir. 2012).

[123] *Id.*

[124] *Id.* at 286.

[125] *Id.*

[126] *Id.*

[127] *See generally id.*

approval in order to settle.[128] The most significant takeaway from *Pigford* is the conclusion that the plaintiffs had established questions of law and fact common to the class.[129] The USDA had argued that the plaintiffs failed to identify a particular USDA practice or policy of discrimination common to all class members.[130] However, the court found that "the unifying pattern of discrimination at issue in this case is the USDA's failure to properly process complaints of discrimination, without regard to the program that triggered the discrimination complaint."[131] Claims of discrimination in the granting or servicing of loans or credit would have been too broad to establish commonality for class certification, but *Pigford's* allegations of discrimination focused more narrowly on the USDA's centralized processing of written complaints of discrimination.[132]

Under the Federal Rules of Civil Procedure,

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.[133]

Many courts have quoted *Pigford* in determining the commonality and typicality requirements of FRCP 23(a): "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class."[134] In addition, a named plaintiff must show (i) discrimination (ii) against a particular group (iii) of which the plaintiff is a member, plus (iv)

---

[128] *See* FED. R. CIV. P. 23(e).
[129] Pigford v. Glickman, 182 F.R.D. 341, 348 (D.D.C 1998).
[130] *Id.* at 349.
[131] *Id.*
[132] *Id.* at 344–45.
[133] FED. R. CIV. P. 23(a).
[134] FED. R. CIV. P. 23(a)(3).

some additional factor that permits the court to infer that members of the class suffered from a common policy of discrimination.[135] *Pigford* helped establish that Rule 23(a)(3)'s typicality requirement "is satisfied if each class member's claim arises from the same course of events that led to the claims of the representative parties and each class member makes similar legal arguments to prove the defendant's liability."[136] For instance, ten female farmers who were alleging discrimination within USDA lending programs and a failure to investigate complaints were denied class certification because they failed to "bridge the gap" between their individual claims and the commonality requirement.[137] Some offered anecdotal evidence of personal loan application denial, and some reported discriminatory treatment by USDA officials, but their anecdotal evidence widely differed.[138] When denying class certification, the court referenced the arduous handling of a similar class action case—*Pigford*.[139]

The pattern or practice theory has also emerged in determining the commonality of class certification.[140] In a 2004 case, plaintiffs alleged that the USDA engaged in systematic discrimination against minorities in the administration of home loan programs to help low-income, rural families by, inter alia, putting their names on an illegal waiting list.[141] The allegations of discriminatory conduct, and the injuries suffered as a result thereof, differed amongst class members, ranging from the refusal to issue loan applications to the failure to investigate and process discrimination complaints.[142] Nevertheless, the court found that these claimants adequately alleged a uniform course of conduct common to all class members, holding that a pattern or practice is present "only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature."[143] The plaintiffs established such a practice here.[144]

---

[135] Love v. Johanns, 439 F.3d 723, 728 (D.C. Cir. 2006).

[136] Rogers v. Lumina Solar, Inc., No. 18-CV-2128 (KBJ), 2020 WL 3402360 at *5 (D.D.C. June 19, 2020) (quoting *Pigford*, 182 F.R.D. at 349).

[137] Love v. Johanns, 439 F.3d 723, 729 (D.C. Cir. 2006).

[138] *Id.*

[139] *Id.* at 730.

[140] *In re* Chiang, 385 F.3d 256, 266 (3d Cir. 2004).

[141] *Id.* at 262.

[142] *Id.* at 266.

[143] *Id.*

[144] *Id.*

C. Pigford set a precedent for the success of other minority class action lawsuits against the USDA.

Although the USDA settled with the class of black farmers first, over the past two decades, the USDA has settled discrimination lawsuits with several different groups of farmers.[145] The consent decree used in *Pigford I* became a template for the other cases and inspired parallel lawsuits by Native American, female, and Hispanic farmers.[146]

The USDA next settled a class action suit with Native American farmers.[147] In 1999, Native American farmers filed a lawsuit virtually identical to *Pigford I* seeking compensation for loan discrimination.[148] Although class certification was extensively litigated, they did obtain certification over the government's opposition.[149] The government settled this case in 2010, establishing a claims resolution process nearly identical to that in *Pigford II* to distribute approximately $680 million in damages and $80 million in debt forgiveness.[150] Similar lawsuits by Hispanic farmers (*Garcia v. Johanns*) and female farmers (*Love v. Johanns*) followed, alleging discrimination on the basis of ethnicity and gender in connection with farm loans from the USDA, but they did not result in class-wide settlements because both lawsuits failed on the grounds of lack of commonality of the class.[151] The court concluded they had not shown commonality because they did not demonstrate that the USDA operated under a general policy of discrimination nor did they identify a common USDA policy or practice that disparately affected them.[152]

However, the USDA eventually established a claims resolution process to settle the lawsuits filed by both Hispanic farmers and female farmers for $1.33 billion.[153] Although the resolution process resembled *Pigford* and *Keepseagle*, it differed in several respects, including the absence of judicial supervision or class counsel, less monetary relief, a more onerous

---

[145] Est. of Boyland v. U.S. Dep't of Agric., 913 F.3d 117, 119 (D.C. Cir. 2019).

