Correcting the Harms of Slavery:

Collective Liability, the Limited Prospects of Success for a Class Action Suit for Slavery Reparations, and the Reconceptualization of White Racial Identity

Ryan Fortson*

I. INTRODUCTION

Slavery can only be abolished by raising the character of the people who compose the nation; and that can be done only by showing them a higher one.¹

No one now doubts, or at least no one should doubt, that slavery imposed a grievous wrong on Blacks in America, one from which neither the descendants of slaves nor the country as a whole have entirely recovered.²

* J.D., Stanford Law School, 2001; Ph.D. *Political Science), University of Minnesota, 2000; B.A., Amherst College, 1993. Mr. Fortson is currently an associate in the Anchorage office of Dorsey & Whitney LLP.


2. For an extensive account of differences between Blacks and Whites in financial, social, educational, and other forms of achievement, see generally, ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992). Although many of these statistics are admittedly now somewhat outdated and some of the effects of past discrimination may have been mitigated, they certainly have not been completely eliminated. For example, in 1997, white law school graduates were over-represented by 16.8% among law school graduates in comparison to their percentage of the population of the United States (68.36% of population but 79.84% of law school degrees). Blacks, by comparison, were 43.0% under-represented. Ryan Fortson, Affirmative Action, The Bell Curve, and Law School Admissions, 24 SEATTLE U. L. REV. 1087, 1113 (2001).
Legitimate dispute remains over how best to correct the lasting harms caused by slavery. To answer this question, one needs to determine not only the nature of the harms, but also who is responsible for compensating those who have been harmed and how the compensation should be carried out. These questions are not easy to answer. Because the institution of slavery was declared unconstitutional over 135 years ago, its immediate victims are long since dead and their descendants suffer more diffuse after-effects of slavery through social, occupational, and educational disparities that, because they are no longer legally sanctioned, are not always readily apparent. The distance between the harms and those who would be compensated for them, however, is not necessarily a bar to crafting some sort of remedy, be it legal or political.

One possible means of compensating descendants of slaves for the abuses of slavery is to pay monetary reparations for physical or psychological harm, lost wages, breach of contract, or some other less clearly defined harm. The movement for monetary reparations has been gaining steam recently. Partly due to Congress’s decision in 1988 to pay reparations to the remaining Japanese-American survivors of American World War II internment camps, a slavery reparations rally in front of the U.S. Capitol drew thousands of people. Then again, the harms caused by the internment of Japanese Americans are easier to remedy because the victims are easily identifiable since

4. While difficult to calculate, this claim would be based on the premise that slaves were denied wages that they otherwise would have earned were they not forcibly oppressed. Economist Larry Neal has calculated unpaid net wages to slaves prior to emancipation to be $1.4 trillion after adjusting for inflation. See Kevin Merida, Did Freedom Alone Pay a Nation’s Debt?, WASH. POST, Nov. 23, 1999, at C1. Suit was brought, unsuccessfully, in 1915 for profits the United States made from slave labor through a federal tax on cotton. Id.
5. This is based on Special Field Order No. 15 issued by General Sherman in early 1865 promising Blacks “forty acres and a mule” as an inducement to settle the Georgia and South Carolina coasts. This program was later rescinded by President Andrew Johnson and the Freedmen’s Bureau. Id. This, of course, is not directly a slavery issue, but the phrase “forty acres and a mule” has become folklore in the reparations movement. See, e.g., Adjoa A. Aiyetoro, Formulating Reparations Litigation Through the Eyes of the Movement, 58 N.Y.U. ANN. SURV. AM. L. 457, 458 (2003); Kimberly Hohman, 40 Acres and a Luxury Sedan: The Case For and Against Slavery Reparations, About.com– race relations, at http://racerelations.about.com/ newissues/racerelations/library/weekly/aa051200a.htm (last visited Nov. 5, 2003).
6. For example, one could claim that even apart from lost wages, Whites received unjust enrichment from the labor of slaves, without which the plantation economies of the South and by extension much of the industrial North would not have been able to prosper.
the internment was more recent and lists were kept of those interned.\textsuperscript{11} Perhaps more importantly, the number of victims, and hence the amount of the recovery, was rather limited.\textsuperscript{12} This would not be the case for the descendants of slaves. Given the sheer numbers involved in any potential recovery—both the number of recipients and the amount of money that would likely be involved—it may not be practical or politically feasible for Congress to provide monetary reparations that completely compensate slaves and their descendants for their losses.\textsuperscript{13} Discussions of feasibility carry the unfortunate and displeasing aftertaste of ignoring the moral arguments for slavery reparations.\textsuperscript{14} However, assessing feasibility is a necessary task within the realm of politics, where limited resources and conflicting desires mean that not all claims for justice can be vindicated. Furthermore, there is not currently widespread political support for slavery reparations. Not surprisingly, Blacks are significantly more supportive of some form of reparations than are Whites.\textsuperscript{15} For example, ninety percent of white respondents to a February 2002 survey said that the government should not make cash payments to descendants of slaves, whereas fifty-five percent of black respondents felt such payments

\textsuperscript{11} The internment of Japanese Americans was organized and run by the War Relocation Authority, whose records are maintained in the National Archives. See National Archives and Records Administration, \textit{Records of the War Relocation Authority}, at http://www.archives.gov/research_room/federal_records_guide/war_relocation_authority_rg210.html#210.2.1 (summarizing the records collections of the War Relocation Authority).

\textsuperscript{12} Reparations for African Americans in situations where the victims are readily identifiable might be more feasible. For example, the Florida legislature appropriated two million dollars in 1994 for African-American residents (and their descendants) of Rosewood, a black community that was burned down in 1923 after a white woman lied about being assaulted by a black man from the community. Art Alcausin Hall, \textit{There Is A Lot to be Repaired Before We Get to Reparations: A Critique of the Underlying Issues of Race that Impact the Fate of African American Reparations}, 2 SCHOLAR 1, 17 (2000); Eric K. Yamamoto, \textit{Racial Reparations: Japanese American Redress and African American Claims}, 19 B.C. THIRD WORLD L.J. 477, 480 (1998) [hereinafter \textit{Racial Reparations}]. In addition, victims of the Tuskeegee syphilis experiment in 1997 received reparations and a presidential apology. Yamamoto, \textit{Racial Reparations}, infra.

\textsuperscript{13} In every session of Congress since 1989, Rep. John Conyers (D-Mich) has introduced a bill in the Civil and Constitutional Rights Subcommittee of the House Judiciary Committee to create a commission to study the harms caused by slavery and recommend to Congress appropriate remedies, including the possibility of monetary reparations. The text of the bill has not changed significantly in any of its iterations. \textit{Compare} H.R. 3745, 101st Cong. (1989); H.R. 40, 107th Cong. (2001). None of the bills introduced has ever made it out of the subcommittee. See Merida, supra note 4.

\textsuperscript{14} This moral obligation does not just exist with regard to the slaves and their descendants, but also becomes a constitutive part of our national identity. Tuneen Chisolm, for one, argues that if the United States wants to be an equitable multicultural society it must demonstrate this through providing reparations to African Americans as a way of showing commitment to racial recognition and healing. Tuneen E. Chisolm, \textit{Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations}, 147 U. PA. L. REV. 677, 706–07 (1999).

would be appropriate.\textsuperscript{16}

If a political solution cannot be found for providing slavery reparations, there are those who are prepared to bring lawsuits to recover this compensation.\textsuperscript{17} I will take it as my general presumption that African Americans and other racial minorities suffer from glaring disparities in their daily lives when compared to Whites.\textsuperscript{18} It is not my purpose in this article to make moral arguments for (or against) the correction of these disparities; this has been done in many other places.\textsuperscript{19} Rather, I will question: (1) whether compensation for harms to African Americans is best handled through a class action suit for slavery reparations, and (2) whether alternatives to legal action can add greater perspective to the benefits and deficits created and maintained by slavery. While no such class action suit has been filed at the time of this writing, efforts to organize a suit for slavery reparations are underway.\textsuperscript{20} One slavery reparations suit is being organized by Randall Robinson, author of a recent and popular book on slavery reparations entitled The Debt; Harvard Law professor Charles Ogletree; Alexander Pires, who won a landmark racial discrimination suit against the United States Department of Agriculture on behalf of black farmers;\textsuperscript{21} and lawyers from Johnnie Cochran’s firm.\textsuperscript{22} This group, known collectively as the “Reparations Coordinating Committee,” plans

