

Ending a War Waged by Deed of Title: How to Achieve Distributive Justice for Black Farmers

JORDAN C. PATTERSON*

TABLE OF CONTENTS

I.	INTRODUCTION	301
II.	THE RISE OF THE BLACK FARMER IN THE SOUTH.....	304
III.	A WAR WAGED BY DEED OF TITLE: USDA DISCRIMINATION AND THE BLACK FARMERS CASES	306
	A. <i>Racial Discrimination by the USDA and Other Actors</i>	306
	B. <i>The Black Farmers Cases</i>	309
	C. <i>Problems with the Black Farmers Cases</i>	312
IV.	CONGRESS SHOULD ENACT A DISTRIBUTIVE JUSTICE FUND TO COMBAT THE EFFECTS OF THE DISPOSSESSION OF BLACK FARMLAND	315
	A. <i>The Victim Compensation Fund</i>	316
	B. <i>Strengths of the Victim Compensation Fund</i>	317
	1. <i>Expediency of the VCF</i>	318
	2. <i>Accessibility of the VCF</i>	319
	C. <i>Weaknesses of the Victim Compensation Fund</i>	321
	D. <i>A Distributive Justice Fund Is a Better Alternative than a Traditional Tort Based Corrective Justice Model</i>	323
V.	A DISTRIBUTIVE JUSTICE FUND AND BLACK FARMERS	325
	A. <i>Expediency</i>	326
	B. <i>Accessibility</i>	327
	C. <i>Fairness</i>	329
VI.	CONCLUSION.....	330

I. INTRODUCTION

A war waged by deed of title has dispossessed land from 98% of Black farmers in the United States—about 12 million acres in the last century.¹ By

* J.D. Candidate, 2021, The Ohio State University Moritz College of Law; Articles Editor, 2020–2021, *Ohio State Law Journal*. Special thanks to Professor Ellen E. Deason for her thoughtful suggestions, as well as Managing Editor Eleni Christofides and the *Ohio State Law Journal* team for their hard work in preparing this Note for publication. I also want to acknowledge journalist Vann R. Newkirk II for his September 29, 2019 Atlantic article, *The Great Land Robbery*, which provided the inspiration for this article and its research.

¹ Vann R. Newkirk II, *The Great Land Robbery*, ATLANTIC (Sept. 29, 2019), <https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-land/594742/> [https://perma.cc/R2H5-XM8T] (“The telling factor, looking at it from the long view, is that

many different means—mostly legal—Black² farmers lost their homes and livelihoods. Willena Scott-White’s family fell victim to these tragic takings.³ Willena’s grandfather, Ed Scott Jr., sharecropped, rented, and managed farms for white farmers until he was able to buy his first 100 acres.⁴ By the time the elder Scott passed away in 1957 he had amassed more than 1,000 acres of farmland.⁵ Scott’s farmland was foreclosed on due to lack of aid in the 1980s.⁶

“When they steal your land, they steal your future,” Atlanta resident Stephanie Hagans uttered while researching how her great-grandmother, Ablow Weddington Stewart, lost her thirty-five acres in North Carolina.⁷ Hagans’ great-grandmother lost her land after a white lawyer refused to accept payment for her debt of \$540 and instead foreclosed on her home.⁸ In 1964, another example of this type of land loss occurred when the state of Alabama sued Lemon Williams and Lawrence Hudson—two cousins—contending that their family had no right to two forty-acre farms in Alabama.⁹ The family had worked the land for nearly a century, but state officials contended, and Circuit Judge Emmett F. Hildreth ultimately determined, that the land belonged to the state.¹⁰ The judge declared that removing the family, who owned the land since 1874, would be “a severe injustice,” but allowed the state to take the land anyway.¹¹

at the time of World War I there were 1 million black farmers, and in 1992 there were 18,000.”).

²The word “Black” is capitalized in this Note when used in the context of race and culture. The Black experience in the United States is unique and one of shared history and culture. The word “white” will not be capitalized in the same way because, as the Associated Press said, “white people in general have much less shared history and culture, and don’t have the experience of being discriminated against because of skin color.” David Bauder, *AP Says It Will Capitalize Black but not White*, AP (July 20, 2020), <https://apnews.com/article/7e36c00c5af0436abc09e051261fff1f> (on file with the *Ohio State Law Journal*).

³Newkirk II, *supra* note 1 (stating that the elder Scott was able to buy his land from an “uncommonly progressive [white man], [who] encourag[ed] entrepreneurship among the black laborers on his plantation, building schools and churches for them, and providing loans”).

⁴*Id.*

⁵*Id.*

⁶*Id.*

⁷Todd 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/8EDL-6BU6>] [hereinafter Lewan & Barclay, *Steal*].

⁸*Id.*

⁹*Id.*

¹⁰*Id.* Even though the families’ deeds indicated ownership of the land, the federal government had designated the land as “swampland and patented the property to the state of Alabama” in 1906. Todd Lewan, *Alabama Pushed a Black Family off Its Land – and Left It Empty for Years*, AP (2006), <http://www.mamiwata.com/sweetwater.html> [<https://perma.cc/8EDL-6BU6>].

¹¹Lewan & Barclay, *Steal*, *supra* note 7.

Internal memos and letters showed that the family being Black was integral to the case.¹²

These stories, and many others like them, share a common result: Black farmers losing their land. There has been some compensation for this mass land loss. The *Pigford v. Glickman* settlements, which this Note will discuss, initially allowed for settlement of about 23,000 discrimination claims against the U.S. Department of Agriculture (USDA) for its role in the loss of farmland.¹³ The settlements allowed Black farmers to receive compensation, via cash awards and debt relief, for racial discrimination by the Department.¹⁴ Fortunately, some families, like the family of Willena Scott-White, were able to receive compensation through this settlement.¹⁵ However, this compensation was inadequate and unrepresentative of the massive amounts of damage imposed. The class certified in *Pigford* only allowed for claims of discrimination from 1981–1996, ignoring most of the damage inflicted upon Black farmers, like the relatives of Hagans, Williams, and Hudson, who lost their land prior to 1981.

This Note examines the history surrounding the *Pigford v. Glickman* litigation and concludes that Congress should enact a Distributive Justice Fund based on the structure of the September 11th Victim Compensation Fund (VCF). Part II briefly discusses the history of Black farmland ownership—from Reconstruction to the present day—and the harm inflicted by the mass dispossession of Black-owned farmland. Part III describes the broad racial discrimination by the USDA and the settlement agreements in *Pigford* and *Black Farmers* litigation (collectively going forward, Black Farmers cases). Part IV argues that the VCF should be used as a model to set up a Distributive Justice Fund for Black farmers and their descendants. Without intervention by the federal government Black farmers and their descendants will continue to suffer from gross injustice. Part V then explains how and why the VCF model should be altered to address the needs of and provide equitable relief to Black farmers. Lastly, Part VI briefly concludes by advocating for a Distributive Justice Fund to help provide relief for the Black farmers and their descendants.

¹² *See id.* (“The state’s internal memos and letters on the case are peppered with references to the family’s race. . . . [T]he AP located deeds and tax records documenting that the family had owned the land since an ancestor bought it on Jan. 3, 1874.”). Moreover, Alabama’s director of conservation, Claude D. Kelley, indicated that “the state had no intention of dropping the lawsuit because income from cutting timber on it could be used for state-run hospitals.” Lewan, *supra* note 10.

¹³ CONG. RESEARCH SERV., RS20430, THE PIGFORD CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 2, 6 (2013), https://www.everycrsreport.com/files/20130529_RS20430_dd9873a41009e49aa63cdc17a785093c21f8eb23.pdf [<https://perma.cc/2DV5-9NPG>].

¹⁴ *Id.* at 8.

¹⁵ Newkirk II, *supra* note 1.

II. THE RISE OF THE BLACK FARMER IN THE SOUTH

Black land ownership was a new phenomenon during the late 19th century that was born out of revolutionary legislation. Abraham Lincoln ushered in a new dawn by executive order when he issued the Preliminary Emancipation Proclamation in 1862.¹⁶ This executive order dropped the “Preliminary” label when it went into effect on January 1, 1863 and declared “that all persons held as slaves . . . are, and henceforward shall be free.”¹⁷ While the Proclamation did not end slavery, it was a vital first step.¹⁸ The practice of slavery was not formally abolished until the Thirteenth Amendment was passed in 1865.¹⁹ That amendment—along with the Fourteenth and Fifteenth Amendments—fundamentally altered society by entitling Black people to fundamental rights as citizens.²⁰ One such fundamental right was the right to own property.²¹

It was a momentous triumph for the country when the formerly enslaved gained independence; however, they predictably struggled to gain independent access to property and climb the economic ladder.²² The government bore the responsibility to step in, but proposals aimed to help the formerly enslaved all failed for a multitude of reasons.²³ For example, the fabled promise of “Forty Acres and a Mule” was intended to provide opportunities for the formerly enslaved Black citizens to farm on land confiscated from Confederate actors, but was revoked by President Andrew Johnson months after the order was

¹⁶ Emancipation Proclamation, 12 Stat. 1267, 1267 (1862), *reprinted in Preliminary Emancipation Proclamation, September 22, 1862*, NAT’L ARCHIVES & RECORDS ADMIN., https://www.archives.gov/exhibits/american_originals_iv/sections/transcript_preliminary_emancipation.html [<https://perma.cc/GAW2-N8UG>].

¹⁷ *The Emancipation Proclamation*, NAT’L ARCHIVES & RECORDS ADMIN., <https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation> [<https://perma.cc/4GU8-KSPS>] (“Despite this expansive wording, the Emancipation Proclamation was limited in many ways. It applied only to states that had seceded from the United States . . .”).

¹⁸ Jordan D. Nickerson, *America’s Invisible Farmers: From Slavery, to Freedmen, to the First on the Land*, 23 *DRAKE J. AGRIC. L.* 253, 254 (2018).

¹⁹ *Id.* While the Emancipation Proclamation was symbolically important, it did not stop the practice of slavery or give African American’s any rights. It was not until the Constitution was amended that the formerly enslaved were acknowledged as people under the eyes of the law. *See* U.S. CONST. AMEND. XIII, *reprinted in 13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)*, WWW.OURDOCUMENTS.GOV, <https://www.ourdocuments.gov/doc.php?flash=false&doc=40#> (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

²⁰ Nickerson, *supra* note 18, at 254–55.

²¹ U.S. CONST. amend. V.

²² Nickerson, *supra* note 18, at 255 (illustrating this vulnerability with a quote from one formerly enslaved person: “Gi[ve] us our own land and we take care [of] ourselves; but [without] land, [the] ole [masters] can hire us or starve us, as [they] please”).