[146] *Id.*

[147] *See* Keepseagle v. Veneman, 2001 U.S. Dist. LEXIS 25200 (D.D.C. 2001).

[148] *See id.* at *2.

[149] *Id.* at *1.

[150] *See* Statement by the President on the Settlement Agreement in the Native American Farmers Lawsuit Against USDA (Oct. 19, 2010), http://www.whitehouse.gov/the-press-office/2010/10/19/statement-president-settlement-agreement-native-american-farmers-lawsuit [https://perma.cc/VPF8-ZUZ3].

[151] *See* Garcia v. Johanns, 444 F.3d 625 (D.C. Cir. 2006); Love v. Johanns, 439 F.3d 723 (D.C. Cir. 2006).

[152] *See Garcia*, 444 F.3d at 637; *Love*, 439 F.3d at 729.

[153] *Reminder: Hispanic and Women Farmers and Ranchers Claims Period Ends March 25*, U.S.D.A. FSA (February 16, 2013, 2:09 PM), https://content.govdelivery.com/accounts/USFSA/bulletins/6cb418.

burden of proof, and a limited category of claims.[154] The denial of class certification was improper in both cases because although there were no specifically cited discriminatory policies against Hispanics farmers and women farmers, the USDA's loan-granting process prejudicially affected both Hispanic and women farmers in a way similar to the prejudice black farmers had endured.[155] Though not granted commonality, there was enough evidence of discrimination that both classes received a sizable settlement—essentially an acknowledgement of guilt by the USDA.[156]

Pigford left its mark on modern American jurisprudence by pointing out the deficiencies within the USDA loan system, thus making systemic racism within the USDA public knowledge.[157] However, *Pigford* did not necessarily fix the system and its many deficiencies, and it certainly left many unanswered questions about the future of relations between black farmers and U.S. agriculture. Since the USDA is part of the Executive Branch, it is not difficult to see that when dealing with a system so entrenched in its practices, one settlement alone is not necessarily capable of compelling permanent change without continued effort.

D. The Pigford Fallout

Despite *Pigford II's* immeasurable success as a feat of both logistics and law, especially in comparison to the original *Pigford* action, the benefits for black farmers fell drastically short. Totaling around $2.31 billion in settlement, *Pigford* certainly appeared to be a victory for black farmers.[158] However, when determining the success of *Pigford*, it is important to not only keep the large sum of settlement money in perspective, but to also acknowledge that the loss of black-owned land is still occurring today in disproportionate ways.[159]

$2.31 billion is no small sum of money. However, this has been the only form of compensation that black farmers have received for a century of discrimination and dispossession, and it has been estimated that black farmers lost amounts up to $6.6 billion in the fifteen years beginning in 1950 alone.[160] Further, researchers conservatively estimate that the dispossession of black farmland over the last century (the claims in *Pigford* only covered a

---

[154] Cantu v. U.S., 565 Fed. Appx. 7, 9 (D.C. Cir. 2014).

[155] *See Garcia*, 444 F.3d 625; *Love*, 439 F.3d 723.

[156] *See id.*

[157] *See Pigford*, 182 F.R.D. 341.

[158] *Id.*

[159] Nickerson, *supra* note 45, at 268.

[160] Jordan C. Patterson, Note, *Ending a War Waged by Deed of Title: How to Achieve Distributive Justice for Black Farmers*, 82 OHIO ST. L.J. 301, 311–314 (2021).

narrow window of recent claims of discrimination from 1981 to 1996)[161] resulted in the loss of, at the very least, hundreds of billions of dollars of black wealth.[162] Some rightfully argue that the *Pigford* settlement merely gave money to black farmers that should have been theirs decades ago.[163] Hank Sanders, lead counsel for plaintiff in *Pigford I*, was always concerned that the $50,000 amount per farmer that most claimants opted to receive through the *Track A* process was inadequate to qualify as justice.[164] In 2019, he stated, "When you take a farm away from people, you not only take away a way of earning a living, you also take away a lifestyle. Money can't replace that."[165]