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\bibitem{16} \textit{Id.} Both Whites and Blacks were more receptive to the idea of corporations being sued for profits made off of slave labor (32\% and 68\% respectively). \textit{Id.}
\bibitem{17} Indeed, lawsuits were filed in March 2002 against Aetna Corp. for insuring against injured and runaway slaves and against CSX Railroad for using slave labor to build its rail lines. \textit{Id.} In early September 2002, additional lawsuits were filed against a range of investment banks, insurers, railroad companies, textile producers, and tobacco companies for their insurance or use of slave labor. Darryl Fears, \textit{Slaves’ Descendants Sue Firms: Filing Seeks Reparations From Profits on Free Labor}, WASH. POST, Sept. 4, 2002, at A22. Some of these cases have subsequently been consolidated and will be heard in the Northern District of Illinois. In re African-American Slave Descendants Litig., 231 F. Supp. 2d 1357 (J.P.M.L. 2002). For an overview of recent slavery reparations suits, see Eric K. Yamamoto, Susan K. Serrano, & Michelle Natividad Rodriguez, \textit{American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror}, 101 Mich. L. Rev. 1269, 1296-1301 (2003). Yamamoto et al. also discuss the merits of slavery reparations as “repair” through concepts of restorative justice and community development, rather than as individual lawsuits. \textit{Id.} at 1303.
\bibitem{18} See generally, HACKER, supra note 2.
\bibitem{19} See, e.g., RANDALL ROBINSON, \textit{THE DEBT} (2000) (arguing in favor of reparations, though not necessarily in monetary form, to compensate African Americans for the exploitation they have suffered, first through slavery and later though institutional discrimination); John McWhorter, \textit{Against Reparations}, THE NEW REPUBLIC, July 23, 2001, at 32 (responding to many of the points raised by Robinson in \textit{The Debt}).
\bibitem{20} See, e.g., Willie E. Gary et al., \textit{Making the Case of Racial Reparations: Does America Owe a Debt to the Descendants of Its Slaves?}, HARPER’S MAG., Nov. 2000, at 37. As discussed in footnote 17, several smaller cases have been filed against individual private companies that allegedly profited from slave labor or the slave trade. \textit{See supra} note 17.
\bibitem{21} See generally \textit{id.} (discussing Alexander Pires’ representation of black farmers against the U.S. Department of Agriculture in Pigford v. Glickman litigation).
\bibitem{22} See Gary, supra note 20, at 51; Shepard, supra note 7; Vern E. Smith, \textit{Debating the Wages of Slavery}, NEWSWEEK, Aug. 27, 2001, at 20, 23.
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on filing the suit as early as is feasible.\textsuperscript{23} The legal and theoretical difficulties in bringing such a suit will be one of the key foci of this article. My discussion of the barriers to a class action lawsuit for slavery reparations will be counterpoised with the arguments advanced by Cheryl Harris in her article \textit{Whiteness as Property},\textsuperscript{24} which I see as providing a more viable theoretical framework for addressing racial disparities than slavery reparations. It is important to keep in mind that even if a legal solution is untenable, this does not remove any moral imperatives that may exist for slavery reparations. However, the abstracted glance of the law, with its basis in precedent and a jurisprudential concern for firm causality in assigning fault, places restrictions, perhaps reasonably so, on more political and emotional pleas for slavery reparations.

II.

\textit{"Whiteness as Property" and Racial Disparities: Limits of the Legal System and of Attributing Blame}

The issue of slavery reparations is fraught with problems precisely because it is presented within a legal framework. Even where the arguments for and against slavery reparations are not overtly legal, they often take place against a backdrop of legal principles. Take, for example, the now infamous ten point manifesto against slavery reparations distributed by David Horowitz to colleges and universities around the nation.\textsuperscript{25} Although Horowitz’s


\textsuperscript{25} In 2001, conservative commentator David Horowitz placed an ad against slavery reparations in many college newspapers across the country. The ad, titled “Ten Reasons Why Reparations for Slavery is a Bad Idea-and Racist Too,” (titled elsewhere as “Ten Reasons Why Reparations for Blacks is a Bad Idea for Blacks—and Racist Too”) is graphically presented as if a public pronouncement on parchment nailed to the walls of a colonial pub. For a visual copy of the ad, see http://www.frontpagemag.com/Articles/Printable.asp?ID=3724. Horowitz’s ten reasons against reparations for slavery can be summarized as follows:

1. No single group is responsible for slavery; many of the slaves were captured by black Africans and Arabs; plus, there were 3,000 black slave-owners in the United States prior to the Civil War;
2. Black Americans as well as white Americans have benefited from slave labor;
3. Only a small number of Americans, even in the South, owned slaves;
4. Most Americans are descended from immigrants that arrived after the Civil War and thus bear no guilt for slavery;
5. The claim for reparations is based on race and not injury, unlike other examples of reparations;
6. Many descendants of slaves have become successful members of society, so those who have not been successful should not feel they are being held back;
7. Seeking reparations makes African Americans fixate on being victims instead of working to better their communities;
8. Reparations have already been provided in the form of welfare and affirmative action;
9. Blacks are free today because Whites started an abolition movement;
assertions are not explicitly legal, many of them are framed in terms of the direct assignment of blame normally associated with legal proceedings. While overtly incendiary and in many instances misguided, the arguments made by Horowitz in his ten points are echoed in some of the arguments against reparations that I present throughout this article. If nothing else, these ten points demonstrate that a lawsuit does little to ease existing racial tensions because it creates a perpetrator versus victim mindset that depends upon a stigmatization of fault. Within the realm of a class action suit, this logic must hold forth. Lawsuits are based upon the premise of there being a winner and a loser, with the assignment of causation principally determining the outcome of the case.

A. Alternatives to Legal Action: Reconceptualizing Racial Identities

The harms which slavery reparations are meant to remedy are more easily legitimized in a theoretical framework that answers questions raised in the context of slavery reparations without relying upon the definitive placement of fault. A lawsuit can only reinforce a dichotomy between races; this separation must be overcome if we are to move toward solving the problems of race relations. An alternative to legal action is needed. Recovering slavery reparations must be viewed as a radical reconceptualization of discrimination that focuses on present disparities instead of past actions.

Cheryl Harris's article Whiteness as Property contains such an alternative. Harris offers a view of the differences between races in America that reconceptualizes those differences as a form of property that—


Horowitz's ad generated quite a firestorm on many college campuses. For example, when the ad ran in the student newspaper at the University of California at Berkeley, groups of students protested by removing copies of the newspaper from racks around campus, forcing the newspaper to publish an apology for running the ad. Charles Burress, UC Newspaper Apologizes for Insensitive Ad; Message Argued Against Slavery Reparations, S.F. CHRON., Mar. 2, 2001, at A21; see also Debra J. Saunders, Free Speech Dies a Bit at Berkeley, S.F. CHRON., March 6, 2001, at A21 (criticizing students for "stealing" the newspapers from the racks). Twenty-six college newspapers ran the ad, with three of them later apologizing; forty college papers refused to run the ad. Regardless of what one thinks of the ad itself, it does raise provocative questions about free speech. If nothing else, it also shows that the debate over slavery reparations is quite alive.

26. For example, point one looks at who captured the slaves; points two, five, and six focus on to what extent, if any, harm has been suffered by descendants of slaves; points three and four implicitly examine who should pay reparations and whether or not they are the ones to be blamed for the alleged harms.

27. Harris, supra note 24.

28. In constructing the idea of whiteness as property, Harris builds largely from Margaret Radin's article Property and Personhood, in which Radin demonstrates that "[a]lmost any theory of private property rights can be referred to some notion of personhood."
Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957, 957 (1982). Radin supports this argument by
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as distinguished from Blacks and other racial minorities—possess through the ways in which laws are written and enforced. Harris defines property as consisting of four “classical” components: (1) the right to dispose of one’s property; (2) the right to use and enjoy one’s property; (3) the reputation and status gained through ownership of property; and (4) the absolute right to exclude others from use of one’s property. Of these, the right to exclude others is of primary importance in conceiving whiteness as property. Whiteness is based principally on the oppression of minority groups by defining them as Other. For Harris, white racial identity has historically been based on the positioning of Whites in a position of superiority to other races through claims of divine right or greater intellectual ability. This superiority can be preserved only through excluding other racial identities from whiteness; the inclusion of these other identities would threaten the validity of the belief in white uniqueness. Notions of reputation and status are necessarily tied to oppression because it is through the possession of whiteness as property that the enjoyment of these benefits flows.

The inalienability of property may seem problematic to a definition of whiteness as property. However, drawing upon Margaret Radin’s work, Harris points out that some elements of the human experience, and typically those conceptual elements of great worth (such as inherent human dignity), have been traditionally thought of as inalienable. Indeed, the inalienability of whiteness may highlight its conceptual importance to those who embrace the concept because it can be seen as something exclusively and essentially theirs.

For Harris, whiteness is necessarily based upon a position of dominance within the racial hierarchy and permeates all aspects of the human

tracing the notions of personhood implicit both in historical theories of property and in modern understandings of different types of property. Id.

29. There is nothing inherent in race biologically that leads to differing character traits and, barring assertions of genetic intellectual inferiority, there is no necessary connection to their social or economic situation either. See, e.g., RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994). As Ian Haney López puts it, “[w]hite is a figure of speech, a social convention read from looks.” ID. at 1731; Margaret Jane Radin, Market-Inalienability, 100 HARV. L. REV. 1849 (1987).

30. This legal construction of race should not be surprising. Haney López states it best: “Races are social products. It follows that legal institutions and practices, as essential components of our highly legalized society, have had a hand in the construction of race.” ID. at 111.

31. Harris, supra note 24, at 1731–37.

32. Id. at 1737.

33. Id. at 1726–27.

34. Id. at 1728–29, 1734.

35. Id. at 1734.

36. Id. at 1731; Margaret Jane Radin, Market-Inalienability, 100 HARV. L. REV. 1849 (1987).

37. Harris, supra note 24, at 1733-34.

38. As the law explicitly ratified those expectations in continued privilege or extended ongoing protection to those illegitimate expectations by failing to expose or to radically disturb
This manner of distinction—which touches not just upon African Americans but upon Native Americans, Asian Americans, Hispanics, and other racial groups as well—has been prevalent throughout our history. Harris notes, “it was the interaction between conceptions of race and property that played a critical role in establishing and maintaining racial and economic subordination.” As conceptions of property have changed, whiteness as property has changed with them. This can be traced not only through the most obvious example of slaves as property, but also through the later legalized recognition of whiteness as property in decisions like Plessy v. Ferguson, where race signified social status and determined where someone could sit on a train. Because Plessy appeared to be white, denying him the ability to sit with those who were by blood entirely white (Plessy himself was one-eighth black) signifies that there is a quality to whiteness that extends beyond skin color. Bloodlines became a way of defining membership in this exclusive club. Such membership can be thought of as a form of property.

This can be seen in the extent to which the Supreme Court based its decision on a connection between race, property, and social reputation.