²³ *Id.*

given.²⁴ The result was that only 2,000—out of a potential 40,000—Black citizens received and retained the confiscated lands after the war.²⁵

Additionally, newly liberated Black citizens became the responsibility of state and local governments. These new citizens brought a new tax burden to areas such as the Mississippi Delta which required action by local governments.²⁶ For example, by 1874 Delta landowners faced increased state and county tax rates that were at least 750% higher than in 1866.²⁷ Despite the lack of substantial aid or reconstruction during the Johnson administration, Black citizens, nonetheless, obtained property via private purchase.²⁸ Specifically, Black people were able to purchase property when white landowners—fearful of losing their more valuable properties—sold less developed, distant, backcountry land to pay for the increased taxes.²⁹ These sales were not out of benevolence, but desperation. And this desperation created opportunities for tens of thousands of Black men in the Delta to become farmers, resulting in immense growth of the emergent Black farming landscape.³⁰

The Black farmer's emergence was not exclusively confined to the Delta. By 1910 Black farmers made up about 16.5% of all landowners in the South.³¹ Furthermore, by 1920 14% of all farmers in the United States identified as African American—an estimated 926,000 Black-owned farms upon 15 million acres of land.³² Against all odds, Black farmers were able to acquire land that

²⁴ See *id.* Sherman's Special Field Order No. 15 is the source of the infamous promise. The order called for the settlement of Black families on confiscated land and encouraged freedmen to join the Union army to help sustain their liberty; the immediate effect would have provided settlement for 40,000 African Americans. Barton Myers, *Sherman's Field Order No. 15*, NEW GA. ENCYCLOPEDIA (Sept. 25, 2020), <https://www.georgiaencyclopedia.org/articles/history-archaeology/shermans-field-order-no-15> [https://perma.cc/3E5A-QUEK]. However, President Andrew Johnson overturned Sherman's order in the fall of 1865 and returned most of the land to the Confederate actors that originally owned it. *Id.*

²⁵ See *supra* note 24 and accompanying text.

²⁶ See JOHN C. WILLIS, FORGOTTEN TIME: THE YAZOO-MISSISSIPPI DELTA AFTER THE CIVIL WAR 44 (2000). Mississippi's state and county governments shouldered responsibility for Black citizens once freed. This caused a need for more revenue—which took on the form of increased property taxes and levies on private land. *Id.*

²⁷ *Id.* at 45 (“In some counties land tax rates rose 1200 percent between 1866 and 1874.”).

²⁸ See *id.* at 181.

²⁹ *Id.* at 180–81. The sky-high tax rates forced the planter's hands, to sell backcountry land that was dangerous and needed excavation before farming was possible. See *id.* at 8–9, 180–81.

³⁰ *Id.* at 181.

³¹ See Nickerson, *supra* note 18, at 256.

³² *Id.* at 257. It is important to note that all but 10,000 of these Black farmers lived in the South. *Id.* Southern farming became the social and economic lifeblood of the Black experience in the United States. See Newkirk II, *supra* note 1 (“According to the U.S. Department of Agriculture, there were 25,000 black farm operators in 1910, an increase of almost 20 percent from 1900. Black farmland in Mississippi totaled 2.2 million acres in 1910—some 14 percent of all black-owned agricultural land in the country, and the most of any state.”).

would allow them to be self-sufficient and secure. But the privilege of property ownership did not last long.

III. A WAR WAGED BY DEED OF TITLE: USDA DISCRIMINATION AND THE BLACK FARMERS CASES

Black farmers made great strides in land ownership after Reconstruction; however, through a variety of means—economic, legal, coercive, and occasionally violent—the land was stripped away, acre by acre.³³ While owners of small farms, regardless of race, suffer from economic forces,³⁴ what happened to Black farmers in the South was not simply the result of free-market economic turbulence—it was the result of a coordinated attack led by insidious forces.³⁵

A. Racial Discrimination by the USDA and Other Actors

Strides in Black farmland ownership were followed by misfortune. Despite its pledge to be nondiscriminatory, the USDA was at the heart of this misfortune by interfering with loan applications of Black farmers.³⁶ In 1935, the USDA

³³Newkirk II, *supra* note 1 (“[The land] was[] cleared, watered, and made productive for intensive agriculture by the labor of enslaved Africans, who after Emancipation would come to own a portion of it. Later, through a variety of means—sometimes legal, often coercive, in many cases legal *and* coercive, occasionally violent—farmland owned by black people came into the hands of white people. It was aggregated into larger holdings, then aggregated again, eventually attracting the interest of Wall Street.”). Black people in the South also went through intensive labor to make this land farmable. The land purchased in the Delta was uninhabitable before the Black farmers arrived; they readied the land to be utilized by removing trees, building levees, and overcoming dangerous predators and diseases, making the eventual losses even more tragic. *See* WILLIS, *supra* note 26, at 8–10.

³⁴Gregg Easterbrook, *Making Sense of Agriculture*, ATLANTIC (July 1985), <https://www.theatlantic.com/magazine/archive/1985/07/making-sense-of-agriculture/550250/> [<https://perma.cc/7PTT-JT4X>] (“Because of the nature of agriculture, farmers have a more difficult time responding to economic changes than people in other industries.”).

³⁵*See* Newkirk II, *supra* note 1 (“But what happened to black landowners in the South, and particularly in the Delta, is distinct, and was propelled not only by economic change but also by white racism and local white power.”).

³⁶Mark 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, 1234 (2009); *see also* Pigford v. Glickman, 185 F.R.D. 82, 85 (D.D.C. 1999). The USDA made a pledge, codified as 7 C.F.R. § 15.1(a), that:

[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

implemented a new system in which loans and benefits were administered by local county committees and supervisors that were not receptive to the needs of Black farmers.³⁷ The decisions of these committees determined who benefitted from the new system and Black farmers were often not included in committee leadership.³⁸ In other words, the main support and aid program for all farmers excluded Black farmers from its leadership and resources, resulting in a system that was discriminatory in both its structure and operation.

The USDA's system led to decades of complaints by Black farmers stating that county commissioners discriminated against them by "denying their applications, delaying the processing of their applications or approving them for insufficient amounts or with restrictive conditions."³⁹ For example, Alvin E. Steppes, a Black farmer from Lee County, Arkansas, applied for a USDA operating loan in 1986.⁴⁰ Steppes fully complied with the application process and other requirements but was unable to get access to the loans he was entitled to.⁴¹ The USDA denied his application and, as a result, Steppes lost his farm because he did not have the resources to plant new crops or treat the crops he already had.⁴² Further, in attempts to save his home and livelihood Steppes incurred substantial debts that he was unable to pay off.⁴³

7 C.F.R. § 15.1(a) (2020); *see also* Bunbury, Jr., *supra*, at 1234 n.33 ("[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.") (citations and internal quotation marks omitted).

³⁷ *See* Bunbury, Jr., *supra* note 36, at 1234–35; *see also* Cassandra Jones Havard, *African-American Farmers and Fair Lending: Racializing Rural Economic Space*, 12 STAN. L. & POL'Y REV. 333, 334 (2001) (discussing how the 1935 Soil Conservation and Domestic Allotment Act governed the financial assistance and loan distribution scheme to facilitate and provide agricultural credit to farmers).

³⁸ Bunbury, Jr., *supra* note 36, at 1235; *see also* *Pigford*, 185 F.R.D. at 87 ("The county committees do not represent the racial diversity of the communities they serve. In 1996, 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). . . . In the Southwest region, only 0.3% of the county commissioners were African American. In two of the remaining three regions, there was not a single African American county commissioner. Nationwide, only 37 county commissioners were African American out of a total of 8147 commissioners—approximately 0.45%.")

³⁹ *Pigford*, 185 F.R.D. at 87.

⁴⁰ Seventh Amended Class Action Complaint at 31–32, *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (No. 97-1978), 1998 WL 35264385 [hereinafter *Pigford* Seventh Amended Class Action Complaint].

⁴¹ *Pigford* Seventh Amended Class Action Complaint, *supra* note 40, at 32.

⁴² *See id.* ("These losses led to Mr. Steppes losing his farm land and his ability to farm and to like damages to many other African-American farmers in the same county and state.")

⁴³ *See id.* Alvin Steppes's story was common. He was a "representati[on] of many, if not all, African-American farmers in Arkansas in those years." *Id.* He was one of eighteen Black farmers from Lee County that filed a complaint with the USDA that year. *See id.* ("The racially discriminatory treatment Mr. Steppes was subjected to includes, in 1986, the unfair

In several Southeastern states the USDA took three times as long to process the application of a Black farmer as a white farmer.⁴⁴ The disastrous consequences of a loan delay appear in the story of Calvin Brown. Brown was a Black farmer from Brunswick County, Virginia, and he, like Steppes, fulfilled all the requirements when applying for an operating loan.⁴⁵ However, rather than being outright denied, Brown's loan was delayed by the USDA in 1984.⁴⁶ In anticipation of planting season, Brown filed his application in January but was forced to reapply when the USDA county supervisor falsely claimed he never applied in the first place.⁴⁷ By the time the USDA approved his second application and dispersed his loan money, it was already too late in the planting season to be of use; and, as a result, Brown experienced substantial financial losses from the lack of resources during the growing season.⁴⁸ To add insult to injury, the USDA placed the loan money in a supervised bank account that required a signature by a USDA county supervisor before Brown could obtain the funds—a requirement frequently enforced against Black farmers but not routinely imposed on white farmers.⁴⁹

These tragically common events persisted throughout the twentieth century and often resulted in the loss of land for Black farmers due to lack of access to resources. A “war waged by deed of title” has dispossessed 98% of Black-owned farmland—totaling 12 million acres—in the last century.⁵⁰ Moreover, most of the land losses occurred from the 1950s onward.⁵¹ Around the country, 500,000 Black-owned farms failed in the twenty-five years after 1950.⁵² It is estimated that an average of 820 acres a day—or around 6 million total acres—

denial by FmHA [the Farmers Home Administration] of operating credit, even though he should have qualified and complied with all loan application requirement[s]. This denial of credit prevented him from putting in crops and applying fertilizer, pesticides, and other treatments to the crops he did plant. As a result, he suffered a substantial loss in production and farm income in 1986.”)

⁴⁴ *Pigford*, 185 F.R.D. at 87. Delay can have disastrous effects because farming is a very fragile line of work. If resources are not distributed in an efficient fashion, crops will be lost, planting season will end, and disaster cannot be averted. These consequences affect a farmer's ability to maintain their farm and could result in a farmer not being able to pay his taxes, thus becoming at risk of losing their land. *See id.* at 86.