The farmers seeking relief from *Pigford* wanted compensatory damages—and got it—but they also wanted injunctive relief, which would provide the legal assurance that no black farmers after them would receive anything less than equal, fair, and full treatment.[166] Although *Pigford* provided economic redress, it served as inadequate and incomplete resolution of problems black farmers have faced historically and continue to face today.[167]

The remedies used in *Pigford*, and the subsequent attempt to use such remedies in current legislation to correct the USDA's discriminatory history, fail to remove structural racism within the department.[168] *Pigford* was not the impactful litigation some claim it to be, as data shows that failures internal to the *Pigford* settlement continue to disadvantage black farmers almost a decade after the conclusion of *Pigford II*.[169] Judge Friedman, the presiding judge in *Pigford I*, foreshadowed this continuation of discrimination in his opinion, declaring that he was "surprised and disappoint[ed]" that the USDA did not want to include in the consent decree a sentence that the USDA, in

---

[161] *Id.* at 311, 325–26.

[162] *Id.* at 314.

[163] Nickerson, *supra* note 45, at 268.

[164] FRANCIS, *supra* note 1, at 55.

[165] Debbie Weingarten, *The Case for Reparations for Black Farmers*, TALKPOVERTY.ORG (May 1, 2019), https://talkpoverty.org/2019/05/01/case-reparations-black-farmers/ [https://perma.cc/598Z-7AVN].

[166] FRANCIS, *supra* note 1, at 49.

[167] Literature review and historical research reveal mixed analysis of the *Pigford* settlements and their aftermath. Some cite *Pigford* as the most successful civil rights litigation in recent decades and a "significant first step" in correcting an egregious history of civil rights violations. However, many severely criticize the settlements and point to persistent problems with discrimination, as the decline in black-owned farmland continues to this day. *See* Bilecky, *supra* note 10, at 18.

[168] The American Rescue Plan Act § 1005, titled, "Farm Loan Assistance for Socially Disadvantaged Farmers and Ranchers," allocates $4 billion toward debt forgiveness not only for black farmers, but for thousands of American Indian, Hispanic, Alaskan Native, Asian American or Pacific Islanders, as well. *See* American Rescue Plan Act, Pub. L. No. 117, 135 Stat. 4 (2021).

[169] *Id.*

the future, would exert "best efforts to ensure compliance with all applicable statutes and regulations prohibiting discrimination."[170]

Following *Pigford*, USDA Secretary Tom Vilsack ushered in a supposed "new era of civil rights," by refining loan and benefit programs intended to serve minority and disadvantaged farmers and reforming USDA leadership at many levels.[171] Despite recent statements that the USDA has "come a long way" in terms of improvements[172] or that black farming is slowly on the rise again, the numbers show the opposite: the total number of direct loans to black farmers has rapidly declined in recent years as black farmers' share of direct loans hit a 10-year low in 2020.[173] Recent data reveals the abysmal failures of previous legal settlements in dismantling pervasive racism,[174] pointing to a lack of civil rights enforcement and accountability that facilitates the continuation of the same problems *Pigford* sought to correct.[175] Black farmers and their advocates say that plans such as the 2008 Farm Bill and Section 1005 of the American Rescue Plan Act of 2021 ("ARPA"), while welcome, cannot fix the ongoing problem of bias from the Agriculture Department programs.[176]

Today, 1.3% (45,508) of the country's 3.4 million total farmers are black.[177] Black farms today are much smaller on average, representing just 1.4% of America's farm acreage, and they generate much less income compared to white farms.[178] In 2017, the average farm income for all full-time and part-time white-operated farms was $10,276 while the average income for all full-time and part-time black-operated farms was $795.[179] Additionally, nearly all the money from the COVID-19 pandemic bailout funds went to white farmers.[180] White farmers received nearly 97% of the $9.2 billion provided in 2020 through USDA's Coronavirus Food Assistance

---

[170] *Pigford*, 185 F.R.D. at 112.

[171] *See* Tom Vilsack, *The People's Department: A New Era for Civil Rights at USDA*, MEDIUM (Aug. 2, 2016), https://medium.com/usda-results/https-medium-com-usda-results-chapter-8-b57f91b64d49 [https://perma.cc/87MP-KXF4].

[172] *See id.*

[173] Bustillo, *supra* note 47; Nickerson, *supra* note 45, at 254.

[174] Bustillo, *supra* note 47.

[175] Bilecky, *supra* note 10, at 24.

[176] Bustillo, *supra* note 47.