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is ‘property,’ in the same sense that a right of action or of inheritance is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man, and assigned to a colored coach, he may have his action for damages them, the dominant and subordinate positions within the racial hierarchy were reified in law. When the law recognizes, either implicitly or explicitly, the settled expectations of Whites built on the privileges and benefits produced by white supremacy, it acknowledges an reinforces a property interest in whiteness that reproduces Black subordination.

Harris, supra note 24, at 1731 (footnote omitted).

39. “Whiteness has functioned as self-identity in the domain of the intrinsic, personal, and psychological; as reputation in the interstices between internal and external identity; and, as property in the extrinsic, public, and legal realms.” Id. at 1725.

40. Ian Haney López contends that by drawing upon diverse European heritages, Whites are able to give themselves the illusion of being multicultural without really taking into account the perspectives of racial minorities. HANEY LÓPEZ, supra note 29, at 170.

41. Harris discusses only African Americans and Native Americans in her article, but there is nothing to suggest that her discussion would be limited to these two racial groups.

42. Harris, supra note 24, at 1716. For a less legal and more sociological account of white identity as being based on the oppression of minorities, see generally DAVID R. ROEDIGER, THE WAGES OF WHITENESS (1991).

43. Harris, supra note 24, at 1714.

44. Id. at 1718. Citing Shakespeare’s Othello as an example, Randall Robinson argues that “in the centuries preceding the Atlantic slave trade and the invention of a virulent racism to justify it, the idea of black inferiority did not exist.” ROBINSON, supra note 19, at 17.

45. 163 U.S. 537 (1896).

46. Harris, supra note 24, at 1747.

47. Id. at 1748.
against the company for being deprived of his so-called ‘property.' Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.\(^{48}\)

In other words, those who are white can sue a railroad for the damage to their reputation for being classified as colored, but those who are colored have no claim based on “the reputation of being a white man.” This distinction is only meaningful if it is assumed that white racial identity is somehow superior to that of people of color. Perhaps more importantly, this view of race as reputation rests upon a belief that the reputation can be “taken” from someone or otherwise damaged in a way consistent with notions of property. While it is possible that the Supreme Court would not have discussed reputation as a white man in terms of property had Plessy’s attorneys not suggested the connection, its willingness to entertain this argument demonstrates the implicit belief of the Court’s majority\(^{49}\) that whiteness could be defined through subordination of Blacks and that this ability to define the terms of the relationship was something of definite value.\(^{50}\)

One may think that the abolition of legalized segregation (endorsed in \textit{Plessy}) by \textit{Brown v. Board of Education}\(^{51}\) and related litigation eliminated whiteness as property. To be sure, \textit{Brown} marked a step forward in the cultural status of African Americans by denying Whites the property interest in disassociating from Blacks.\(^{52}\) However, by prohibiting legal segregation, the Court ignored and thus granted tacit acceptance of the underlying economic and social disparities that remained.

\textit{Brown I’s} dialectical contradiction was that it dismantled an old form of whiteness as property while simultaneously permitting its reemergence in a more subtle form. White privilege accorded as a legal right was rejected, but de facto white privilege not mandated by law remained unaddressed. In failing to clearly expose the real inequities produced by segregation, the status quo of substantive

\(^{48}\) Plessy, 163 U.S. at 549.

\(^{49}\) In this regard, it is important to note that even in Justice Harlan's famous dissent in \textit{Plessy}, he explicitly declares the Constitution to be “color-blind” only because the white race is the dominant race and in no danger of losing this position. \textit{Id.} at 559.

\(^{50}\) The fact that these deprivations took juridical form should not detract from the transfer of money that accompanied them. As Richard America states, “there has been a series of arrangements, slavery, Jim Crow, discrimination, all of which were mechanisms that had the effect of transferring money from [B]lacks as a class to [W]hites as a class. . . . Even folks who came to this country in the last 100 years or so had an advantage in that their whiteness was an asset in the marketplace.” Michael Fletcher, \textit{Putting a Price on Slavery’s Legacy: Call for Reparations Builds as Blacks Tally History’s Toll}, \textit{WASH. POST}, Dec. 26, 2000, at A1.

\(^{51}\) 347 U.S. 483 (1954).

\(^{52}\) Harris, \textit{supra} note 24, at 1750.
disadvantage was ratified as an accepted and acceptable base line — a neutral state operating to the disadvantage of Blacks long after de jure segregation had ceased to do so. In accepting substantial inequality as a neutral base line, a new form of whiteness as property was condoned.\textsuperscript{53}

Whiteness as property therefore ceased to be an explicitly legal category, but its status as property persisted. Material inequities not only continued to be a constitutive part of one’s racial identity, they also came to be seen as the norm.\textsuperscript{54} In other words, once the legal playing field was ostensibly leveled, differences between the races could be thought of as detached from a history of whiteness as property.\textsuperscript{55} Despite this perception, current racial disparities make whiteness as property operative. In short, whiteness as property subverted the visible and undeniable racism of slavery and hid racial disparities in a form more easily ignored.

Whiteness as property is reflected today not just through existing racial disparities, but also through reactions to attempts atremedying these disparities. The racial disparities are clear enough. As of 2001, African Americans comprised one quarter of the United States population below the poverty level, even though African Americans were only about thirteen percent of the national population.\textsuperscript{56} Twenty-one percent of African Americans over twenty-five years of age had less than a high school education, whereas this was true of only eleven percent of non-Hispanic Whites in the same age-group.\textsuperscript{57} As of 2000, life expectancy for Whites was 77.4 years, but only 71.7 years for Blacks.\textsuperscript{58}

However, racial disparities are not by themselves examples of whiteness as property. Rather, whiteness as property is manifested in the way in which those who benefit from this unequal distribution of income, services, and opportunities perpetuate these disparities. Whites, Harris argues, grow to expect maintenance of a status quo in which they are in a relative position of

\begin{itemize}
\item \textsuperscript{53} Id. at 1753 (footnote omitted).
\item \textsuperscript{54} Cf., e.g., Charles R. Lawrence, III, The Id, the Ego, and Equal Protection Reckoning with Unconscious Racism, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 235 (Kimberlé Crenshaw et al. eds., 1995) [hereinafter CRITICAL RACE THEORY] (arguing that the cultural meaning of racist acts is more important than the intention of the perpetrator); Neil Gotanda, A Critique of “Our Constitution is Color-Blind”, in CRITICAL RACE THEORY infra at 257, 268-72 (contending that premises of colorblindness have masked the real effects of racial subordination).
\item \textsuperscript{55} Harris, supra note 24, at 1753.
\item \textsuperscript{57} Id.
\item \textsuperscript{58} National Vital Statistics Reports, Estimated Life Expectancy at Birth in Years, by Race and Sex (Dec. 19, 2002), at http://www.cdc.gov/nchs/data/dvs/nvsr51_03t12.pdf.
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power to Blacks.\textsuperscript{59} This is accomplished, in part, by disassociating white privilege from past and present economic exploitation and adopting an emphasis on race-neutrality that can only reinforce this status quo. As Harris states, "[t]he law masks what is chosen as natural; it obscures the consequences of social selection as inevitable. The result is that the distortions in social relations are immunized from truly effective intervention, because the existing inequities are obscured and rendered nearly invisible."\textsuperscript{60} Responsibility is in this way shifted from those who benefit from racial disparities to those who are oppressed.

An example of this process can be seen in how racial minorities are sometimes "blamed" for not obtaining the same levels of achievement as Whites. This is reflected, to some extent, in the ten point manifesto against slavery reparations by David Horowitz, who argues against reparations by minimizing the harm to present-day descendants of slaves and claiming that blame for the wrongs of slavery cannot be attributed to Whites today.\textsuperscript{61} A more infamous example is the book \textit{The Bell Curve}, which contends that the gap in educational achievement between African Americans and Whites is partially due to the genetic inferiority of African-American intellect.\textsuperscript{62} \textit{The Bell Curve} reifies whiteness as property to the extreme by positing a superior genetic attribute that Whites possess and Blacks do not. We need a means of remedying these disparities in a way that avoids connotations of blame and instead focuses on socioeconomic distributions in their own right.

\textbf{B. Addressing Racial Disparities: Affirmative Action and Whiteness as Property}

Affirmative action can be seen as a way to address some of these racial disparities. Alan David Freeman contends that programs like affirmative action aimed at correcting racial disparities can be viewed either from the perspective of the perpetrators (those who have historically exercised the discrimination, i.e. Whites) or the victim (those who have historically experienced the discrimination, i.e. Blacks).\textsuperscript{63} Legal approaches asserting that the removal of racially discriminatory laws fulfills the obligations of the majority to the minority only make sense by focusing on the actions that are being committed.\textsuperscript{64} If no overtly racist actions are being committed, then supposedly

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  \item \textsuperscript{59} Harris, supra note 24, at 1778.
  \item \textsuperscript{60} \textit{Id.} at 1177-78 (footnote omitted).
  \item \textsuperscript{61} Horowitz, supra note 25.
  \item \textsuperscript{62} See generally, HERRNSTEIN ET AL., supra note 29. For a discussion of \textit{The Bell Curve} and its implications for affirmative action, especially in law schools, see Fortson, supra note 2.
  \item \textsuperscript{63} Alan David Freeman, \textit{Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine}, in CRITICAL RACE THEORY, supra note 54, at 29. Freeman traces this dichotomy through the history of Supreme Court decisions on race, arguing that these decisions have invariably embraced the perpetrator perspective.
  \item \textsuperscript{64} \textit{Id.}
\end{itemize}
no injustice has occurred and the majority can view itself as "innocent." This places the causes of racially disparate demographics beyond the scope of the law. Shifting the focus from actions to conditions—which is to adopt the perspective of the victim—allows recognition of the continuing harms that remain from a history of systematic discrimination. It is not that Whites intentionally act in a racially discriminatory manner. Rather, the system that grew out of a history of racism continues to have racially discriminatory effects, intentional or not. Defining racial privilege as property effectuates this shift from the perpetrator to the victim by creating a means for conceptualizing existing disparities not as actions but as "things."