⁴⁵ *Pigford* Seventh Amended Class Action Complaint, *supra* note 40, at 24.

⁴⁶ *See id.* at 24–25.

⁴⁷ *Id.*

⁴⁸ *Id.* at 25.

⁴⁹ *Pigford*, 185 F.R.D. at 87.

⁵⁰ *Newkirk II*, *supra* note 1. However, this statement needs to be taken in context. While the takings have occurred over the last century, most of the losses occurred relatively recently—since the 1950s. *Id.* (“But even that statement falsely consigns the losses to long-ago history. In fact, the losses mostly occurred within living memory, from the 1950s onward. Today, except for a handful of farmers . . . black people in this most productive corner of the Deep South own almost nothing of the bounty under their feet.”).

⁵¹ *Id.*

⁵² *Id.*

were lost between 1950 and 1969.⁵³ In Mississippi Black farmers lost almost 800,000 acres of land from 1950 to 1964, which translates to an estimated financial loss of \$3.7 billion to \$6.6 billion today.⁵⁴

While the dispossession of Black farmland is not currently considered an uncompensated government “taking” in the Fifth Amendment sense,⁵⁵ the USDA’s actions, coupled with the federal government’s lack of protections, had the same unjust result: Black people losing their farmland without compensation. Investigations into the USDA have found that the organization’s actions and omissions created massive transfers of wealth from Black farmers to white farmers from the 1950s onward.⁵⁶ Evidence showed that racial discrimination “accelerate[d] the displacement and impoverishment” of Black farmers.⁵⁷ In sum, Black farmers were not able to acquire loans and benefits to keep their operations running or keep up with financial obligations. Accordingly, most of the dispossession was devised through *legal* mechanisms like tax sales, partition sales, and foreclosures. But these legal mechanisms were motivated by *illegal* pressures like racial discrimination, shady lawyers, unlawful denial of private loans, and acts of violence or intimidation.⁵⁸ Black farmers did not receive any compensation for the century’s worth of discrimination and takings until recently.

B. *The Black Farmers Cases*

The USDA only recently acknowledged this pattern of discrimination and dispossession. In 1994, the USDA commissioned a study that analyzed

⁵³ *Id.* This land loss equates to land the size of Central Park “erased with each sunset.” *Id.* (“Black-owned cotton farms in the South almost completely disappeared, diminishing from 87,000 to just over 3,000 in the 1960s alone.”).

⁵⁴ *Id.* (“An analysis for *The Atlantic* by a research team that included Dania Francis, at the University of Massachusetts, and Darrick Hamilton, at Ohio State, translates this land loss into a financial loss—including both property and income—of \$3.7 billion to \$6.6 billion in today’s dollars.”).

⁵⁵ U.S. CONST. amend. V (requiring that no person’s “private property be taken for public use, without just compensation”).

⁵⁶ Newkirk II, *supra* note 1.

⁵⁷ *Id.* (“In 1965, the United States Commission on Civil Rights uncovered blatant and dramatic racial differences in the level of federal investment in farmers. The commission found that . . . much larger loans [were provided to] small and medium-size white-owned farms, relative to net worth, than [were provided] for similarly sized black-owned farms . . .”).

⁵⁸ *Id.* The dispossession did not happen by accident—it was through conscious decision-making by public and private actors. *Id.* (“Mass dispossession did not require a central organizing force or a grand conspiracy. Thousands of individual decisions by white people, enabled or motivated by greed, racism, existing laws, and market forces, all pushed in a single direction.”).

complaints of discrimination from 1990–1995.⁵⁹ The study, which evaluated conditions surrounding loan programs, found that loans distributed to Black male farmers were on average 25% less than similar loans given to white male farmers.⁶⁰ Additionally, 97% of all disaster loan payments were given to white farmers, while less than 1% were given to farmers that were Black.⁶¹ These findings caused the 1996 Secretary of Agriculture, Dan Glickman, to order a suspension of all government farm foreclosures until an investigation into the racial discrimination of the USDA's loan program could be conducted.⁶² During this suspension, Glickman made some internal changes; however, the Department made no effort to redress past wrongs or compensate victims of discrimination.⁶³

In August of 1997, the lack of redress prompted Timothy Pigford to file a class action suit on behalf of Black farmers⁶⁴ for claims rooted in racial discrimination by the USDA.⁶⁵ Led by Pigford, the plaintiffs alleged that the USDA engaged in systematic discrimination in the awarding of farm ownership, operating loans, and other credit services and program benefits.⁶⁶ The plaintiffs further alleged that there was a systematic failure to process and investigate complaints of discrimination.⁶⁷ The lawsuit, *Pigford v. Glickman (Pigford I)*, had begun.⁶⁸ A complicating factor in *Pigford I* was the two-year statute of limitations for claims in the Equal Credit Opportunity Act (ECOA), which was the basis for the suit.⁶⁹ However, Congress, aware of this hurdle, waived the

⁵⁹ See CONG. RESEARCH SERV., RS20430, THE *PIGFORD* CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 2 (May 2013), https://www.everycrsreport.com/files/20130529_RS20430_dd9873a41009e49aa63cdc17a785093c21f8eb23.pdf [https://perma.cc/2DV5-9NPG].

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* The agency appointed the USDA Civil Rights Task Force to study racial discrimination in its loan programs. *Id.* The Task Force recommended ninety-two changes to address racial bias within the USDA but did not seek redress for past wrongs and compensation for losses suffered by Black farmers. *Id.*

⁶⁴ *Pigford v. Glickman*, 185 F.R.D. 82, 82 (D.D.C. 1999).

⁶⁵ See *id.* at 86; see also *supra* Part III.A.

⁶⁶ Kindaka Jamal Sanders, *Re-Assembling Osiris: Rule 23, the Black Farmers Case, and Reparations*, 118 PENN ST. L. REV. 339, 352 (2013).

⁶⁷ *Id.*

⁶⁸ See CONG. RESEARCH SERV., RS20430, THE *PIGFORD* CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 2 (May 2013), https://www.everycrsreport.com/files/20130529_RS20430_dd9873a41009e49aa63cdc17a785093c21f8eb23.pdf [https://perma.cc/2DV5-9NPG]. By mid-November of 1997 the government agreed to explore a mediation and settlement. *Id.* Even though the USDA had acknowledged their discriminatory past, the Department of Justice opposed blanket mediation, arguing that each case had to be investigated separately. *Id.* at 3. However, early in litigation it became obvious that the USDA would not be able to resolve the myriad of individual complaints from Black farmers, and in October of 1998 the court certified the class of Black farmers against the USDA. *Id.*

⁶⁹ *Id.*

statute of limitations on civil rights claims against the USDA made between 1981 and 1996—the period covered by *Pigford I*.⁷⁰ As the court date approached, the two sides reached a settlement, and in April of 1999 a consent decree was approved by the court, which allowed the claims process to proceed.⁷¹

The *Pigford* consent decree established a process where individuals could have their claims heard for eligibility and compensation.⁷² Specifically, the consent decree established a two-track dispute resolution system for claimants. Track A—the most widely used—provided a settlement of \$50,000 plus other relief if a claimant could present substantial evidence of eligibility.⁷³ Claimants utilizing Track B could seek larger payments by proving actual damages by a preponderance of the evidence—a higher bar.⁷⁴ The *Pigford I* claims process was not without its issues, but it did provide a historic amount of settlement agreements, with over a billion dollars in compensation for Black farmers.⁷⁵

Congress attempted to address some of the issues that arose in *Pigford I*, such as an issue of notice, when they passed the 2008 farm bill, which created a new right to sue for any claimant who was a late filer in the original suit.⁷⁶ This new cause of action resulted in many claims that were consolidated into a single case, *In re Black Farmers Discrimination Litigation (Pigford II)*.⁷⁷ The *Pigford II* settlement provided \$1.25 billion in additional settlements for eligible farmers.⁷⁸ The two Black Farmers cases have been the only form of compensation that Black farmers have received for a century of discrimination and dispossession. Despite the historic nature of the settlements—totaling over \$2 billion—it still is not enough.

⁷⁰ *Id.*

⁷¹ *Id.* The consent decree set forth a revised settlement agreement of all claims raised by class members and review of the claims began almost immediately. *Id.*

⁷² See *Pigford v. Glickman*, 185 F.R.D. 82, 95–98 (D.D.C. 1999).

⁷³ CONG. RESEARCH SERV., RS20430, THE *PIGFORD* CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 3 (May 2013), https://www.everycrsreport.com/files/20130529_RS20430_dd9873a41009e49aa63cdc17a785093c21f8eb23.pdf [https://perma.cc/2DV5-9NPG].

⁷⁴ *Id.* at 4.

⁷⁵ *Id.* at 7 (“The federal government provided a total of approximately \$1.06 billion . . . in cash relief, estimated tax payments, and debt relief to prevailing claimants.”).

⁷⁶ Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012(b), 122 Stat. 1651, 2210 (2008).

⁷⁷ *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 11 (D.D.C. 2011).

⁷⁸ See CONG. RESEARCH SERV., RS20430, THE *PIGFORD* CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 7 (May 2013), https://www.everycrsreport.com/files/20130529_RS20430_dd9873a41009e49aa63cdc17a785093c21f8eb23.pdf [https://perma.cc/2DV5-9NPG].

C. Problems with the Black Farmers Cases

Despite the historic settlements, there were many issues with *Pigford I*. These issues included a high percentage of claim denials, “ineffective or defective” notice, and a narrow temporal window.⁷⁹ The first issue—claim denials—can be traced to the consent decree requirements for eligibility. The *Pigford* consent decree established a two-track resolution mechanism where an eligible claimant was required to be: (1) an African-American; (2) who farmed or attempted to farm between January 1, 1981 and December 31, 1996; (3) applied for farm credit or program benefits with the USDA and believed they were racially discriminated against by the USDA; and (4) made a complaint against the USDA on or before July 1, 1997.⁸⁰ This class definition in *Pigford* proved too restrictive because of the substantial efforts required to become eligible. African American farmers had to prove they *applied* to the USDA for a federal farm credit or benefit program and *filed* a discrimination complaint regarding their application.⁸¹ The consent decree further limited the class when it required that each class member provide proof that they filed a discrimination complaint or submit an affidavit from a non-family member stating they have

⁷⁹ See *id.* at 5; see also Bunbury, Jr., *supra* note 36, at 1247 (“Considering the historical discrimination that the USDA practiced, why do[] [the settlements] only offer assistance to those who attempted to farm between January 1, 1981, and December 31, 1996?”). Under *Pigford I*, a claimant could file a claim under either Track A or Track B. Track A was the “virtually automatic” track which provided a monetary settlement plus relief in the form of loan forgiveness and offsets of tax liability. CONG. RESEARCH SERV., RS20430, THE *PIGFORD* CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 3, 5 (May 2013), https://www.everycrsreport.com/files/20130529_RS20430_dd9873a41009e49aa63cdc17a785093c21f8eb23.pdf [https://perma.cc/2DV5-9NPG]. Under Track B claimants could seek “larger, tailored payment[s] by showing evidence of greater damages.” *Id.* at 4. The catch lied in the evidentiary bar—Track B required a preponderance of the evidence whereas Track A merely required substantial evidence. *Id.* at 3–4.