[177] *See 2017 Census of Agriculture Highlights*, USDA NAT'L AGRIC. STAT. SERV. (Apr. 2019), https://www.nass.usda.gov/Publications/Highlights/2019/2017Census_Farm_Producers.pdf [https://perma.cc/D9UW-EPQB].

[178] *See* Castro & Willingham, *supra* note 25.

[179] *See id.*

[180] Jared Hayes, *USDA Data: Nearly All Pandemic Bailout Funds Went to White Farmers*, ENVTL. WORKING GRP. (Feb. 18, 2021), https://www.ewg.org/news-insights/news/usda-data-nearly-all-pandemic-bailout-funds-went-white-farmers [https://perma.cc/A9MA-9RSY].

Program, designed to help farmers weather the coronavirus pandemic.[181] In a situation strikingly similar to that of decades before, 73% of black farmers were not aware of pandemic relief programs available to them due to poor outreach efforts and lingering distrust of the USDA.[182] In addition, USDA data shows that white farmers received, on average, four times more than the average black farmer:[183] the average white farmer received $3,398, whereas the average black farmer received $422.[184] In addition, the USDA granted loans to only 37% of black applicants in 2021 through a program that helped farmers pay for land, equipment, and repairs, but they granted loans to 71% of white applicants.[185]

The critical question, then, is why the rapid decline of black-owned farmland and the strong bias against black farmers in loan distribution continues. In addition to the historical conditions discussed in this note—racial discrimination, lack of institutional economic support, discriminatory lending practices, and others—racist USDA policies did not end with *Pigford*.[186] There are current conditions that continue to advance and encapsulate systemic oppression against black farmers, despite the significant political and legal advances provided by *Pigford* and ensuing legislation.[187]

Thomas Vilsack, the current U.S. Secretary of Agriculture under the Biden Administration, acknowledged that the pandemic relief money for the agricultural sector disproportionately benefitted white-owned farms and, in a rebalancing attempt, enacted ARPA.[188] Section 1005 of the ARPA ("Section 1005"), titled *Farm Loan Assistance for Socially Disadvantaged Farmers and Ranchers*, allocated $4 billion toward debt forgiveness not only for black farmers, but also for thousands of American Indians, Hispanics, Alaskan Natives, Asian Americans, and Pacific Islander farmers.[189]

---

[181] *Id.*

[182] Wynn v. Vilsack, 545 F. Supp. 3d 1271, 1279 (M.D. Fla. 2021).

[183] Hayes, *supra* note 180.

[184] *Id.* ("The disparity between white and Black farmers was even greater for the Market Facilitation Program created by the Trump administration to offset the impact of Trump's failed trade war with China, which closed many lucrative markets for many American farmers."); *see* Nathan Rosenberg, *USDA Gave Almost 100 Percent of Trump's Trade War Bailout To White Farmers*, FBLE (July 24, 2019), http://www.farmbilllaw.org/2019/07/24/usda-gave-almost-100-percent-of-trumps-trade-war-bailout-to-white-farmers/ [https://perma.cc/W73Z-BH5G] (stating 99.4% of the funds distributed went to white farmers).

[185] *See* Bustillo, *supra* note 47.

[186] *See* Browning, *supra* note 32, at 3.

[187] *Id.*

[188] Alan Rappeport & Ana Swanson, *Biden Administration Ramps Up Debt Relief Program to Help Black Farmers*, N.Y. TIMES (Mar. 25, 2021), https://www.nytimes.com/2021/03/25/us/politics/biden-debt-relief-black-farmers.html [https://perma.cc/9FAS-32CL].

[189] *See* American Rescue Plan Act, Pub. L. No. 117, 135 Stat. 4 (2021).

However, in 2021, a federal district court enacted a nationwide halt of Section 1005 due to a challenge from a white farmer, who had qualifying loans, but was ineligible for debt relief under Section 1005 solely because of his race.[190] There have been many similar lawsuits from white farmers seeking enjoinment of Section 1005, arguing that the program applied "strictly on racial grounds," irrespective of any other factor.[191] To implement Section 1005, the government was required to show a strong basis in evidence for its conclusion that past racial discrimination warrants a race-based remedy.[192] The government relied on substantial legislative history, testimony given by experts at various congressional committee meetings, reports prepared at Congress's request regarding discrimination in USDA programs, and floor statements made in support of Section 1005.[193]

Despite the trial court's admission that the USDA has an undeniable dark history of discrimination against minority farmers, it determined that the significant remedial measures previously taken by Congress had adequately solved the problem.[194] Therefore, the historical evidence did not address the need for continued remediation through Section 1005.[195] Rather, for the government to justify additional remedial action, they must present evidence that either the prior remedial measures failed to adequately remedy the harm caused by USDA's past discrimination, or that the government remains a participant in discrimination in USDA loans and programs.[196]