Though she does not make this argument explicitly, the shift from an action-based to an object-based view of racial disparities is implicit in Harris's attempt to reformulate the debate over affirmative action. Harris wants to move the debate over affirmative action away from a "corrective" focus of placing blame on one side or another—Whites for allegedly discriminatory actions and minorities for taking jobs that would otherwise go to "more qualified" Whites—and look at affirmative action more in terms of a redistributive framework. Whiteness as property removes the veil of innocence from existing racial disparities in employment and education. By "destabilizing" our presumptions about racial identity, Harris contends, whiteness as property allows us to see the sometimes subtle way in which notions of White supremacy have structured American economic and social relations. These racial disparities may be seen as a form of property, whereby whiteness has more value than blackness not just in material terms but also in terms of opportunities to participate fully in society. Affirmative action, viewed as a means of redistributing property so that minorities have the same investment in their identities as Whites "begins the essential work of rethinking

65. Id. at 30.
66. Id.
67. Id. at 29.
68. Freeman does not use the "whiteness as property" language, but I see no reason why it would be incompatible with his analysis.
69. The issue of affirmative action is a vexing one for proponents of reparations for slavery. If affirmative action is to be viewed as a success, then some argue it must necessarily be considered a form of reparations. Editorial, The Reparations Debate, CHI. TRIB., April 3, 2000, at N8. This is especially true if one believes the whiteness as property argument. Many supporters of affirmative action have argued that it has provided tangible benefits to minority groups (and usually to Whites as well) in an effort to encourage continuation of the programs. See generally, e.g., WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (1998) (advancing arguments for the benefits of considering race in college admissions). Proponents of reparations for slavery, though, are faced with the proposition either of arguing that affirmative action has not been effective, thus risking discontinuation of the programs, or of reducing their requested recovery accordingly. This choice is arguably inapplicable when one focuses solely on the harms caused to actual slaves and not on the lingering effects of slavery, as would presumably be the case with a class action lawsuit for slavery reparations.
70. Harris, supra note 24, at 1781-84.
71. Id. at 1778-79.
rights, power, equality, race, and property from the perspective of those whose access to each of these has been limited by their oppression. This reconceived affirmative action thus turns on ideas of entitlement and fairness rather than determinations of guilt and innocence. Not only does this reconception allow both sides of the debate to think of affirmative action as a way of achieving justice without accusing one side of harming the other, it consequently helps build a dialogue of reconciliation and understanding by enabling people to disassociate from their racial identity. Because a property interest in whiteness has at its core a reliance upon the exclusivity of whiteness, this process of overcoming the divisive black/white dichotomy cannot take place until whiteness as property is abandoned. Conceiving of whiteness as property provides a neutral matrix, one not based upon racial identities that require the advancement of subject-centered issue positions, for creating a redistributive framework. In other words, conceiving of whiteness as property provides a necessary level of abstraction for dealing with race problems.

Whiteness as property therefore provides an alternate framework for understanding race relations in this country that differs from the one implicitly relied upon by a class action suit for slavery reparations, which necessarily depends upon attributing fault to historical groups or entities in a legally causal manner. When exploring the topic of slavery reparations from outside the context of a class action suit, it is possible to find credible responses to the flaws that otherwise exist in such a suit because the issue of slavery reparations is being addressed outside of a purely legal setting. Harris's article and her concept of whiteness as property provide a framework for formulating those responses by shifting the focus of a discussion of the historical meaning of slavery away from a blame game and more toward a detached analysis of the benefits and deficits created by treating white racial identity as a form of property. This should not be seen as creating a moral equivalence between the slaves and their masters by removing legal fault from the central focus of the analysis. Rather, Harris provides a means for addressing morally reprehensible past actions that avoids many of the pitfalls of a lawsuit. Her framework can in this way be applied to the reparations debate to gain a fresh

72. Id. at 1779.
73. Id. at 1783.
74. Id. at 1782–83.
75. Harris rejects the notion that affirmative action could lead to a property interest in blackness because she views affirmative action as being “based on principles of anti-subordination, not principles of Black superiority.” Id. at 1785. Whiteness as property, on the other hand, “is derived from the deep historical roots of systematic white supremacy that has given rise to definitions of group identity predicated on racial subordination of the ‘other,’ and that has reified expectations of continued white privilege.” Id.
76. Id. at 1789.
77. Id. at 1731–37.
perspective on the issue.

III.
TOWARD A MORE CONSTRUCTIVE DISCUSSION OF RACE RELATIONS:
PROSPECTS FOR SLAVERY REPARATIONS AS A CLASS ACTION SUIT AND THE
LIMITATIONS OF THIS APPROACH

The best way to approach the question of a lawsuit for monetary reparations for slavery is by examining a series of questions defining the parameters of such a suit. Asking these questions will not only explore the legal options and limitations for a reparations case, but also the theoretical dimensions of what such a case could and could not accomplish. Thus, in answering each of the following questions, I will examine both the legal ramifications of the question and some of the more theoretical issues that arise from them. In turn, the whiteness as property approach provided by Harris will highlight many of the complicating and arguably unsolvable issues raised in a lawsuit for slavery reparations. While Harris does not address reparations, her analysis generates credible responses to the legal difficulties a lawsuit for slavery reparations faces. These responses may not be as viscerally satisfying as a definitive court victory likely would be, but the arguments that can be drawn from Harris's more theoretical tactic are ultimately more persuasive than an inherently flawed lawsuit.

Part of the problem with addressing slavery reparations with a lawsuit is that such a suit would be so far afield from any past cases that it is necessary to engage in a fair bit of speculation about the potential legal bases for the case.78

Primarily, I will focus on the internal logic of a possible class action lawsuit to recover damages for American slaves and their descendants. To a lesser extent, I will address the political and cultural ramifications for bringing a suit demanding reparations, though these issues would certainly be worth analyzing in more depth in a larger article. There is by no means complete agreement within the African-American community about how to remedy slavery and the injuries it has caused.79 My discussion is by no means exhaustive. I use Harris not so much to formulate a comprehensive plan to unravel the core problems of race relations in this country, but rather, more modestly, to show why a legal


approach to the issue, in the form of a lawsuit for slavery reparations, is likely to create more problems than it solves. The alternatives I briefly elaborate upon serve as a starting point for a more constructive discussion of race relations.

The remainder of this article will focus on four central questions at the heart of a lawsuit for slavery reparations: (1) Who can recover?; (2) How much should each participant in the suit recover?; (3) What is the theory of recovery?; and (4) Who can be sued? The first question seeks to identify the present-day victims to whom reparations for slavery would be paid. Once it is determined who should recover, the second question addresses the amount that can be recovered for the harms caused by slavery. This raises important questions about the types of harms suffered by slaves and ways in which these damages might be legally cognizable. The discussion of damages, therefore, segues into a discussion of alternate theories of recovery for slavery reparations. Not surprisingly, different theories of recovery rely upon suing different entities for monetary damages. The last section focuses on some of the problems relating to different potential defendants. By necessity, the discussion of these four issues will be somewhat intertwined throughout.

A. Defining a Slavery Reparations Class

The main legal issue with regard to recovering some form of compensation for the harms caused by slavery is whether or not anyone alive today can recover for the harms suffered by slaves many generations ago. Rule 23(a) of the Federal Rules of Civil Procedure lays out the following criteria for establishing a class in a class action suit:

(1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The predominant 23(a) hurdle is the requirement that class representatives be typical of the class as a whole. It should be fairly obvious that the proposed class in a slavery reparations case is large enough to make joinder not only impractical but impossible. It is also likely that there will be common questions of law for the class, though this may be slightly in peril if the

80. These questions roughly mirror (reflecting the order in which the questions were laid out) the four elements of any tort suit: (1) breach, (2) damages, (3) causation, and (4) duty. I hesitate to push this analogy too far since, as will be seen, many of the calls for reparations are at their heart contract-based claims. The possible analogy to a tort suit, though, does touch upon the centrality and relevance of the questions I am addressing.

81. FED. R. CIV. P. 23(a).
defendants were to differentiate how different slaves were treated and consequently articulate different theories of recovery. Whether or not this is possible will depend on the legal theory of the case. The fourth requirement addresses situations, where, for example, the class representatives might personally accept a large amount of money in a settlement offer at the expense of other members of the class. This requirement would not be invoked until an actual suit was filed and thus does not need to be addressed here.

The typicality of claims requirement touches on who can be a member of the class. The representative parties in a lawsuit for slavery reparations, even if suing on behalf of the slaves themselves and not on their own behalf, would almost certainly be the descendants of slaves. But who is a representative slave descendant? In the reparations for interned Japanese Americans—awarded through Congressional appropriation and not a lawsuit—many of the victims were still alive or, at the very least, they and their immediate descendants were more readily identifiable because reliable records exist identifying those interned.

This specificity would not exist for the descendants of slaves. Most Blacks in America have at least one ancestor who was a slave. However, many people who consider themselves black, or whom society or the law considers black, also have ancestors who were not slaves. Additionally, a number of people may not consider themselves black but have at least one ancestor who was a black American slave. This mixed ancestry becomes a problem when attempting to craft a class action suit because in order to file such a suit one needs to select certain class members who will represent the class as a whole. Then again, if the suit is being brought over harms—economic, physical or otherwise—committed against slaves, it might be more appropriate if plaintiffs bring suit by the estates of definitively identified slaves. Certainly, there will be enough African Americans who can trace their ancestry back to specific slaves to satisfy the requirements for certifying a class.