⁸⁰ CONG. RESEARCH SERV., RS20430, THE *PIGFORD* CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 3 (May 2013), https://www.everycrsreport.com/files/20130529_RS20430_dd9873a41009e49aa63cdc17a785093c21f8eb23.pdf [https://perma.cc/2DV5-9NPG] (“The consent decree set up a system for notice, claims submission, consideration, and review that involved a facilitator, arbitrator, adjudicator, and monitor, all with assigned responsibilities.”); see also *Pigford v. Glickman*, 185 F.R.D. 82, 96–97 (D.D.C. 1999) (“A claimant asserting discrimination in a credit transaction can satisfy this burden by presenting evidence of four specific things: (1) that he owned or leased, or attempted to own or lease, farm land; (2) that he applied for a specific credit transaction at a USDA county office between January 1, 1981 and December 31, 1996; (3) that the loan was denied, provided late, approved for a lesser amount than requested, encumbered by restrictive conditions, or USDA failed to provide appropriate loan service, and such treatment was less favorable than that accorded specifically identified, similarly situated white farmers; and (4) that USDA’s treatment of the loan application led to economic damage to the class member.”).

⁸¹ See *Pigford*, 185 F.R.D. at 100.

personal knowledge that such a complaint was filed.⁸² Further, in order for a claimant to prove they were racially discriminated against by the USDA, claimants were required to show that their treatment was “less favorable than that accorded specifically identified, similarly situated white farmers,” the difficulty of which was amplified by poor access to USDA files.⁸³ The claim denial issue was particularly harmful because 80%–90% of class members lacked any documentary evidence of the alleged discrimination.⁸⁴

The second issue—the issue of notice—was a more alarming issue at the time. A large percentage of Black farmers missed the filing deadline due to a lack of awareness or inadequate information, and thus did not have their cases heard on the merits.⁸⁵ The notice issue affected so many eligible claimants that Congress included a provision in the 2008 farm bill that permitted any late filing *Pigford I* claimant who submitted a request to petition in federal court for a determination.⁸⁶ The claims that were filed were consolidated into a single case: *Pigford II*.⁸⁷ *Pigford II* resulted in a \$1.25 billion settlement⁸⁸—leaving the grand total of the two *Pigford* settlements at about \$2.31 billion.

Third, the consent decree’s temporal component was deficient. The USDA’s racial discrimination stretches back to the peak of Black farming—a century ago.⁸⁹ Although the *Pigford* claimants received historic judgments, it is still not enough. It is estimated that Black farmers lost amounts up to \$6.6 billion

⁸² *Id.* at 101. A “discrimination complaint” is defined broadly. It includes “a communication from a class member directly to USDA, or to a member of Congress, the White House, or a state, local or federal official who forwarded the class member’s communication to USDA.” *Id.* Even though this is seen as a broad definition, it still creates a barrier to class eligibility. Applying for a loan is a private endeavor that one doesn’t broadcast to everyone. By requiring an affidavit from a non-family member, the probability of a credible witness decreases dramatically. *See id.*

⁸³ CONG. RESEARCH SERV., RS20430, THE *PIGFORD* CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 4 (May 2013), https://www.everycrsreport.com/files/20130529_RS20430_dd9873a41009e49aa63cdc17a785093c21f8eb23.pdf [https://perma.cc/2DV5-9NPG]. The poor approval percentages under Track A—the lowest evidentiary bar—were relatively low due to these requirements. *See id.* at 5.

⁸⁴ *Pigford*, 185 F.R.D at 104. However, due to the nature of the settlement, claimants were still able to get compensation. If the case would have went to trial, however, it would have opened a lengthy legal battle and it would not be clear whether many class members would have been able to recover anything at all. *Id.*

⁸⁵ CONG. RESEARCH SERV., RS20430, THE *PIGFORD* CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 5 (May 2013), https://www.everycrsreport.com/files/20130529_RS20430_dd9873a41009e49aa63cdc17a785093c21f8eb23.pdf [https://perma.cc/2DV5-9NPG].

⁸⁶ *Id.* at 7 (“This provision did not reopen the previous *Pigford* litigation, but rather provided such farmers with a new right to sue.”).

⁸⁷ *See supra* Part III.B.

⁸⁸ CONG. RESEARCH SERV., RS20430, THE *PIGFORD* CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 7 (May 2013), https://www.everycrsreport.com/files/20130529_RS20430_dd9873a41009e49aa63cdc17a785093c21f8eb23.pdf [https://perma.cc/2DV5-9NPG].

⁸⁹ *See supra* Part III.B.

in the fifteen years beginning in 1950 alone.⁹⁰ Further, researchers conservatively estimate that the dispossession of Black farmland over the last century resulted in the loss of *hundreds of billions of dollars* of Black wealth—and depending on the multiplier effects, rate of return, and other factors, the loss could actually have reached into the *trillions*.⁹¹ While white farming declined during the 20th century as well, Black farm ownership declined two and a half times faster than white ownership.⁹² The loss of land for Black farmers was of a difference in kind—not degree—due to its magnitude and the forces behind the loss.⁹³ It is important to note the severe effects these losses in wealth have had on Black communities.⁹⁴ The large wealth gap seen today between white and Black families—where the average white family has a net worth ten times greater than the average Black family—can in part be attributed to these historic losses of land.⁹⁵ Further, the poverty and lack of wealth that resulted from these injustices is compounded by the way in which property and wealth are passed down from generation to generation.⁹⁶

Because of the problems with the Black Farmers cases, Congress must take action to provide for victims of dispossession and their families through a display of compassion.⁹⁷ The areas where dispossession was most entrenched are currently under the most severe hardship. For example, ten counties in the Mississippi Delta are among the poorest fifty in America.⁹⁸ The consequences of this poverty is clear, with four tracts in the Delta among the lowest 100 counties in average life expectancy.⁹⁹ The infant mortality rate in some Delta

⁹⁰ See *supra* note 54 and accompanying text.

⁹¹ Newkirk II, *supra* note 1.

⁹² Lewan & Barclay, *Steal*, *supra* note 7.

⁹³ See *id.* (“In the decades between Reconstruction and the civil rights struggle, blacks were powerless to prevent [the takings] . . . [i]n an era when black men were lynched for whistling at white women, few blacks dared to challenge whites. Those who did could rarely find lawyers to take their cases.”).

⁹⁴ See *infra* notes 95–96 and accompanying text.

⁹⁵ Newkirk II, *supra* note 1. The average white family has a net worth that is nearly ten times greater than the average Black family—\$171,000 versus \$17,150. Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-White Wealth Gap*, BROOKINGS (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/> [<https://perma.cc/PNS3-SXFS>]. This unconscionable discrepancy “reflects a society that has not and does not afford equality of opportunity to all its citizens.” *Id.*

⁹⁶ See McIntosh et al., *supra* note 95 (“This history matters for contemporary inequality in part because its legacy is passed down generation-to-generation through unequal monetary inheritances which make up a great deal of current wealth. In 2020 Americans are projected to inherit about \$765 billion in gifts and bequests, excluding wealth transfers to spouses and transfers that support minor children. Inheritances account for roughly 4 percent of annual household income, much of which goes untaxed by the U.S. government.”).

⁹⁷ See *infra* Part IV.D.

⁹⁸ Newkirk II, *supra* note 1.

⁹⁹ *Id.* And “[m]ore than 30 tracts in the Delta have an average life expectancy below [seventy],” versus a national average of seventy-nine. *Id.*

counties is more than double the nationwide rate.¹⁰⁰ Further, the federal government has placed additional burdens on communities facing these significant hardships with the IRS auditing households in the Delta harder than anywhere else in the country.¹⁰¹ Instead of remaining complacent or inflicting further harms, the federal government should take action to combat the inequities caused by the dispossession of Black farmland.

IV. CONGRESS SHOULD ENACT A DISTRIBUTIVE JUSTICE FUND TO COMBAT THE EFFECTS OF THE DISPOSSESSION OF BLACK FARMLAND

Recent history suggests that Congress may be unable—or unwilling—to revisit conversations surrounding the damage inflicted upon Black farmers because of intense gridlock in a polarized political environment.¹⁰² One saving grace is that the federal government displayed a willingness to provide relief to farmers in 2019, dishing out the highest level of subsidies in fourteen years.¹⁰³ These subsidies were very generous—constituting about twice as much as the damages incurred by the farmers.¹⁰⁴ Moreover, there has been little pushback against these payments, and farmers believe they will continue.¹⁰⁵

Farmers have always occupied a soft spot in the psyche of American politics and culture.¹⁰⁶ This can be seen through recent examples, such as the subsidies

¹⁰⁰ *Id.*

¹⁰¹ Paul Kiel & Hannah Fresques, *Where in the U.S. Are You Most Likely To Be Audited by the IRS?*, PROPUBLICA (Apr. 1, 2019), <https://projects.propublica.org/graphics/eitc-audit> (on file with the *Ohio State Law Journal*).

¹⁰² Lee Drutman, *America Is Now the Divided Republic the Framers Feared*, ATLANTIC (Jan. 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/two-party-system-broke-constitution/604213/> [<https://perma.cc/DJ3L-DQPP>] (“Under divided government . . . [there is no] system of bargaining and compromise, but one of capitulation and stonewalling.”); see also Sheryl Gay Stolberg & Nicholas Fandos, *As Gridlock Deepens in Congress, Only Gloom Is Bipartisan*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html> [<https://perma.cc/5UYG-FTAL>] (“Mr. Trump’s presidency has pushed an already dysfunctional Congress into a near-permanent state of gridlock that threatens to diminish American democracy itself.”).