The government pointed to the insufficiency of past remedies and the USDA's continued participation in discrimination by presenting evidence of: (1) incomplete debt relief; (2) the erosion of recovery through state taxes; (3) reports before Congress showing that the settlements have not cured the problems faced by minority farmers; and (4) statistics showing the disproportionately low distribution of pandemic relief assistance.[197] However, the evidence presented was insufficient to withstand constitutional scrutiny.[198] The court held that Section 1005 even appears to duplicate or, in some instances, exceed the relief granted to those who suffered discrimination already remedied through *Pigford*, and that the government did not give serious consideration to any race-neutral alternatives.[199]

---

[190] *Wynn*, 545 F. Supp. 3d at 1295.

[191] *Id.* (holding that affording special treatment to socially disadvantaged farmers—a group defined in part by their racial identity—is unconstitutional race discrimination).

[192] *Id.*

[193] *Id.* at 1278.

[194] *Id.* at 1279.

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.* at 1285.

The delays caused by the district court's injunction have forced many black farmers to fall even deeper into debt over the past year.[200] Mr. Smith, a black father of four who owes about $200,000 in outstanding loans on his ranch, quickly signed and returned documents to the Agriculture Department last year, formally accepting the debt relief.[201] He then purchased more equipment for his ranch, believing that he had been given a financial lifeline upon which to rely.[202] Instead, Mr. Smith has now fallen deeper into debt, and black farmers across the nation have yet to see any of the Biden administration's promised relief.[203]

These remedy-based solutions fail to provide any real change, and serve as an attempt at a band-aid tactic by the government to redress decades of wrongful treatment. These remedy-based solutions are, in part, failing substantively and now legally, as well. The issues black farmers continue to face today are simply a continuation of historical oppression: the present-day effects of past discrimination dating from the denial of "Forty acres and a Mule" at the beginning of the First Reconstruction to reverse discrimination suits brought by white farmers against black farmers in 2021.[204] Agriculture Department programs are so entrenched in their discriminatory practices that the system needs a substantial structural remedy to open the farming market to black farmers.

Despite the disproportionate effects that the USDA's discrimination continues to have on minority farmers, courts appear willing to tolerate such discrimination, even claiming that current statistical discrepancies can be explained by non-race related factors, such as farm size.[205] However, even in the absence of intentional discrimination, systemic institutional processes and policies can perpetuate racial inequality.[206]

The Supreme Court has continuously allowed legislation with disparate impacts on minority groups under the guise of "no intent to discriminate," even in cases as recent as 2021.[207] The Supreme Court continues to cynically foster discrimination; for example, the Court upheld new Arizona voting laws that had disparate impacts on minority groups because the restriction was facially neutral and had not been enacted with

---

[200] Alan Rappeport, *Black Farmers Fear Foreclosure as Debt Relief Remains Frozen*, N.Y. TIMES (Feb. 21, 2022), https://www.nytimes.com/2022/02/21/us/politics/black-farmers-debt-relief.html [https://perma.cc/NR2G-K9DH].

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *See id.*

[205] *Wynn*, 545 F.Supp. 3d at 1280–81.

[206] Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL'Y & L. 197, 202 (2004-2005).

[207] *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

discriminatory intent.[208] Because there was only "modest evidence" of racially disparate burdens caused by the voting laws, the State's justifications were sufficient to avoid liability.[209] When dealing with contemporary racism, it is unlikely that one will find facially discriminatory policies within any institution or organization.[210] However, rulings—such as *Brnovich v. Democratic National Committee*—continue to enable racist organizations, like the USDA, to discriminate to such an extent that the USDA need not enact discriminatory processes and policies in order to discriminate—they are able to do so under the facade of facially neutral processes and policies.[211]

IV. RESOLUTION

A. Recognizing the Reality of the Lock-In Model

Governmental organizations such as the USDA and the courts alike must leave behind that antiquated idea that only intentional racism is impermissible, and must also seek to quash self-reinforcing institutional processes that can produce persistent racial inequality.[212] The Lock-In Model of Inequality is the guiding principle behind this approach to modern racism, which was originally designed to explain how market monopolies can become self-reinforcing over time—to such an extent as to become a permanent part of the economic landscape, even in the absence of continuing intentional wrongdoing by a monopoly firm.[213] The model explains that institutionally self-reinforcing processes may become "locked-in" if they create barriers to entry that prevent competitors from catching up.[214] In the racial context, just as a financial firm's early monopoly advantage can become locked into the market over time, so too can a race's early advantage become institutionally difficult to dismantle, even in the absence of intentional discrimination.[215] Understanding inequality as "locked-in" exposes the lack of mobility across race boundaries.[216]