82. I will address possible legal theories in a later section.
83. See supra note 11.
84. The relevance of this in determining the distribution of any settlement will be addressed shortly. If a legal case is in fact to be based on compensation for the actual harms of slavery, as opposed to its lingering effects—which I posit as a basic presumption of this article to avoid the even further legal complexities that would necessarily arise in a suit over the lingering effects of slavery—then anyone seeking recovery would need to establish that an actual ancestor of theirs had been a slave. Because written records giving traceable names of slaves are rare—though not entirely non-existent—this may be difficult. Oral traditions may provide descendants with knowledge of their past, but the admissibility of these stories in court as a means of establishing ancestry is questionable.
85. For a list of pre-Brown state laws determining the percentage of “black” blood needed to be classified as black, see HANEY LÓPEZ, supra note 29.
The question then becomes how to determine the scope of the class. Class action suits normally require that notice be given to potential class members, usually for the purpose of allowing them to opt out if they choose. However, this becomes problematic when it is nearly impossible to identify harmed plaintiffs to whom notice should be given. Most slaves cannot be specifically identified. Similarly unidentifiable are those who have legal control over slaves' estates. Every slave who has descendants will in most instances have a large number of descendants. The vast majority of persons alive today who have at least some slave ancestry have probably descended from more than one former slave. This creates a web of legal relationships impossible to untangle. Whether a court would be willing to overlook problems of notice or accept such a relatively nebulous definition of a class is unknown.

Even if a class can be established for the purposes of a class action suit, the delineation of who will recover is quite attenuated. If the recovery is to be tied to the past harms of slavery, which is the premise of my analysis, then the recovery must be based on past harms and not on any present ill-effects from the vestiges of slavery. Yet, this masks the very real racism and racial tension that grew in large part out of the institution of slavery in America. For example, it is hard to imagine that anyone who was three-quarters black would be discriminated against any less than someone whose bloodlines were entirely from former slaves. And, what of recent immigrants of African heritage who do not have any ancestors who were American slaves? They, too, suffer the

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87. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (requiring that notice be given to each individual class member who can be identified through reasonable effort).

88. See, e.g., Gen. Tele. Co. v. Falcon, 457 U.S. 147 (1982) (denying class certification, on the grounds that sufficient evidence of the existence of common questions of law or fact had not been demonstrated, to a man of Mexican-American ancestry filing a discrimination claim on behalf of all Mexican-American employees or applicants who were either not promoted or not hired).

89. This raises the question of whether suit can even be brought by descendants several generations removed from the victims of the harm. It is hard to find legal precedent one way or the other on this issue because the situation surrounding reparations is so unique. The closest case I could find is one where heirs of the sole shareholders of a corporation which had conveyed (in 1925) certain land to a city for use as a library site sued the city for return of the deed to the land after the city (in 1969) ceased using the land for a library. City of Klamath Falls v. Bell, 490 P.2d 515 (Or. App. 1971). The court allowed the case to continue and eventually found in favor of the descendants of the shareholders, even though the corporation had in the meantime dissolved. Id. at 340. See also Prima v. Darden Rests., Inc., 78 F. Supp. 2d 337 (D. N.J. 2000) (holding that a widow could sue when a restaurant in its commercials imitated her husband’s voice and singing style without permission).

90. When considering the history of racial classification in America, one need only remember that Plessy in the Plessy v. Ferguson case was one-eighth black (and seven-eighths white) and in outward appearance looked predominantly white, though he did not challenge his racial classification. 163 U.S. 537, 541 (1896). This is but one example of the “one drop” rule for establishing racial identity in many southern states.

91. It is certainly possible that they may be descended from those who were slaves in another country or colony, like many in the Caribbean, but this would not bear on claims in American courts, unless the slavery could somehow be tied to violations of international law and
full brunt of racial discrimination. Yet, if a suit awards money by proxy to former slaves, it would be easy to argue that the amount of money awarded should be based on the percentage of former slaves in one's bloodlines.\textsuperscript{92} Does this then mean that anyone who has an ancestor who was a slave should recover the same amount as everyone else descended, at least in part, from a slave; or, should those with a larger percentage of their bloodline from former slaves be awarded more than those with a lesser percentage?

Because the harms are so distant and widespread, it is harder to answer these questions for slavery's victims than it would be for other victims. For example, asbestos-related decedents have readily identifiable and uncommingled descendants. Similarly, a definite recovery amount was set for each individual interned Japanese American because each one could be more easily identified. It is impossible to set an individual amount per slave, not only because exact numbers of slaves are not known—though estimates could serve largely the same purpose—but because it is impossible to identify each individual slave.\textsuperscript{93} There is also the additional problem that, if recovery is based either on lost wages or some other ongoing harm—psychological trauma perhaps—to the slave, it would be necessary to determine how long a slave lived in order to have a basis for calculating the recovery. This information is certainly scarcer than identifications of individual slaves. Without the ability to establish with any certainty the identity of slaves or how long they lived, determining who can recover becomes highly problematic, especially since a class action suit for slavery would supposedly be based on harms to slaves themselves and only indirectly benefit their descendants.

Perhaps recovery for individual descendants of slaves is not the best form that reparations could take. A central fund might be established from which monies could be distributed to applicant groups to carry out projects generally benefiting those reasonably believed to have descended from slaves.\textsuperscript{94} Such an arrangement is not unprecedented in a reparations context,\textsuperscript{95} though these

\textsuperscript{92} For more thoughts on this topic, see Kevin Hopkins, \textit{How to Right the Wrongs of Slavery}, CHI. TRIB., May 11, 2000, at 31.

\textsuperscript{93} Presumably, there will be enough documentation to identify some slaves, but certainly not enough to identify the vast majority of them. I am assuming that those advocating reparations for former slaves would not want to limit recovery to those who could be documented as actual slaves and their documentable descendants. I will discuss possible amounts requested for recovery to descendants of slaves in the next section.

\textsuperscript{94} For example, Robert Westley proposes the creation of a trust fund, financed by general federal revenues, from which money could be drawn for projects “aimed at the educational and economic empowerment of the trust beneficiaries to be determined on the basis of need.” Westley, \textit{supra} note 78, at 470.

\textsuperscript{95} Many “reparations” arrangements for Native Americans are structured in the form of a trust from which money can be distributed to tribes or other groups of individuals. \textit{See, e.g.,} Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1604–08 (2003). Also, the reparations agreement for Japanese Americans interned during World War II contained a provision for making part of the funds available to educate the public about what transpired. \textit{Civil Liberties Act
solutions have invariably been political and not judicial. Furthermore, it is unclear if this would be legally acceptable for a group as expansive as African Americans. This general trust fund could relieve some of the qualms of over-and under-inclusiveness that would result from a type of redistribution system that required documentation of descent from slaves, especially when one considers the issue of mixed heritage. However, setting up a trust fund this expansive creates its own set of problems—who would administer the fund and decide whom the grant recipients should be? Furthermore, establishing a trust fund aimed at generalized reparations projects might weaken the legal foundations for the initial case. The theory for reparations under which I am proceeding is that the reparations are meant to compensate the victims of slavery and only indirectly their descendants. Yet, the types of projects that this trust fund would support presumably would respond to relieving current financial and social disparities. These projects, because they focus on present inequities and not past harms, arguably diminish the idea that the class-action award is meant as compensation for the direct victims of slavery. Addressing current inequalities between Blacks and Whites necessitates bringing a different kind of case with a different set of legal theories. Thus, when determining who could recover in a reparations case brought on behalf of the victims of slavery, one is faced with balancing the legal arguments that seem to lead to direct monetary compensation of those descended from slaves against the practical difficulties this kind of award could cause.

In short, one of the problems with reparations for descendants of slaves is that it potentially limits those who could receive some form of compensation for the discrimination they presently experience. Not only are recent African-American immigrants and Caribbean Blacks excluded, but more importantly, many other racial groups who have been victims of systematic discrimination would be excluded from a suit brought on behalf of slaves. Indeed, it is also important to ask why women, who have been historically discriminated against and continue to face a measured disparity in wages as compared to their male counterparts, should not have a similar basis to a claim for reparations as do African Americans. A number of demographic groups have suffered economic loss because of past discrimination and can likely document much of this loss. Arguably, none of the losses of these other groups rivals the appalling harms suffered by Blacks due to the institution of slavery. However, this would only weigh upon the amount of damages recovered, and not the underlying theory of recovery. Yet, by saying that every non-white male has been harmed, one diminishes the uniqueness of the claims made by descendants of slaves with

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96. See Westley, supra note 78, at 471–73 (discussing the over- and under-inclusiveness problems related to slavery reparations).

97. See generally, DEBORAH RHODE, SPEAKING OF SEX (1997) (discussing socioeconomic disparities faced by women and the legal framework relating to those disparities).
regard to reparations. Without the uniqueness of their position in relation to the
dominant social and political class (white males), slavery reparations becomes
less salient, at least from a political perspective if not a legal one.

Whiteness as property broadens the scope of recovery to include all of
those who are victims of a property interest in whiteness defined in terms of the
oppression and subordination of others.98 While slaves and Blacks in general
occupy a unique place in American history,99 it seems unfair for a recovery
plan based on present circumstances to limit its focus to only one racial group.
The natural response would be that these other groups could bring their own
lawsuits, but as thin as the case is for slavery reparations, it would likely be
even thinner for other systematic race-based claims. Whiteness as property
unites minorities in a common cause rather than pitting them against each
other.100 When redistributive programs, such as affirmative action or a broad-
based trust fund, are established, there will still be some difficulties in defining
who is a member of a racial group based on percentages of bloodlines and so
on. This problem is unavoidable in any system using racial identifiers. A focus
on correcting current racism removes the serious documentation issues that
would exist in a class action suit concerning descendants of slaves. Because
whiteness as property rests upon an analysis, though historically based, of
existing socioeconomic differences between races, it also justifies
compensatory programs, such as the trust fund discussed above, based upon
present disparities. Whiteness as property allows recovery, so to speak,
regardless of the particularities of one's ancestry. In this way, it solves many of
the problems that are created by attempting to define a class of victims for a
suit for slavery reparations.