¹⁰³ Dan Charles, *Farmers Got Billions from Taxpayers in 2019, and Hardly Anyone Objected*, NPR (Dec. 31, 2019), <https://www.npr.org/sections/thesalt/2019/12/31/790261705/farmers-got-billions-from-taxpayers-in-2019-and-hardly-anyone-objected> [<https://perma.cc/7AAZ-FMWL>] (“In 2019, the federal government delivered an extraordinary financial aid package to America’s farmers. Farm subsidies jumped to their highest level in 14 years, most of them paid out without any action by Congress.”).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* A Missouri farmer, Robert Henry, calls the subsidies “Trump money” and expects that the USDA is “going to do it again.” *Id.*

¹⁰⁶ Easterbrook, *supra* note 34 (“Few economic endeavors have any aura of romance and tradition. . . . [f]arming, though, occupies an honored place in our culture.”). Consumers of American culture will also remember the Dodge Ram Trucks commercial aired during Super Bowl XLVII, narrated by Paul Harvey, which opened with the

discussed above,¹⁰⁷ and outcomes like the unanimous consent of the *Pigford II* appropriation in the Senate.¹⁰⁸ In the context of the Black farmers who fell victim to dispossession, Congress should take more drastic measures. The state of areas like the Mississippi Delta are under the darkest of shadows as an effect of the dispossession.¹⁰⁹ To bring light to this issue, members of Congress should enact a distributive justice-based fund that resembles the VCF. While not perfect, the VCF's basic principles can be used as a blueprint for the distributive justice needed to address the dispossession of the Black farmland.

First, this Part examines the VCF by looking at its origins. Next, this Part examines the strengths, followed by the weaknesses, of the VCF. Lastly, this Part briefly discusses distributive justice and explains why a Distributive Justice Fund is preferable to an alternative that relies on traditional tort-based corrective justice principles.

A. *The Victim Compensation Fund*

The VCF's origins can be traced back to the September 11th, 2001 attacks on American soil. Congress enacted the VCF as Title IV of the Air Transportation and System Stabilization Act (ATSSA).¹¹⁰ The purposes of the ATSSA were: (1) to protect the airline industry from financial ruin and (2) to provide victims recovery for the tragedy where proof of liability would not be required.¹¹¹ The VCF was inserted last-minute into the ATSSA, and, accordingly, was not thoroughly deliberated before being voted on.¹¹² The rushed legislation did not provide much guidance, so the VCF was a bare

proclamation from his now famous 1978 monologue, “[a]nd on the eighth day, God looked down on his planned paradise and said, ‘I need a caretaker.’ So God made a farmer.” Ram Trucks, “*Farmer*” | *Ram Trucks*, YOUTUBE (Feb. 3, 2013), <https://youtu.be/AmpZ0TGjbWE> [<https://perma.cc/3RV2-8WFD>].

¹⁰⁷ See Charles, *supra* note 103.

¹⁰⁸ See CONG. RESEARCH SERV., RS20430, *THE PIGFORD CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS* 8 (May 2013), https://www.everycrsreport.com/files/20130529_RS20430_dd9873a41009e49aa63cdc17a785093c21f8eb23.pdf [<https://perma.cc/2DV5-9NPG>] (discussing how the Claims Resolution Act of 2010 passed with “unanimous consent” to provide a \$1.15 billion appropriation).

¹⁰⁹ See Newkirk II, *supra* note 1; *supra* Part III.C.

¹¹⁰ Air Transportation Safety and System Stabilization Act (ATSSA), Pub. L. No. 107-42, § 101, 115 Stat. 230, 210 (2001).

¹¹¹ Josh Romero, Note, *A Victim's Eye View of the September 11th Victim Compensation Fund*, 71 DEF. COUNS. J. 64, 64 (2004). See generally Air Transportation Safety and System Stabilization Act § 101.

¹¹² September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66274, 66275 (Dec. 21, 2001) (codified as amended at 28 C.F.R. pt. 104) [hereinafter Interim Final Rule]; Tracy Hresko, *Restoration and Relief: Procedural Justice and the September 11th Victim Compensation Fund*, 42 GONZ. L. REV. 95, 99 (2006) (“In fact, just twenty-two hours elapsed ‘between the first recorded mention of a victim compensation program and September 22, when the President signed the bill into law.’”).

skeleton of a program that Congress left to be fleshed out by a Special Master with broad discretion over its execution.¹¹³

Kenneth R. Feinberg was appointed as the Special Master by Attorney General John Ashcroft on November 26, 2001.¹¹⁴ To provide some direction for the operation of the fund, Feinberg passed two sets of administrative regulations—the Interim Final Rule and the Final Rule.¹¹⁵ These administrative rules outlined who was eligible to receive relief, the limitations on civil actions, factors used in determination of economic and noneconomic damages, sources of collateral offsets, the claims evaluation process, and excluded a right to appeal.¹¹⁶

The procedures provided by the Rules were upheld in *Colaio v. Feinberg*.¹¹⁷ In that case, the court ruled that “the procedures required by the regulations and by the Special Master fairly implement the Act, are entitled to judicial respect, and do not infringe on plaintiffs’ constitutional and statutory rights.”¹¹⁸ This Note will not discuss each of these provisions in depth, but it will discuss the strengths and weaknesses of the administrative regulations as a whole.

B. *Strengths of the Victim Compensation Fund*

Analyzing the VCF’s strengths will aid in application of a similar model to differing circumstances. One of the most integral procedural values is efficiency¹¹⁹ and this value was also a guiding principle and strength of the VCF. Feinberg stressed the importance of efficiency in the preamble to the Interim Final Rule when he stated that “the process should be efficient,

¹¹³ See Hresko, *supra* note 112, at 99–100. The quick drafting and approval provided almost no legislative history to aid the Special Master in constructing the fund. The Special Master was given the power to determine the regulations, procedural form, and substantive content of the entire program. These two factors created a scenario where the Special Master had broad control over almost every aspect of the fund. See *id.* at 99–100 (discussing the lack of structure the lack of deliberation enabled).

¹¹⁴ Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administration Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 148 (2005). Feinberg was very qualified for the position of administering mass-tort cases because he served as Special Master in Agent Orange, DES, and Dalkon Shield cases. *Id.* at 148.

¹¹⁵ Interim Final Rule, *supra* note 112; September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11,233 (Mar. 13, 2002) (codified at 28 C.F.R. pt. 104) [hereinafter Final Rule]; see also Hresko, *supra* note 112, at 100.

¹¹⁶ See Hresko, *supra* note 112, at 101–05 (discussing the key provisions of the Interim Final Rule and Final Rule).

¹¹⁷ *Colaio v. Feinberg*, 262 F. Supp. 2d 273, 274 (S.D.N.Y. 2003).

¹¹⁸ *Id.* at 290.

¹¹⁹ The Federal Rules of Civil Procedure outline the scope and purpose of procedural rules. Hresko, *supra* note 112, at 105 (“[A]ll federal civil courts in the United States must be ‘construed and administered to secure the just, speedy and inexpensive determination of every action.’”) (quoting FED. R. CIV. P. 1).

straightforward, and understandable to the claimants.”¹²⁰ Feinberg knew that in order for the VCF to be an effective program it needed to be able to quickly address claimant’s issues in a straightforward way.¹²¹ The effectiveness of the VCF was largely a result of its efficiency in administration.

In her discussion of the VCF’s efficiency, Tracy Hresko identified two sub-values that are essential to efficiency—expediency and accessibility.¹²² First, expediency embodies the notion that a process should be speedy and abstain from unnecessary bureaucracy.¹²³ In other words, the goal is to create a process that is not unduly time-consuming in order to quickly fulfill one of the main purposes of the VCF: to provide victims with recovery from tragedy.¹²⁴ Second, accessibility is the use of a set of procedures to ensure individuals are not subjected to undue obstacles in their attempts to make claims.¹²⁵

1. *Expediency of the VCF*

The VCF was expedient from its genesis. As discussed above, the fund was inserted into the ATSSA a mere twenty-two hours before being formally approved by the President.¹²⁶ Even the administrative rules that followed the ATSSA’s enactment were promulgated without delay—having full “force and effect immediately upon publication.”¹²⁷ Furthermore, these rules declared that financial awards were to be given to the victims in “an expedited, efficient manner without unnecessary bureaucracy and needless demands of the victims.”¹²⁸

¹²⁰ Interim Final Rule, *supra* note 112 (“This objective is based in part upon the statutory requirement that the Special Master review each claim and make an award determination within 120 days of filing.”).

¹²¹ *Id.* (“More important, however, is that claimants be able to enter the program—or choose not to enter the program—with an understanding of how their claim will be treated.”).

¹²² See Hresko, *supra* note 112, at 107.

¹²³ *Id.*

¹²⁴ *Id.* (“Fulfillment of this value seems particularly important in cases, like this one, where procedures are designed to provide rapid relief to individuals.”). The VCF’s language showed Congress intended the fund to embody this value. The ATSSA reads in relevant part that the Special Master must make a claim determination “[n]ot later than 120 days after that date on which [the] claim [was] filed.” Air Transportation Safety and System Stabilization Act (ATSSA), Pub. L. No. 107-42, § 405(b)(3), 115 Stat. 230, 239 (2001).

¹²⁵ See Hresko, *supra* note 112, at 107.

¹²⁶ See *supra* note 112 and accompanying text.

¹²⁷ See Interim Final Rule, *supra* note 112 (“In order to allow the Special Master to begin distributing funds, the Department is issuing this rule as an ‘Interim Final Rule’ that will have the force and effect of law immediately upon publication.”).

¹²⁸ *Id.* This aspect was crucial because the VCF was offering an alternative to the long, methodical process of litigation. In order to ensure participants opted in and waived their rights to civil suit, the process needed to provide some value. A speedy, efficient award would be a major incentive for victims to utilize the fund. *Id.*

The VCF issued its first award letters in August 2002—less than one year after the fund was founded.¹²⁹ Further demonstrating the expedient nature of the VCF, the Special Master was directed by Congress to make a claim determination within 120 days of filing¹³⁰ and there is no indication that the Special Master did not meet this requirement in every single case.¹³¹ The procedures the Special Master set up allowed an award, once approved, to be processed and received within six to eight weeks.¹³²

The VCF was procedurally expedient. The claims process was non-adversarial, involving only the claimant and the administrative agency whose interests were aligned.¹³³ This principle can also be seen in the resulting participation in the program—over 98% of eligible families submitted over 7,300 claims to the fund and all claims were processed by June 15, 2004.¹³⁴ Conversely, only thirty-nine families chose to file lawsuits instead of participating with the VCF and only about fifty families decided to abstain entirely from either measure.¹³⁵ The VCF by all means accomplished its goal to be expedient by “provid[ing] quick financial relief and reparations to the victims of September 11th while simultaneously stopping a barrage of lawsuits from being filed.”¹³⁶

2. Accessibility of the VCF

The VCF was procedurally accessible as well. Procedural accessibility is achieved when a program avoids undue expense, is straightforward, and ensures no discrimination between eligible individuals.¹³⁷ First, the program was not

¹²⁹ See generally U.S. DEP’T OF JUSTICE, AUDIT REPORT 04-01, THE SEPTEMBER 11 VICTIM COMPENSATION FUND OF 2001 (Oct. 2003), <https://oig.justice.gov/reports/plus/a0401/final.pdf> [<https://perma.cc/EX6Y-QUGB>].