The lock-in model of racial inequality puts forward three central claims about the nature of racial inequality.[217] First, contemporary racial inequality is a path-dependent product of early history, meaning past events

---

[208] *Id.*
[209] *Id.* at 2347–48.
[210] Roithmayr, *supra* note 206, at 243.
[211] *See Brnovich*, 141 S.Ct. at 2350.
[212] Roithmayr, *supra* note 206, at 205.
[213] *Id.* at 207.
[214] *Id.*
[215] *Id.* at 209.
[216] *Id.* at 256.
[217] *Id.* at 209.

and decisions have constrained future advancement.[218] More specifically, earlier events have charted a particular course of history for many minority groups—a course that maintains persistent racial inequality.[219] Such actions created generational wealth and stability for white families and generational poverty and instability for African-Americans.[220] Second, whites' early anti-competitive advantage may have become self-reinforcing.[221] Third, in the absence of some intervening event, racial disparities may persist indefinitely.[222] Any policy looking to remedy locked-in racial inequality would incur significant structural and political costs of restricting or modifying routine institutional practices.[223] Historical racial advantage can become self-reinforcing through these feedback loops, even in the absence of intentional discrimination.[224]

B. Expanding the Definition of Discrimination

When dealing with issues of USDA discrimination today, one must consider that institutional structures have already unfairly rigged the system for black farmers.[225] When considering potential remedies to the USDA's locked-in racism, the regulatory definition of discrimination must be expanded to include actions that reinforce historical disparities, rather than simply ignoring the dynamic effects of accumulated disadvantage on contemporary racial disparities.[226] Specifically, discrimination could be defined to include any institutional rule, practice, or decision that has racially disparate effects—regardless of whether it is motivated by malice, economic self-interest, or administrative efficiency—as long as the rule, practice, or decision creates, reproduces, or reinforces specific racial disparities that were historically associated with intentional discrimination.[227] This expansion would force to the surface the almost-physical constraints created by the "barriers" to entry for black farmers in America. Recognized in *Wynn v. Vilsack*, those barriers include smaller farm sizes, weaker credit histories, and lack of clear title to land.[228] Although the court ultimately found that these

---

[218] *Id.;* Caroline Banton, *Path Dependency*, INVESTOPEDIA (Nov. 29, 2021), https://www.investopedia.com/terms/p/path-dependency.asp [https://perma.cc/J2FH-WXFA].

[219] Roithmayr, *supra* note 206, at 209.

[220] Vitolo v. Guzman, 999 F.3d 353 (6th Cir. 2011).

[221] Roithmayr, *supra* note 206, at 209.

[222] *Id.* at 210.

[223] *Id.*

[224] *Id.* at 213.

[225] *Id.* at 253.

[226] *Id.* at 239–40.

[227] *Id.* at 245.

[228] *Wynn*, 545 F. Supp. 3d at 1279–80.

barriers could not be connected to prior or ongoing discrimination by the USDA,[229] they still exist within the race-neutral institutional practices of the USDA.[230] Many of the barriers today are not facially discriminatory, but they nevertheless prevent forward progress and mobility for the modern-day black farmer.[231] Expanding the regulatory definition of discrimination within U.S. Agriculture Agencies would begin to chip away at these longstanding and seemingly impenetrable barriers.

For example, a USDA rule allowing the FSA to consider previously generated revenue from each farm when determining loan grants would be a discriminatory policy under the expanded definition of discrimination. Black farmers were historically passed over for loans, and were therefore unable to generate the same amount of revenue as larger, white-owned farms.[232] Therefore, the consideration of previously generated farm revenue would have disparate impacts on black-owned farms and would reinforce disparities in U.S. agriculture that were historically associated with racial discrimination in loan and credit administration.[233] In contrast, if the USDA considered the types of crops grown when determining loan grants, this may not as easily constitute discrimination. Although this might disparately impact black farmers, it would not reinforce specific disparities that were historically associated with race. Rather, it would be reflective of the country's needs at the time (i.e., certain crops may be prioritized based on the needs of the American public and trade agreements).

South Africa has recent experience with a similarly expanded definition of discrimination.[234] The South African Constitution's equality clause prohibits "unfair discrimination" on the basis of race, gender, sexual orientation, and a number of other listed grounds that are utilized when deciding cases.[235] Importantly, this expanded definition does not depend on any allegation of individual intent[236] and is therefore far more able to discern links between, for example, farm size and race, than an intent-based definition would be able to capture. Further, this definition imposes strict requirements on available defenses, ruling that it cannot be enough for

---

[229] *Id.*

[230] *See id.*

[231] *See id.*

[232] Roithmayr, *supra* note 206, at 245.