98. This argument could easily be extended to an interest in gender as a form of property.
The history and case law might not be as directly on point as it is with regard to race, but it is not a
stretch to apply the principles behind Harris's whiteness as property approach to the legal
treatment of gender and the way in which women have been viewed as temperamentally unsuited
for certain occupations or given certain "consideration" because of their supposed inability to
operate on the same level as men. For example, women as the "fairer sex" were for many years
excluded from the practice of law. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN
LAW 639 (2nd ed. 1985). As recently as 1974, in Kahn v. Shevin, the Supreme Court upheld a
state tax exemption for widows but not widowers on the grounds that widows disproportionately
bear the burden of the death of a spouse. 416 U.S. 351, 355 (1974). Men are required to register
for the draft, but women not.

99. Salim Muwakkil contends that non-black historically despised racial groups like Poles,
Vietnamese, Italians, and Mexicans do not share the degradation of their land of origin that those
of African heritage, who must face the stigma of coming from a "savage continent," experience.
Salim Muwakkil, Reparations Part II: The Movement's Next Step, CHI. TRIB., Feb. 12, 2001, at
N15.

100. For a discussion of the relationship between the black-white paradigm typical in race
relations and a multi-ethnic approach to race, see Hall, supra note 12, at 41-42.
B. Putting a Price on Slavery

On May 4, 1969, James Forman, a former leader of the Student Non-Violent Coordinating Committee (SNCC), interrupted the Sunday service at New York's Riverside Church and read his Black Manifesto to the 1,500 worshipers. Contained in the Manifesto was a demand that white Christian churches and Jewish synagogues collectively pay a total of five hundred million dollars, which worked out to about fifteen dollars per African American, in reparations for their role as part of an exploitative capitalist system. Reparations activist Robert Brock filed a class action suit in federal court in Los Angeles in 1965 against the United States claiming that descendants of slaves were due monetary damages for the harms committed against their ancestors. Brock's damages claim was for five hundred thousand dollars, plus interest, for each African American in the United States. According to the United States Census Bureau, as of March 2002, there were approximately thirty-six million people in the country racially classified as black. Using Brock's damages claim, this would work out to a total recovery of $1.8 trillion, which is about equal to the federal budget for 2000. This figure, though, does not include interest, which would multiply the amount to an almost unimaginable figure.

This is not the only astoundingly high recovery figure that can be found. The National Coalition of Blacks for Reparations in America (N’COBRA) claims that the descendants of slaves are owed eight trillion dollars by the federal government. Time magazine columnist Jack White calculated that

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101. Hall, supra note 12, at 18–19.
102. Id. It is unclear if Forman intended to request reparations from organizations other than churches.
103. Brock, head of the Self Determination Committee, a reparations lobbying group, claimed that by filing before the 100th anniversary of the ratification of the Thirteenth Amendment he effectively stopped the statute of limitations on any claims based on that Amendment. Jeffrey Ghannam, Repairing the Past, 86 A.B.A. J. 39, 41 (2000). It is unclear why Brock draws this conclusion, as the discussion in the section on who can be sued suggests a dramatically shorter statute of limitations. There are no cases or statutes creating a 100-year statute of limitations for constitutional amendments.
104. Id. Brock’s legal theory is that slavery violated international law by capturing Africans (which he considers necessarily to be an act of war) and transporting them over international waters. According to Brock, both claims would make the actions subject to international law.
105. Id. A different source records that Brock asked for $250,000 per recipient in gold bullion plus financial support to establish a country in Africa for black Americans who wanted to resettle. Steve Miller, Reparations is a Hot Topic, but No Dollars in Sight, WASH. TIMES, June 15, 2000, at A1.
106. McKinnon, supra note 56.
108. Steve Lash, Group Seeks Reparation for Slavery, HOUS. CHRON., June 14, 2000, at
descendants of slaves are owed twenty-four trillion dollars "based on unpaid wages denied ten million slaves, doubled for pain and suffering with interest added."\footnote{109} The plaintiffs in \textit{Cato v. United States} sought one hundred million dollars in compensation for the effects of slavery on those kidnapped from Africa and forced to labor in an oppressive foreign culture, along with an acknowledgment of and apology for the United States’ role in the enforcement of slavery laws.\footnote{110} Since this was not a class action suit, presumably the plaintiffs would have received all of this money had they prevailed. A similar recovery extended to every slave descendant would reach into the hundreds or even thousands of trillions of dollars. As discussed earlier, Japanese Americans interned during World War II received, by statute, twenty thousand dollars per person for approximately four years of imprisonment and disruption of their lives. Given that reparations were paid to roughly 60,000 survivors, this amounted to a total of $1.2 billion in reparations.\footnote{111} If a similar amount were given to each descendant of slavery, the total reparations would be approximately $720 billion.\footnote{112}

How do you put a price on the harms caused to slaves by an unforgivable institution? Normally in tort claims, the award of damages is meant to make the victim whole. In mass torts and class action suits, this usually occurs not through individual assessment but rather through some generalized computation about the average harm a victim would have suffered or will suffer. In cases dealing with potential future harms, this involves a calculation of the risk that one will contract the ailment or suffer whatever other harm is being litigated. Because we are by stipulation dealing only with past harms,\footnote{113} some generalized calculation would have to be made about the economic and psychological harm suffered by the “average” slave. Such a calculation masks the individual stories of horror that many slaves experienced, but it is likely

\footnote{109}{\textit{Id.}}
\footnote{110}{70 F.3d 1103, 1106 (9th Cir. 1995).}
\footnote{111}{\textit{Id.} supra note 4. The German government paid sixty billion dollars to victims of Nazi persecution. \textit{Id.} supra note 4. The comparison of slavery to Nazism is an intriguing one. Certainly, both are based on principles of racism and violent, forced oppression. \textit{See} Edward Benson, \textit{Repairing the American Holocaust}, \textit{THE DUKE CHRONICLE}, Feb. 14, 2001 (retrieved from LEXIS in University Wire file). However, slavery was aimed at economic exploitation as opposed to systematic extermination of an entire race. To the extent that one sympathizes with the analogy between slavery and Nazism, this provides a moral argument for reparations, but it is hard to see how this analogy can be translated into a legal argument.}
\footnote{112}{See McKinnon, \textit{supra} note 56 (using census data).}
\footnote{113}{If one were suing over the present effects of the vestiges of slavery, then one could project into the future the value that those harms will have before being satisfactorily mitigated.}
necessary for legal purposes. How one arrives at a dollar figure per slave is hard to determine. One could suggest lost wages, but there were no minimum wage laws or other salary figures at the time, so it is unclear how this figure could be derived. There was also no known workforce comparable to slaves at the time in the agricultural South. Those who lived on small farms and did not own slaves were mostly subsistence farmers and thus did not earn what could reasonably be called a wage. It may be possible to calculate an estimate of the earnings that plantation owners made in an average year, but if one is willing to concede that plantation owners, qua capitalist businessmen, were due some profit margin, one runs into thorny questions of exactly how wide this margin should be in adjusting accordingly the amount exploited from slaves. All of this ignores the question of over how many years recovery

114. Individual stories of abuse might be helpful in selecting class representatives, but if all recoveries were determined on this basis, cases would be better brought individually instead of as a class action suit.

115. In a letter responding to a request from his former slave master to return to work, Jourdon Anderson wrote that he would only return if he was paid back wages for his thirty-two years of service, which at twenty-five dollars a month for himself and two dollars a month for his wife he calculated to be $11,680. ROBINSON, supra note 19, at 240-41 (quoting Anderson’s letter). The twenty-five dollars was based on Anderson’s wages as a free laborer. Id.

116. In 1850, there were 347,525 slaveholders in sixteen southern states (Alabama, Arkansas, District of Columbia, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Texas, and Virginia) and 5,873,893 non-slaveholders in the same region. W. O. BLAKE, THE HISTORY OF SLAVERY AND THE SLAVE TRADE, ANCIENT AND MODERN 811 (Mnemosyne Publ’g 1969) (1861). This means that only 5.9% of the population in the South owned slaves. A majority of the 3,204,313 slaves in the region lived on large plantations. Id. at 808.

117. The estimated cash value of farms and plantations in the South in 1850 was a little over $1.1 billion. Id. at 819. The total value of the products of slavery in the same year were estimated to be $13.65 million. Id. at 822. Using a population of 3.2 million slaves, this results in an economic output of $42.66 per year for each slave. (This figure is quite different from the twenty-five a month Jourdon Anderson was earning. Even though this salary was based on wages as a free laborer and not economic output as a slave, it is hard to square with an estimated prior economic output of $42.66 a year.) The “profit” from each slave is likely to be lower, as this figure does not include the cost of maintaining the slaves, assuming one believes the costs of food and limited housing to the slaves should be deducted from the output of each slave. I cannot say whether this figure is representative of the amount of labor appropriated from slaves throughout the history of the institution. Eugene Genovese, for one, argues that the economic productivity of slavery was declining toward the time of the Civil War. EUGENE D. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY: STUDIES IN THE ECONOMY AND SOCIETY OF THE SLAVE SOUTH 43 (1989).

It is also important to keep in mind that plantation owners were selling their crops based upon slave labor being, for the most part, free. If wages had been paid, the prices for those crops almost certainly would have been increased, depending on what the market would bear. This leads to even more speculation about the wages slaves would otherwise have been paid on the profit that slave owners obtained from slave labor.