¹³⁰ Air Transportation Safety and System Stabilization Act (ATSSA), Pub. L. No. 107-42, § 405(b)(3), 115 Stat. 230, 239 (2001).

¹³¹ See Hresko, *supra* note 112, at 113.

¹³² *Id.*; see also Ackerman, *supra* note 114, at 220.

¹³³ Ackerman, *supra* note 114, at 221 One of the major differences between the VCF and the traditional tort model was the non-adversarial nature of the proceedings. This allowed the two sides to work together, rather than fight tooth and nail during each proceeding, and greatly expedited the process. *Id.* (“Neither Feinberg nor his deputies considered it their obligation to protect the U.S. Treasury against genuine claims.”).

¹³⁴ Press Release, Kenneth R. Feinberg, U.S. Dep’t of Justice, Closing Statement from the Special Master, Mr. Kenneth R. Feinberg, on the Shutdown of the September 11th Victim Compensation Fund, <http://www.justice.gov/archive/victimcompensation/closingstatement.pdf> [<https://perma.cc/M8RK-P857>] [hereinafter Closing Statement] (“On that date, all claims for death and physical injury will have received final award determinations and will be authorized for payment by the Special Master’s office within 20 days of that date. Once authorized, all payments should be processed and received within 6 - 8 weeks.”).

¹³⁵ Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627, 644 (2003).

¹³⁶ Hresko, *supra* note 112, at 128.

¹³⁷ *Id.* at 114.

unduly expensive. The claims process was completely free, costing nothing to file a claim and even allowing applications to be obtained online or via a toll-free phone number.¹³⁸ Furthermore, once the applications were obtained the VCF provided no-cost assistance via toll-free phone numbers and free walk-in claim assistance centers throughout the country.¹³⁹ Moreover, its accessibility was aided by independent organizations, encouraged by patriotic values of community service, which provided free advice and assistance to claimants.¹⁴⁰

Second, the program was straightforward for claimants. In addition to the free services noted above, the use of an extensive website that detailed the regulations and provided forms, statistics, frequently asked questions, information about deadlines, and walk-in centers, greatly aided the claimants.¹⁴¹ While some scholars argue that the application process was very complex because of the extensive documentation requirements, a recovery scheme like the VCF requires documentation to safeguard other important values such as accuracy and consistency.¹⁴² The ultimate proof that the VCF was adequately straightforward is the fact that over 98% of eligible families submitted claims.¹⁴³ A program which was not straightforward, but rather too complex, would not have achieved these results. Lastly, the VCF's eligibility requirements were extremely liberal, in that they, unlike tort law, required no proof of liability or causation, only a showing that the victim was injured or killed because of the attacks.¹⁴⁴

However, the VCF was not immune from discriminatory practices. The VCF relied on state law, which was a problem for some potential claimants.¹⁴⁵

¹³⁸ U.S. DEP'T OF JUSTICE, VICTIM COMPENSATION FUND FREQUENTLY ASKED QUESTIONS § 1.1 (Feb. 2004), <http://www.justice.gov/archive/victimcompensation/faq1.pdf> [<https://perma.cc/WD4D-CFPM>] [hereinafter VCF FAQ SHEET].

¹³⁹ See Hresko, *supra* note 112, at 114. The Special Master even held informational town hall meetings across the country during September and October 2003 to provide assistance to families. See VCF FAQ SHEET, *supra* note 138.

¹⁴⁰ See Hresko, *supra* note 112, at 114 (“[A] number of outside legal organizations—most notably, Trial Lawyers Who Care—provided free advice and extensive cost-free assistance to claimants.”).

¹⁴¹ See *id.* at 115 (“Moreover, as discussed above, a great deal of free assistance was readily available to claimants by telephone and in person.”).

¹⁴² *Id.* at 125 (“The Fund, therefore, seems to have met the requirements of accuracy by requiring claimants to submit substantial documentation of their losses and to attest to the veracity of their documents.”). Claimants were not likely to know offhand specific financial details, such as information about pension plans, social security, and salary from prior years, that were required to make accurate award decisions. *Id.* at 115.

¹⁴³ See *supra* note 134 and accompanying text.

¹⁴⁴ See Hresko, *supra* note 112, at 116.

¹⁴⁵ *Id.* at 116. A claim with the VCF could only be filed by the person injured or the “personal representative” of a victim. The personal representative of a decedent is either a person appointed by a court or the executor or administrator of a decedent's estate. See Alexander, *supra* note 135, at 678. State law controlled here and was especially consequential when the court had not appointed a personal representative. This is because

This was particularly true for LGBTQ partners of victims who, at the time, under state law did not have standing to be personal representatives of decedents.¹⁴⁶ The VCF could have created its own process for determining who had standing, but this would have undermined the efficiency of the fund¹⁴⁷ and would have been at odds with the structure of the VCF which replicated the results of the tort system.¹⁴⁸ While it is questionable whether the VCF was non-discriminatory, it still largely embodied the principles of accessibility by meeting two of the three criteria. Thus, it was “strongly, though not entirely, efficient.”¹⁴⁹

C. Weaknesses of the Victim Compensation Fund

Another important fundamental procedural value is fairness.¹⁵⁰ The underlying principle of individualized determinations of tort damages is the wrongdoer’s responsibility to put “victims back in the position they would have occupied but for the wrongful act.”¹⁵¹ However, when the federal government is not the tortfeasor but is still compensating the victims, the competing principle is equality.¹⁵² Equality can be expressed as payments that are equal for all victims, based on need, or a hybrid.¹⁵³

the VCF mandated that the personal representative then be “the first person in the line of succession established by the laws of the decedent’s domicile governing intestacy.” September 11th Victim Compensation Fund of 2001, 28 C.F.R. § 104.4(a)(2) (2020).

¹⁴⁶Hresko, *supra* note 112, at 116 (“Under virtually all state laws, gay and lesbian partners, fiancées, and live-in significant others did not have standing to be personal representatives of decedents.”).

¹⁴⁷*Id.* at 116 (“While the fund could have created its own mechanism for determining who had standing to be a Personal Representative of each deceased victim, this would have been an incredibly laborious and legally complex task and one that arguably would have drastically undermined the efficiency of the [VCF].”).

¹⁴⁸*See* Alexander, *supra* note 135, at 679 (“If the goal is to replicate the results of the tort system, then the program should follow the rules of the state of the victims’ domicile.”).

¹⁴⁹Hresko, *supra* note 112, at 117–18.

¹⁵⁰*See* Alexander, *supra* note 135, at 651 (discussing the principles that support fairness in tort damages).

¹⁵¹*Id.* at 651 (“This process is considered legitimate because it forces the defendant to internalize the costs of risk creation and compensates each plaintiff for the market value of his or her loss.”).

¹⁵²*Id.* at 651. When the government is not the tortfeasor and still pays individualized compensation of tort damage, the underlying principle of the wrongdoer’s responsibility to make the victim whole is no longer fair. Thus, equality becomes the principal value in determining fairness. *Id.* (“[Equality] points to a remedy that values all persons equally, without regard to their wealth, status, class, race, ethnicity, or gender.”).

¹⁵³*Id.* (“For example, claimants could receive medical care and reimbursement of medical expenses, perhaps administratively through an agency or by including them in military or government employee health plans or Medicare, plus a set amount based on the severity of the injury.”).

The VCF failed in this respect. By making individualized tort damages, which are calculated primarily by variables such as income and wealth, a deciding factor in compensation awarded, the government was at odds with the principle of equality.¹⁵⁴ In other words, the VCF compensated victims' families based on how much wealth they accumulated before the tragedy, which led to an unequal outcome that compensated wealthy families more than others. The individualized calculations created an issue of valuation of lives where families of the wealthiest victims would receive more money than first responders, like the police officers and firefighters, who put themselves in harm's way to rescue them.¹⁵⁵ Feinberg even acknowledged the issue that the VCF valued lives differently based on individual circumstances.¹⁵⁶ In a statement, he implied that if the statutory language were different—by replacing the factor of “economic loss” with a more holistic measure—he would have been able to avoid this criticism.¹⁵⁷

The philosophy behind the VCF's choice of beneficiaries raises other fairness and line-drawing problems. Specifically, the philosophy forces us to question why the beneficiaries of the VCF were treated differently from other similarly situated individuals affected by tragedy. The government broke the mold of the traditional tort model by providing compensation to victims who would not be able to find defendants to sue.¹⁵⁸ What differentiates the victims of the horrible terrorist attacks on September 11th from victims of other terrorists' attacks? What differentiates the victims from victims of other tragedies? This line-drawing problem only stokes the VCF's issue with providing fairness. Feinberg thinks this criticism can be thwarted because of the

¹⁵⁴ *See id.* at 652 (“When the government is a volunteer, there is no particular rationale for adopting tort damages as the measure of the award. . . . [I]ncome and wealth . . . [being] the measure of compensation paid by the national government to victims who died together in the same terrorist attack is inconsistent with the fundamental principle in a democracy that, to the government, at least, all persons have equal value. It has even been called ‘un-American.’”).

¹⁵⁵ *See* Ackerman, *supra* note 114, at 161–62 (“The notion that economic distinctions would survive the deaths of those involved in a common disaster seemed perverse to some.”).

¹⁵⁶ *See* Press Release, U.S. Dep't of Justice, Statement of the Special Master Regarding the Progress of the September 11th Victim Compensation Fund, https://www.justice.gov/archive/victimcompensation/sp_statement.pdf [<https://perma.cc/FCY6-YHB4>].

¹⁵⁷ *Id.* Feinberg had no choice but to follow the words of the statute that granted him his power as Special Master. His statement implies that a different statute at a different time could consider an alternative model for awards—but he could not under these circumstances. *See id.* (“[T]he Fund expressly requires that I consider the claimant's ‘economic loss.’ Given that statutory language, I had no choice but to make income one of the many individual circumstances that I consider in calculating awards.”).

¹⁵⁸ *See* Alexander, *supra* note 135, at 654. Line-drawing problems quickly arise in this context. Questions of who deserves relief from disaster and tragedy can be very contentious. *Id.* at 653–54 (“The September 11th program, precisely because it was an ad hoc response to the events of a single terrible day, has been criticized for failing this basic test of fairness.”).

sui generis nature of the VCF.¹⁵⁹ However, why can't this "vengeful philanthropy," as Feinberg coins it, be used in other contexts as well?¹⁶⁰ The "we'll show the world" attitude, which Feinberg states helps explain the VCF, could also be a signal to the world that America will respond with compassion to other tragic events—even if inflicted by our own institutions.¹⁶¹ The principle of fairness demands us to consider these questions when scrutinizing the weaknesses of the VCF. Consequently, if the program cannot withstand the scrutiny, it does not uphold the principle.