[233] *Id.*

[234] *Id.* at 246.

[235] S. AFR. CONST. ch. 2 (Bill of Rights), § 9.

[236] Roithmayr, *supra* note 206, at 246–47 ("In *Pretoria City Council v. Walker*, 1998 (2) SA 363 (CC) ¶ 43, the South African Constitutional Court explicitly decided that plaintiffs need not allege intent to discriminate in order to bring an unfair discrimination claim under § 9(3) of the South African Constitution. To be sure, the *Walker* court also held that the intent to discriminate was relevant in assessing the potential unfairness of government conduct, but the court found that intent was not dispositive.").

defendants to prove a business necessity because business necessities are precisely what make institutional practices self-reinforcing.[237] For example, although larger farms are undeniably more profitable, this defense alone will not suffice to prove a lack of discrimination if such a decision could lead to racially disparate impacts.[238] The South African equality clause focuses on whether the defendant has engaged in "unfair discrimination."[239] The defendant can argue that the relevant action is actually fair discrimination,[240] but such a defense is difficult to prove. To date, the only case in which the South African Constitutional Court has found "fair discrimination" involved a city's efforts to remedy the historic disadvantage of blacks via race-conscious means.[241]

The U.S. is likely not in need of such aggressive measures that were uniquely necessary to transition the country of South Africa to a new Constitutional order,[242] and the U.S. modern jurisprudence on societal discrimination would likely strike down any legislative remedies that rely on notions of historical discrimination or race-consciousness as unconstitutional.[243] However, the South African equality clause can prove instructive for a regulatory change within U.S. government agencies such as the USDA. The model reflects the growing consensus in social science research that accumulated advantage and disadvantage plays a central role in persistent racial disparities.[244]

The application of an expanded definition of discrimination is not necessarily retroactive in that it does not provide an exact remedy or compensation for those who have been previously wronged (i.e., reparations, payouts, etc.), but it is preventative in its application because it is instead *based* on previous wrongs with the goal of ensuring that the same

---

[237] *Id.* at 247 ("Title VII specifies that, once a plaintiff demonstrates the disparate impact of a specific business practice, an employer must demonstrate that the challenged practice is job-related and consistent with business necessity."); *see* 42 U.S.C.A. S2000e-2(k)(1)(A)(i) (amending Title VII to add section 703(l)(1)(a)).

[238] *Id.* (suggesting that rather, defendants should be held to a "business necessity plus" standard more akin to a compelling governmental interest).

[239] *See* S. AFR. CONST. ch. 2, § 9(2).

[240] *See* Harksen v. Lane N.O., 1997 (11) BCLR 1489 (CC) at ¶ 45.

[241] Roithmayr, *supra* note 206, at 247 ("In *Pretoria v. Walker*, the Court found for the City of Pretoria on behalf of black residents, when the city had adopted differential rates that favored historically black areas. In that case, the Court decided that rate differentiations were on its face discrimination on the basis of race, but that the discrimination was not unfair given that the rate differentials were trying to remedy historic disadvantage. *See* 1998(3) BCLR 257, 275, 290–91.").

[242] *Id.* at 248.

[243] *Id.* at 250.

[244] DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 31–37 (1999); *See generally* MELVIN OLIVER & THOMAS SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL EQUALITY (1995).

discrimination will not occur again in the future.[245] With this change in mind, legislation such as ARPA could be implemented to potentially remedy the historic disadvantage of black farmers via race-conscious means and "fair discrimination."[246] The opportunity for rare "fair discrimination" practices would bar white farmers from so easily succeeding in reverse racism litigation, like in *Wynn v. Vilsack*, because strictly race-based remedies are not unfair to white farmers given that the program is attempting to remedy historic disadvantage that white farmers have not experienced.[247] Although the current Court does not appear predisposed to shift to an expanded definition of discrimination, this model could prove to be an avenue to build upon the *Pigford* legacy, and could be useful as a conceptual model[248] that will draw attention to USDA policies that, although facially neutral, have discriminatory effects.

C. Making Institutional Changes

An analysis of the USDA's systemic racism arose from both the collective level of the institution itself and from those individual agents who follow USDA rules and policies.[249] When dealing with USDA discrimination today, one must consider that institutional structures have already unfairly rigged the system for black farmers.[250] Eliminating the structural racism that is deeply entrenched within the USDA may require the dismantling of a web of institutional processes that reinforce such discrimination.[251]

The Locked-In Model suggests that small changes in the right places can accomplish a great deal.[252] For example, slight modifications made to the loan application process would likely drastically impact the number of loan approvals for black farmers. Depending on the type of loan a farmer wants, that farmer must meet specific eligibility requirements.[253] Farming discrimination has created cumulative economic and opportunity disadvantage for black farmers, and many of the remaining loan requirements today continue to reinforce this disadvantage.[254] For example, one eligibility

---

[245] Roithmayr, *supra* note 206, at 247.