118. Indeed, in comparison to the economy of the North, the economy of the South was quite poor, calling into question the profitability of slavery in the first place. Walter Williams, Does America Owe Reparations?, CHATTANOOGA TIMES, Feb. 11, 2001, at G5; GENOVESE, supra note 117.
Randall Robinson, for one, claims that reparations are owed for the full 246 years that Africans were held as slaves. The compensable timeframe would need to be set before the amount of recovery could be determined. Needless to say, the length of the timeframe adopted would have an enormous effect on the amount of recovery demanded.

However, a tort approach opens the reparations debate to challenges that slavery’s victims were not worse off as a result of slavery. Jeff Jacoby has argued that all Americans, including Blacks, are indirect beneficiaries of slavery, citing economist Walter Williams’ position that there is no need for compensation because slaves were better off than they had been in Africa. Jacoby’s argument is that, even conceding that slave labor bolstered the economy prior to (and after) the Civil War, Blacks today are now sharing in those benefits far in excess of any compensation out of which they were cheated. Jacoby argues that an emancipated slave, and by extension a modern African American, is better off than a never captured black African. Jacoby summarizes his position by quoting from black journalist Keith Richburg, who after many years covering the misery of modern Africans reflected, “Thank God my ancestor got out, because, now, I am not one of them.” Although suggesting that Blacks benefited from the institution of slavery, Jacoby further suggests that “[i]f slavery’s awful debt has never been repaid, neither has the debt for freedom.”

119. The monetary figures cited in the first few paragraphs of this section do not specify the timeframe used in calculating the amount of reparations due.

120. ROBINSON, supra note 19, at 204, 208.

121. There is also the issue of how the lawyers for the case would be paid. Would they be willing to work pro bono? Would they request a percentage of the recovery? (Presumably, this would have to be a very small percentage, as the potential recovery is so huge.) Robert Brock has been asking for donations of fifty dollars from those who fill out a claim form as a way of financing his suit. Michael A. Fletcher, Putting a Price on Slavery’s Legacy: Call for Reparations Builds as Blacks Tally History’s Toll, WASH. POST, Dec. 26, 2000, at A1. This mechanism of raising funds is rife with the potential for fraud, leading some black politicians to attack the schemes. Duncan Campbell, Black Americans Step Up Fight for Slavery Redress, THE GUARDIAN (London), Feb. 12, 2001, at 15.


123. Id. In another article, Jacoby argues that this repayment of debt is especially complete, when one considers the benefits that African Americans have received from affirmative action over the last few decades. Jeff Jacoby, The Hefty Bill for Slavery—and Freedom, BOSTON GLOBE, Feb. 8, 2001, at A23. Furthermore, Jacoby argues, even if a case for reparations could be made, this bill was more than repaid through the loss of 360,000 Union soldiers in the Civil War. Id. Jacoby further suggests that “[i]f slavery’s awful debt has never been repaid, neither has the debt for freedom.” Id. This last claim is entirely inappropriate, as it was Whites—either through slave owners in the South or slave traders in the North—and industrialists who processed and sold the raw goods produced by slaves, and who benefited economically from the institution of slavery that denied Blacks their freedom in the first place. Thus, the lives lost by the Union soldiers must be balanced against the benefits they received, albeit often indirectly, from the prior existence of slavery. Indeed, if one were to view the cause of the Civil War either as an attempt to maintain the Union or as moral guilt for an institution which the North had played a part in perpetuating, then the notion of the Civil War as reparations is similarly misplaced, because in either instance the benefits were not meant to be directed at the slaves. The bottom line is that slaves needed to be freed only because they were formerly oppressed.

124. Jacoby, supra note 122. It should be noted that some reparations demands do call for
slavery is certainly morally repugnant, it may have legal legs. In order to recover damages in a court of law, the claimant has to show that he or she was left worse off because of the actions of the defendant.\textsuperscript{125} If Jacoby’s assertion is correct, then the claim by those suing on behalf of the victims of slaves is severely limited if not entirely eliminated. All that would be left is the claim that slaves were treated more harshly than was absolutely necessary to reap the benefits of their labor. As I suggested earlier, it would be quite difficult to show this financially as there were few laws against economic exploitation and (with regard to slaves) no laws against forced labor.

However, one could likely make this claim from a psychological perspective based upon the tortures and wrongful deaths executed on slaves.\textsuperscript{126} Indeed, one could reasonably claim that life under slavery was worse than the life that would have been lived in Africa, leading to an independent basis for recovery. Because we are concerned with compensating the victims of slavery and not their descendants, we can ignore subsequent alleged benefits like economic growth and affirmative action. How one makes a comparison, and places a monetary valuation on such a comparison, of life under slavery and life in Africa at the same time is unclear. This becomes especially complicated when attempting to square an intentional tort for wrongful treatment with the experience of the “average” slave. Each enslaved person suffered the harms of slavery in a unique and personal manner. Families were separated. Many were whipped or otherwise physically abused. Female slaves were often raped. But no proof exists that all families were separated, all slaves whipped, and all women raped. How do you create a measuring stick for physical and emotional harm when at the level of experience necessary for affixing monetary damages a commonality of experience is illusory?\textsuperscript{127} Would this restrict the class membership to those who could prove this level of suffering or greater by their ancestors?

Reliance upon the framework of a lawsuit creates other harms to the legacy of slavery. By bringing a class action suit involving an abstract “average” slave, one risks losing many of the traumatic and powerful stories that might otherwise give the history of American slavery, and the related attempt to acknowledge and correct this history, an effective impact on the

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\textsuperscript{125} E.g., Hawkins v. McGee, 146 A. 641 (N.H. 1929) (holding, in the infamous “hairy hand” case, that damages are the differential value of the bad and good hands plus the costs and pain and suffering for the second operation required to repair the hand).

\textsuperscript{126} For examples of narratives about these experiences, see EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1974).

\textsuperscript{127} This additionally skips over the problem that the percentage of slaves who suffered a particular harm is almost certainly indeterminable. In other words, anecdotes and other accounts may give some rough sense of the extent to which slaves were whipped, but it is unlikely that a reliable percentage could be derived from these accounts.
American conscience. In this way one risks impersonalizing the experience of slavery, a risk that would be even greater if damages were based upon something so economically abstract as lost wages. This may not be a metaphysical cost that the descendants of slaves wish to pay. The underlying point is that any calculations of damages will be unavoidably subjective and speculative. Since this determination would be up to a jury, the amount of damages awarded, assuming the claimants could survive all of the legal challenges, would be almost entirely unpredictable.  

This would be true regardless of whether the damages being calculated are economic, physical, or emotional. In all instances, what it would have taken to make the victims of slavery whole depends on who you ask.

Whiteness as property introduces alternative forms of compensation. Reparations for whiteness as property are not based exclusively, or even primarily, on monetary compensation. The figures suggested earlier for a lawsuit for slavery reparations are hard to justify empirically from the historical record because the amount recommended can vary greatly according to what factors and harms one considers in determining the compensation. The figures also make recovery politically infeasible, leaving a long-shot legal case as the only recourse. Whiteness as property allows for non-monetary forms of compensation, such as affirmative action or public education initiatives. Because these forms of reparations do not involve direct monetary transfers, they are more politically palatable. Indeed, to the extent that a program like affirmative action can be said to carry costs, these costs are generally shifted to private white individuals who benefit the greatest from their property interest in whiteness.

128. Indeed, it is entirely possible that the award would be significantly smaller than expected, especially considering some of the discussion above about the arguably limited profitability of slavery or the “benefits” received by those transported to the United States and their descendants.

129. Some argue that monetary reparations are necessary to show sincerity. See, e.g., Westley, supra note 78, at 470. I disagree. Sincerity is shown through diligent efforts at rectifying an unjust situation. Money may be a part of reparations, but this is not necessarily so. Westley may have a point about the general demise and increasing political unacceptability of affirmative action, but to me this seems all the more reason to reconceive of affirmative action through the lens of whiteness as property rather than turn to a monetary reparations program that stands even less political chance of success.

130. Chisolm also argues for a monetary tax exemption. See Chisolm, supra note 14, at 723 (arguing for public education and discussing short-term affirmative action as non-monetary forms of reparations). Donald Lancaster argues for increasing funds to Historically Black Colleges as a way of equalizing racial disparities. Donald Aquinas Lancaster, Jr., The Alchemy and Legacy of the United States of America’s Sanction of Slavery and Segregation: A Property Law and Equitable Remedy Analysis of African American Reparations, 43 How. L.J. 171, 208 (2000). While certainly a monetary transfer, this would still be more of a group-based transfer than would a reparations award for each individual slave descendant.

131. Harris suggests that those Whites who do not succeed when faced with affirmative action do so not because of their race but in spite of it. Harris, supra note 24, at 1786. She cites class oppression as a common cause of this failure to succeed. Id.
Reparations for whiteness as property would not depend upon complex calculations of a single monetary award for all of the harms of slavery, possibly divided differently among class members with greater or less slave heritage. Rather, whiteness as property is premised upon a redistributive framework that addresses a myriad of present racial disparities in power, privileges, and opportunity. The types of recovery and reparations that would arise out of a view of whiteness as property thus allow for flexibility in addressing harms not possible in a solely monetary award. Finally, because it does not depend on fabricating an abstract "average" slave or slavery experience, whiteness as property embraces the multitude of stories of the horrors of slavery as an element in creating an effective argument for some means of correcting the present disparities that are a result of these past harms. This is a more sensible path for those seeking equalization of the races.