D. A Distributive Justice Fund Is a Better Alternative than a Traditional Tort Based Corrective Justice Model

The VCF's strength of efficiency is a principle that should be upheld by any future program; however, to address the VCF's major weakness of fairness, any future program should be based on distributive justice principles rather than corrective justice principles.¹⁶² A major issue with the way the VCF was constructed is that the purpose of the fund—to generously provide relief for victims' families—and its means of providing that relief—a compensatory damages scheme—are at odds with each other. The purpose or soul of the fund was grounded in distributive justice principles, while its system of achieving that purpose was grounded in traditional tort law based on corrective justice principles.¹⁶³

¹⁵⁹ See KENNETH R. FEINBERG, WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 190 (2005) ("[T]he success of the 9/11 fund is largely attributable to its uniqueness. In the wake of those unprecedented attacks, the 9/11 fund had to be creative and bold in forging a response. That response should not be viewed as a precedent for compensation programs yet to come.").

¹⁶⁰ See *id.* at 190–91 ("[The VCF showed] America would not be cowed or defeated by the horror of 9/11. On the contrary, the people of the United States would respond not only with muscle, but also with compassion.").

¹⁶¹ See *id.* at 191 ("This 'we'll show the world' attitude helps explain the fund. . . . [It] was not just about saving the airlines or restricting lawsuits; it was also about the nation speaking with one voice and demonstrating the best of the American character.").

¹⁶² See Ackerman, *supra* note 114, at 164. Traditional tort remedies are based on corrective justice principles. Defendants are held liable on the basis of fault, their wrongdoing classified as intentional or negligent, and damages place the plaintiff in the same position they would have been without the defendant's conduct. Thus, corrective justice systems are designed to "punish wrongdoers and compensate victims" whereas a distributive justice system is designed "to more equitably provide for victims' families and demonstrate compassion." *Id.* at 162–64. One can also look at distributive justice as being grounded in social welfare principles of providing assistance for those who are in need and viewed as worthy of support. See also Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719, 724 (2003).

¹⁶³ See Diller, *supra* note 162, at 732. This can be best summed up by Feinberg's words. He framed this dilemma, which was exacerbated by Congress's lack of direction, with the question, "Is it tort or is it social welfare?" *Id.* ("The [VCF] is, therefore, an amalgam of two

Distributive justice lies in the “just distribution of goods and services on the basis of information about the preferences and claims of particular individuals.”¹⁶⁴ This just distribution should entail the transfer of the goods and services to enhance the position of the *least* favored individuals.¹⁶⁵ When the structure of a system takes this form the results will be just—whatever those results may be.¹⁶⁶ Everyday examples of this distribution can be seen in programs like social security, employment benefits, or other forms of social insurance. On their face, class action settlements operate through this distributive justice lens. The settlements offer “justice” through compensation to people who suffer different kinds of losses that come from many—sometimes indistinguishable—causes.¹⁶⁷ Further, the settlements distribute money and goods equitably and efficiently through streamlined processes.¹⁶⁸ Class action settlements, however, are not pure distributive justice programs. Their compensation schemes utilize corrective justice principles that force a specific wrongdoer to restore his victims’ specific losses in an individualized way.¹⁶⁹ This is at odds with the *equitable* distribution of goods. By restoring victims to their respective positions *before* the harm, we do not take into account the principles of distributive justice that require the distribution to enhance the position of the *least* favored individuals.

The VCF embodies this conflict between distributive and corrective justice principles. The VCF’s underlying principles were grounded in distributive justice, but its compensation scheme relied on traditional tort-based corrective justice principles. In sum, the VCF distributed goods efficiently but it was not equitable or fair in that distribution.¹⁷⁰

One way the VCF model could be altered to achieve fairness in distribution of resources is to align the purpose and means of achievement. To do this a future model would need to move away from corrective justice principles and rely on distributive justice principles of providing relief for those in need and deemed worthy of support. The fundamental difference between the two is the former replaces losses while the latter meets needs.¹⁷¹ This difference creates a different set of expectations. Corrective justice is concerned with an actor’s

different systems for making payments to victims—the private law regime of tort, which is based on the principle that wrongdoers should compensate those injured by their wrongs, and social welfare programs rooted in public law which are based on the principle that government should provide assistance to those in need.”).

¹⁶⁴ JOHN RAWLS, A THEORY OF JUSTICE 267 (revised ed. 1999) (discussing the principles of distributive justice).

¹⁶⁵ *Id.* at 267.

¹⁶⁶ Rawls also notes that at minimum the results will be “at least not unjust.” *Id.*

¹⁶⁷ Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 511 (2011) (discussing the conflicting nature of class action settlements which function on “the line between tort and public benefit compensation”).

¹⁶⁸ *Id.* at 511.

¹⁶⁹ *Id.* at 511–12.

¹⁷⁰ See *supra* Parts IV.B–D.

¹⁷¹ See Diller, *supra* note 162, at 732.

misconduct justifying payments to victims, while distributive justice is not based on the misconduct of the actor, rather using payments as a means of relieving victims of hardship.¹⁷² While the misconduct of the actor is useful as a means of justifying why the victims are worthy of support, it is not the focus of distributive justice—the victim’s needs are.

In a system of distributive justice, a need-based standard is the most fair and equitable way to distribute resources. Need-based standards arise from a “desire to target assistance to those who need it most.”¹⁷³ This means that the relief will redistribute income downward, based on variables that show discrepancies between claimants’ situations, to provide for those eligible in a display of compassion.¹⁷⁴ In other words, rather than simply looking at the position an individual would have been in if not for harm, need-based standards look to provide some threshold of living to recipients because it is the moral thing to do.¹⁷⁵

V. A DISTRIBUTIVE JUSTICE FUND AND BLACK FARMERS

Black farmers and their descendants deserve a Distributive Justice Fund to further aid them with their hardships.¹⁷⁶ While some will say that Black farmers received this compensation via the settlements stemming from the Black Farmers cases, those claims only covered a narrow window of recent claims of

¹⁷² *Id.* at 732–33.

¹⁷³ *See id.* at 730 (“Implicit within the idea of the need standard is the notion that government support should provide some threshold living standard to recipients—a floor, rather than simply some incremental amount of assistance to a broad swath of people.”).

¹⁷⁴ While achieving parity is very complex, it is not necessarily the goal—providing a threshold standard of living is. *Id.* at 728–30.

¹⁷⁵ *See id.* at 730.

¹⁷⁶ Since the completion of this Note, Senators Cory Booker, Elizabeth Warren, and Kirsten Gillibrand co-sponsored legislation in November of 2020 aimed to address historic discrimination against Black farmers by the USDA (Booker Plan). *See Justice for Black Farmers: Section-by-Section Summary*, SENATE.GOV, <https://www.booker.senate.gov/imo/media/doc/JSF%20Section%20by%20Section%2011.16.20.pdf> [<https://perma.cc/7NV9-CZR4>]. The Booker Plan would enable individual Black farmers to acquire up to 160 acres of land via a USDA system of land grant, allocating up to 32 million acres of farmland. *See id.* The Booker Plan differs from mine in that it distributes land to Black individuals and entities who are current or would-be farmers and requires the government to identify and buy land to redistribute. *See id.* My proposal, discussed herein, advocates for distribution of money, based on a need-based standard of distribution, to account for the dispossession of their family’s farmland. *See infra* Part V. I believe my proposal is more equitable and efficient because: (1) Black farmers and their descendants, who may have established lives anywhere and may not want the farming lifestyle, would not be restricted to farmland as a means of compensation; (2) a need-based standard allows for flexibility in the amount of money distributed based on an adequate threshold living standard; and (3) distributing money is more efficient than buying land and redistributing to Black farmers.

discrimination—from 1981 to 1996.¹⁷⁷ The temporal aspect of the class definition was not large enough to provide adequate assistance. This is particularly troublesome because the settlements do not cover any claims of discrimination “stretching back to the period of the civil-rights era, when the great bulk of Black-owned farms disappeared.”¹⁷⁸ Furthermore, the restrictive class criteria, high evidentiary bars, and lack of adequate notice largely restricted the amount of claimants and size of settlements required to address the magnitude of the issue.¹⁷⁹

A Distributive Justice Fund based on the *Pigford* litigation would have to take the class criteria into account when deciding who is eligible to access the fund. As discussed above, the VCF model is both expedient¹⁸⁰ and accessible.¹⁸¹ A Distributive Justice Fund would need to build on the VCF’s expediency and accessibility, while addressing the unfair aspects of the VCF.

A. Expediency

A Distributive Justice Fund could uphold the principle of expediency by holding hearings in an urgent manner and being non-adversarial in nature like the VCF. The number of Black farmers that could potentially be claimants is vast, so expediency is a must.¹⁸² For example, much like the VCF, any administrative rules of a Distributive Justice Fund should have the “force and effect of law immediately upon publication” to eliminate any problems with a large backlog of hearings.¹⁸³ Moreover, a fund that utilizes need-based standard of awards, coupled with the VCF’s rule of providing for distribution of awards in an “expedited, efficient manner without unnecessary bureaucracy,” would allow for a more expedited process than the VCF due to the individualized nature of the VCF’s award process.¹⁸⁴ In other words, a need-based standard does not need to determine where the individual claimant would have been if not for the harm—it merely sets out to provide a threshold standard of living.¹⁸⁵

¹⁷⁷ See *Pigford v. Glickman*, 185 F.R.D. 82, 93 (D.D.C. 1999). The Black Farmers litigation class definition required class members to have “farmed or attempted to farm between January 1, 1981, and December 31, 1996,” which is only a fifteen year window. *Id.* at 93.

¹⁷⁸ *Newkirk II*, *supra* note 1 (“The telling factor, looking at it from the long view, is that at the time of World War I there were 1 million black farmers, and in 1992 there were 18,000.”) (internal quotation marks omitted).

¹⁷⁹ See *supra* Part III.C.

¹⁸⁰ See *supra* Part IV.B.1.

¹⁸¹ See *supra* Part IV.B.2.

¹⁸² At the time of World War I, there were 1 million Black farmers. See *Newkirk II*, *supra* note 1.

¹⁸³ See Interim Final Rule, *supra* note 112.