[246] *Id.*

[247] *Id.*

[248] *Id.* at 250.

[249] *See* Roithmayr, *supra* note 206, at 255.

[250] *Id.*

[251] *Id.*

[252] *Id.* at 244.

[253] U.S.D.A. FARM. SERV. AGENCY, YOUR GUIDE TO FSA FARM LOANS 17–19 (June 2012), https://www.fsa.usda.gov/Internet/FSA_File/fsa_br_01_web_booklet.pdf [https://perma.cc/M4DG-3263].

[254] *Id.* at 19.

requirement for a direct loan from the FSA requires a farmer to "show that I have a good credit history (I pay my bills on time) or, if I do not, I can show that my failure to pay my bills was due to circumstances beyond my control, was infrequent, or did not happen recently."[255] As evidenced in prior sections of this Note, poor credit is the most common reason cited for the rejection of black farmers' direct loan applications.[256] This irony is not lost on farmers like Travis Cleaver of Hodgenville, Kentucky, who said in an interview: "If you have good credit, they say 'go get a loan at a primary institute, you don't need us.' So, it's a double-edged sword. To me it's just trickery because you have bad credit, or you have too good credit. They have too many loopholes."[257] This requirement should be amended to establish an exception for black farmers who had previously been denied loans or credit assistance based on race in order to offset the dark history of credit discrimination against black farmers that has been conclusively proven through *Pigford*. It cannot be ignored any longer that the reason behind most black farmers' poor credit histories and lack of farm profitability is that U.S. Agriculture programs make it nearly impossible for them to succeed.

According to the loan application, if a farmer applying for the loan answers "no" to any of the requirements on the loan application, the farmer must discuss the requirement further with an FSA loan officer—a significant step in the application process where a large majority of black farmers historically have ran into serious problems dealing with the racist personnel employed at local USDA offices.[258] Although many of the "significant" remedial measures cited by the court in *Wynn v. Vilsack* as correcting past discrimination against minority farmers referenced "adopting measures to increase [socially disadvantaged farmers and ranchers] participation on local USDA committees,"[259] the Lock-In Model suggests that integration alone will never remedy locked-in inequality.[260] These local county officers remain the primary point of contact for farm assistance loans today.[261] While integration of more minority farmers into these offices is a step in the right direction, merely bringing non-whites into local office administration by itself will not eliminate racial disparities in the stringent loan process.

---

[255] *Id.*

[256] Bustillo, *supra* note 47; *See supra* pg. 7-8.

[257] *Id.*

[258] YOUR GUIDE TO FSA FARM LOANS, *supra* note 253, at 18.

[259] *Wynn*, 545 F. Supp. 3d at 1279.

[260] Roithmayr, *supra* note 206, at 244.

[261] U.S.D.A. FARM. SERV. AGENCY, LOANS FOR SOCIALLY DISADVANTAGED FARMERS AND RANCHERS 2 (Aug. 2019), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/2019/sda_loans-fact_sheet-aug_2019.pdf [https://perma.cc/UJ67-4DPU].

V. CONCLUSION

Although progressive policymakers and *Pigford* have made strides in addressing past discrimination against black farmers and the resulting loss of land and generational wealth, there is still much work to be done in dismantling the structural racism embedded within the USDA. While *Pigford* left much to be desired in terms of changing the cultural landscape within U.S. Agricultural Programs, it gave credence to the many issues that previously remained hidden under the surface of the powerful USDA and provided the grounds for transformative frameworks, like the Lock-In Model.

Monitoring the continued impacts of *Pigford* within modern jurisprudence, expanding the regulatory definition of discrimination amongst government agencies, and making small but effective changes to USDA policies and procedures is a start in devoting renewed attention to the USDA's culture.

Mike Epsy, the 25th Secretary of Agriculture and Former Member of Congress, stated, "When two branches of government, the Executive and Legislative, can't get it done, our nation allows the option to aggressively engage the third, the Judiciary, for redress."[262] However, when the Judiciary does just that, change will only result from continued pressure on the Executive and Legislative branches of government. More needs to be done, and only a continuing commitment to the USDA's process of cultural transformation looking forward will make a lasting difference.

---

[262] EPSY, *supra* note 4, at 12.