¹⁸⁴ See *id.*

¹⁸⁵ See *Diller*, *supra* note 162, at 730. While there would be some sort of individualized determination of what a claimant deserves under a need-based standard of distribution, the

Additionally, by requiring that the claims process only involve the claimant and the administrative body, both of which share the goal of ensuring the claimant receives relief, the process can be non-adversarial just like the VCF. Going one step further, Congress must create a non-adversarial culture in any claims process for a Distributive Justice Fund by eliminating budgetary restraints of the administrative body in the awards process.¹⁸⁶ To accomplish this goal, Congress should tie the awarding of claims to the unlimited Judgment Fund at the Department of the Treasury. The Judgment Fund is “an unlimited amount of money set aside to pay judgments against the United States.”¹⁸⁷ By eliminating the financial incentive of administrators to protect the Department of the Treasury, a non-adversarial culture can be fostered. Senators Charles Grassley and Kay Hagan attempted to have the *Pigford II* claims funded in this way, but their legislation failed.¹⁸⁸ Congress should use its authority to link a Distributive Justice Fund’s award process to the Judgment Fund.¹⁸⁹

B. Accessibility

A Distributive Justice Fund must also uphold the accessibility the VCF offered. The Fund would need to create an infrastructure, like the VCF, where the application was completely free and straightforward.¹⁹⁰ However, the eligibility requirements would need to be altered. The main issue with the two *Pigford* settlements is that they did not allow for wide enough recovery. A key to uphold accessibility would be to expand scope of potential claimants.

process would be more standardized than the alternative, therefore more efficient. *See id.* at 729 (“In part, the emphasis [of government benefit programs] on uniformity flows from a concern about administrative efficiency.”).

¹⁸⁶ *See supra* note 133 and accompanying text.

¹⁸⁷ CONG. RESEARCH SERV., RS42835, THE JUDGMENT FUND: HISTORY, ADMINISTRATION, AND COMMON USAGE 1 (March 2013), https://www.everycrsreport.com/files/20130307_R42835_59acaf309988cce1bd9542f41e9d8c6981ea752a.pdf [https://perma.cc/LHL4-23LQ].

¹⁸⁸ *See* CONG. RESEARCH SERV., RS20430, THE *PIGFORD* CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 11 (May 2013), https://www.everycrsreport.com/files/20130529_RS20430_dd9873a41009e49aa63cdc17a785093c21f8eb23.pdf [https://perma.cc/2DV5-9NPG] (“Senator Charles Grassley and Senator Kay Hagan introduced S. 972, a bill that would have amended the 2008 farm bill to allow access to an unlimited Judgment Fund at the Department of the Treasury to pay successful claims. The legislation also would have allowed for legal fees to be paid from the fund in addition to anti-fraud protection regarding claims.”).

¹⁸⁹ The Judgment Fund may only be used to pay judgments or settlements involving money judgments. *See* CONG. RESEARCH SERV., RS42835, THE JUDGMENT FUND: HISTORY, ADMINISTRATION, AND COMMON USAGE 5 (March 2013), https://www.everycrsreport.com/files/20130307_R42835_59acaf309988cce1bd9542f41e9d8c6981ea752a.pdf [https://perma.cc/LHL4-23LQ].

¹⁹⁰ *See supra* Part IV.B.2 (describing the free resources available to ensure the process was accessible to claimants).

A Distributive Justice Fund should expand eligibility to include any Black farmers that farmed from 1935, when the USDA financial assistance scheme was implemented,¹⁹¹ to 1980, the year precluding the *Pigford I* class certification. This period would include the era when most of the dispossessions occurred.¹⁹² Furthermore, Black-owned cotton farms in the South were almost exterminated in the 1960s alone—going from 87,000 to about 3,000 in the decade.¹⁹³ In order to adequately address this tragedy, the period covered by the Fund should also include Black farmers' descendants because of the way in which the USDA's discriminatory scheme has affected subsequent generations.

Additionally, any evidentiary bar should be set very low. This is because, as we saw in the *Pigford* settlement, eighty to ninety percent of claimants lacked evidence necessary to prove discrimination.¹⁹⁴ It is likely that in many cases evidence of discrimination will not be available.¹⁹⁵ Moreover, evidence of discrimination complaints of deceased relatives from the early twentieth-century will be hard to obtain—especially when even land records are hard to acquire in rural areas.¹⁹⁶ There is some hope, however, due to the surging genealogy industry, because some documents are being unearthed that show the

¹⁹¹ See Havard, *supra* note 37, at 190.

¹⁹² Newkirk II, *supra* note 1 (“As the historian Pete Daniel recounts, half a million black-owned farms across the country failed in the 25 years after 1950.”). Another alarming statistic is that according to the U.S. Agricultural Census from 1969 to 2001, mostly through partition sales, Black farmers lost “80 percent of the 5.5 million acres of farmland” they owned. Todd Lewan & Dolores Barclay, *Developers and Lawyers Use a Legal Maneuver to Strip Black Families of Land*, AUTHENTIC VOICE, https://theauthenticvoice.org/main/stories/tornfromtheland/torn_part5/ [<https://perma.cc/PR3Z-KA7R>] [hereinafter Lewan & Barclay, *Developers*].

¹⁹³ Newkirk II, *supra* note 1 (“According to the Census of Agriculture, the racial disparity in farm acreage increased in Mississippi from 1950 to 1964, when black farmers lost almost 800,000 acres of land. . . . [T]his land loss [translates] into a financial loss—including both property and income—of \$3.7 billion to \$6.6 billion in today’s dollars.”).

¹⁹⁴ See *Pigford v. Glickman*, 185 F.R.D. 82, 104 (D.D.C. 1999).

¹⁹⁵ See also Havard, *supra* note 37, at 342–43. See generally Lewan & Barclay, *Steal*, *supra* note 7.

¹⁹⁶ Newkirk II, *supra* note 1 (“[L]and records are spotty in rural areas, especially records from the 1950s and ‘60s. . . . According to Tristan Quinn-Thibodeau, a campaigner and organizer at ActionAid. . . . ‘It’s been a struggle to get this information.’ The organization has tried to follow the trails of deeds [to no avail].”). Further, Black landowners in the South are “especially vulnerable because up to 83 percent of them do not leave wills” due to lack of rural access to the legal system. Lewan & Barclay, *Developers*, *supra* note 192 (discussing how Black landowners in the South suffer from partition sales at an alarming rate due to lack of legal records like wills). Also gaps in public records, altered public records, and even widespread arson make the documentation even more troublesome. See Lewan & Barclay, *Steal*, *supra* note 7 (“The true extent of land-takings from black families will never be known because of gaps in public records. The AP found crumbling tax records, deed books with pages torn from them and records that had been crudely altered. The AP also found that about a third of the county courthouses in Southern and border states have burned—some more than once—since the Civil War. Some of the fires were deliberately set.”).

stories of Black families in the South.¹⁹⁷ For example, Bryan Logan was researching his family tree when he found a connection to 264 acres of land in Virginia that is now a country club worth at least \$2.94 million.¹⁹⁸ The evidentiary bar should be set so individuals like Bryan Logan meet the bar by providing sufficient evidence (like court documents, tax records, and deeds) of ancestral ownership of land and unjust taking of said land. Unlike *Pigford*, this bar should be implemented without requiring the evidence of USDA discrimination because the harm was so widespread and so prevalent that the environment created by the USDA alone would have affected all Black farmers and their families.

C. Fairness

To achieve fairness, the purpose of the Fund—to provide relief to the victims of hardship—and the means of accomplishing that purpose need to be aligned. The main issue with respect to fairness in the administration of the VCF was that its purpose was based on distributive justice principles while it used a corrective justice mechanism to try to accomplish that purpose.¹⁹⁹ To avoid this issue, a Distributive Justice Fund should attempt to have a downstream approach and help those most in need from the consequences of dispossession rather than focusing on purely economic loss.

The total economic impact of the dispossession can be analyzed based on raw numbers. It is estimated that the dispossession of Black farmland “resulted in the loss of hundreds of billions of dollars of [B]lack wealth . . . [and] [d]epending on the multiplier effects, rates of returns, and other factors, it could reach into the trillions.”²⁰⁰ While economics should be a consideration, it should not be the deciding factor in how much or little compensation is paid. A need-based standard would help make a Distributive Justice Fund fairer than its VCF counterpart. By assessing each eligible claimant’s needs, the Fund would provide equitable relief and display the compassion the situation requires.

For example, rather than simply attempting to put the claimant back to the position they *would have been* if not for the harm, a need-based standard would also look at the individual’s situation *relative to others*. This variable of relativity would allow the Fund to uphold the distributive justice principle of allocating resources to those who are in the worst position among a group.²⁰¹ In other words, a fair and equitable Distributive Justice Fund would distribute resources based on need to provide the standard of life warranted. This method would also quell any critics that would say that some potential claimants would

¹⁹⁷ See Lewan & Barclay, *Steal*, *supra* note 7 (discussing stories of Black people who have discovered their connection to lost land).

¹⁹⁸ *Id.*

¹⁹⁹ See *supra* Part IV.C.

²⁰⁰ Newkirk II, *supra* note 1 (“The large wealth gap between white and black families today exists in part because of this historic loss.”).

²⁰¹ See *supra* notes 165–67.

not be deserving due to their financial situation. A need-based approach would allow individuals that were lucky enough to fight through adversity to get a modest sum, while the less fortunate claimants get more.

VI. CONCLUSION

The areas where Black farming was dominant have been struck with historic losses of wealth and the tragedy. While the Black farmers cases provided historic settlements, the relief was not sufficient economically to address the needs of the people affected, or sufficient morally to meet the high bar of justice. The VCF provides a model in its purpose and mechanisms that, with some tinkering, can help provide aid to victims of tragedy like Black farmers. The USDA has inflicted damage on Black farmers that cannot be undone; however, relief can and should be provided.

Congress should pass legislation that enacts a Distributive Justice Fund for Black farmers and their descendants. Like the VCF before it, this Fund would show the world that our nation can come together and display compassion by “speaking with one voice and demonstrating the best of the American character.”²⁰² This Distributive Justice Fund would allow for individuals like Stephanie Hagans, Lemon Williams, and Lawrence Hudson to get need-based compensation for the tragedy inflicted upon their families. The dispossession of Black farmland has created communities that are the most vulnerable and impoverished in the United States. Congress should establish a Distributive Justice Fund to show the world that American compassion extends to those who have been wronged by society—intentionally or unintentionally—because people are worthy and deserve it. Hagans wondered “[h]ow different would our lives be . . . if we’d had the opportunities, the pride, that land brings?”²⁰³ Congress has the power to show her, and all people like her, how different their lives should be.

²⁰² See FEINBERG, *supra* note 159, at 191.

²⁰³ Lewan & Barclay, *Steal*, *supra* note 7.