C. Proving a Legally Cognizable Violation

1. The Equal Protection Clause

Given the difficulties in obtaining slavery reparations in the political arena, it is understandable why some proponents of reparations advocate a lawsuit. However, the Supreme Court has grown increasingly opposed to government-created group-based remedies for racial disparities. Many calls for affirmative action involve some sort of government intervention, which must necessarily satisfy the Equal Protection Clause of the Fourteenth Amendment. Where facially neutral public policies are concerned, the presumption has generally been in favor of the government unless the plaintiff can show both a disparate impact on a constitutionally protected group (in this case racial groups) and a discriminatory intent on the part of government actors. In Palmer v. Thompson, Jackson, Mississippi closed its swimming pools after receiving a federal court order to integrate. This action was upheld as constitutional because there was no "affirmative duty" to operate swimming pools. In short, the Court refused to infer discriminatory intent

132. If a trust fund were set up from the recovery of slavery reparations, instead of giving a monetary recovery to individual class members, then some, though not all, of the flexibility of whiteness as property could be achieved.
133. See supra note 78.
134. Robert Westley uses this as the basis for his assertion that it is Congress that must be "persuaded to enact reparations." Westley, supra note 78, at 436.
137. Id. at 218–19.
138. Id. at 220. Furthermore, Justice Black argued, there may have been financial burdens caused by integration that the city could see as justifying their actions. Id. at 225.
where such a conclusion was not clearly supported by the record. This sentiment continued in Washington v. Davis, in which the Supreme Court upheld a qualifying test for police officers (testing language skills), despite the fact that it resulted in a disproportionate failure rate among Blacks. Unlike Palmer, there was no allegation of discriminatory intent behind the practice, so the use of the test was challenged solely on its effects. The Court held that disparate impact alone was not sufficient to strike down the program. The fact that a greater proportion of Blacks failed the test did not deny them equal protection. The test served a justifiable government purpose and as such was constitutional.

The Court’s distinction of disparate impact and discriminatory intent has led it to require a demonstration of specific involvement in discrimination before the government can engage in practices aimed at alleviating racial disparities by implementing public policies that favor one racial group over another. In Richmond v. J.A. Croson Co., the Court invalidated the city of Richmond, Virginia’s thirty percent set-aside program for racial minorities in city construction contracts. The city of Richmond based this program on data that showed a great disparity between the black population in Richmond and the percentage of contracts that went to black businesses. However, the city offered no data to show that the city itself had engaged in past discrimination, and no “realistic” way existed to tie the proposed remedy “to any injury suffered by anyone.” It is not enough, the Court reasoned, to simply label a program as remedial for it to satisfy the requirements of Equal Protection. Rather, the city must show that it was at least a “passive participant” in past discrimination in order for the proposed remedial action to

139. Id. at 225 (stating that “there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters”).
140. 426 U.S. 229 (1976).
141. Id. at 232-33.
142. Id. at 234–35.
143. Id. at 242. For transactions between purely private parties, Congress passed the Civil Rights Act of 1991, which declared that disparate impact analysis could be used to establish an unlawful employment practice. 42 U.S.C. § 2000e-2. While plaintiffs still must proceed stage by stage in the selection process, unless complexity of the process requires looking at the final results, it is now the employer who has to demonstrate that the employment test which has allegedly caused a disparate impact in fact possesses a legitimate business purpose. 42 U.S.C § 2000e-2(k)(1)(B)(i); § 2000e-2(k)(1)(A)(i). For further analysis of demonstrating disparate impact under Title VII, see Barbara J. Flagg, Was Blind, But Now I See: White Race Consciousness & The Law 117–26 (1998).
144. Id. at 245–46.
145. Id. at 246.
147. Id. at 479–80.
148. Id. at 480.
149. Id. at 499. This is underscored by the fact that the city gave preference to several racial groups and not just to Blacks, who had supposedly suffered the most harm.
150. Id. at 500.
be justified.\textsuperscript{151} The Court extended the requirements of a demonstration of past discrimination and a narrowly tailored remedy to the federal government in \textit{Adarand Constructors, Inc. v. Pena}.\textsuperscript{152} Consequently, with regard to employment, there is now a standard of strict scrutiny for justification of any government affirmative action program or other racial classification.\textsuperscript{153}

The Supreme Court recently extended the strict scrutiny standard to affirmative action in higher educational contexts with its decisions regarding the admissions policies for University of Michigan’s law school\textsuperscript{154} and undergraduate\textsuperscript{155} programs. In both cases, the Court applied the strict scrutiny standard, affirming the existing admissions plan in one instance\textsuperscript{156} and striking it down in the other.\textsuperscript{157} The difference in the rulings in these two cases, issued the same day, is illustrative of the Court’s emphasis on individualized as opposed to generalized solutions for racial disparities.

In \textit{Grutter}, the Court upheld the University of Michigan Law School’s admissions policy whereby admissions officials could consider the race of an applicant as part of a determination of whether that person should be admitted.\textsuperscript{158} This admissions policy was justified on the grounds that the law school had a compelling interest in ensuring a diverse student body.\textsuperscript{159} Indeed, the Court was careful to point out, discussing various social science sources and amicus curiae briefs, that the benefits from a diverse student body “are not theoretical but real.”\textsuperscript{160} The Court found that the admissions policy for the law school met the strict scrutiny test because it was narrowly tailored and not a quota system.\textsuperscript{161} Ironically, the admissions policy was considered narrowly tailored because it was flexible and thus could address each student individually.\textsuperscript{162} The undergraduate admissions policy evaluated in \textit{Gratz}, on the other hand was not narrowly tailored, because it automatically assigned twenty points on an admissions scale, one-fifth of the one hundred points needed for admission, solely on the basis of the applicant’s race.\textsuperscript{163} The Court

\begin{itemize}
\item \textsuperscript{151} Id. at 492. Even had the city met this burden, the program was not narrowly tailored because it allowed any minorities in the country to bid upon a contract, even if they were not the ones supposedly harmed by the city’s discrimination. There were plenty of race-neutral ways to accomplish its goal. For that matter, the Court argued, there is no reason to believe that minorities comprise the same percentage in the construction industry as they do in the population as a whole. Id. at 507–08.
\item \textsuperscript{152} 515 U.S. 200 (1995) (overruling Fullilove v. Klutznick, 448 U.S. 448 (1980)).
\item \textsuperscript{153} Id. at 227.
\item \textsuperscript{154} Grutter v. Bollinger, 123 S. Ct. 2325 (2003).
\item \textsuperscript{155} Gratz v. Bollinger, 123 S. Ct. 2411 (2003).
\item \textsuperscript{156} Grutter, 123 S. Ct. at 2347.
\item \textsuperscript{157} Gratz, 123 S. Ct. at 2417.
\item \textsuperscript{158} 123 S.Ct. at 2332.
\item \textsuperscript{159} Id. at 2339 (drawing upon Bakke, 438 U.S. at 315).
\item \textsuperscript{160} Id. at 2340.
\item \textsuperscript{161} Id. at 2342.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} 123 S.Ct. at 2419.
\end{itemize}
found that *Gratz*’s admissions policy did not meet the requirements of strict
scrutiny because it was not a narrowly tailored means of achieving educational
diversity.\(^\text{164}\)

The determinative factor in the *Grutter* and *Gratz* rulings was whether the
admissions policies allowed individualized decisions for each applicant. The
court in *Grutter* stated that:

When using race as a 'plus' factor in university admissions, a
university's admissions program must remain flexible enough to
ensure that each applicant is evaluated as an individual and not in a
way that makes an applicant's race or ethnicity the defining feature of
his or her application. The importance of this individualized attention
in the context of a race-conscious admissions program is paramount.\(^\text{165}\)

The court in *Gratz*, on the other hand, criticized the undergraduate admissions
policy precisely because it automatically assigned a benefit to minority
applicants and thus did not provide individualized consideration.\(^\text{166}\)

The reliance of the Supreme Court on the strict scrutiny standard for
remedying racial disparities, both in education and in employment, makes it
highly unlikely that slavery reparations can be obtained through the judicial
system, at least not on a generalized scale. If the Supreme Court were willing
to accept a remedy directed generally at all descendants of slaves without
attention to their particular circumstances, then it likely would have approved
the automatic "bonus" in *Gratz*. The Supreme Court rejected this approach,
though, favoring instead a more individualized analysis that did not confer any
benefits solely because of race. Alternatively, in the employment context, there
must be a clear demonstration of past discrimination and a narrowly tailored
remedy.\(^\text{167}\) Either way, a class of descendants of slaves would probably face
serious equal protection hurdles because the court would consider them too
disassociated from the actual harm caused, or too diffuse a group of
beneficiaries to satisfy the strict scrutiny standard of a narrowly tailored
remedy.

2. Rule 23

Any suit for slavery reparations must not only satisfy these equal
protection concerns, it must also satisfy the requirements for a class action suit
under federal law. There are three justifications for maintaining a class action
suit under Rule 23 of the Federal Rules of Civil Procedure.\(^\text{168}\)

\(^{164}\) Id. at 2427.
\(^{165}\) 123 S.Ct. at 2342.
\(^{166}\) 123 S.Ct. at 2428.
\(^{167}\) 488 U.S. at 480.
\(^{168}\) FED. R. CIV. P. 23(b).
The first covers situations where there is a danger of the prosecution of individual actions yielding conflicting results. This is limited to instances in which victory by one plaintiff will cause the defendant to take actions that preclude recovery by other plaintiffs—for example, if a suit forced a municipality to refrain from issuing a bond whereas other suits would require only a limit on the size of the bond. Other than the danger of bankruptcy, which really is only an issue if the defendant is a private, non-governmental party, this does not apply to a suit on behalf of slaves, since the legal rights of any individual plaintiff would remain intact regardless of the results of suit by any other plaintiff.

The second situation covers instances in which the potential defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." At first glance, this may seem applicable for a class action suit brought on behalf of slaves. Indeed, this is the provision under which civil rights cases are typically brought. However, the relief to be granted is limited to non-monetary recovery, which, with regard to slaves, would be meaningless. Assuming that those bringing the suit are seeking monetary recovery of some sort for the descendants of slaves, another means will need to be found for bringing the suit.

This alternative can be found in the third justification for bringing class action suits, which covers situations where common questions of law "predominate over any questions affecting only individual members...." This situation would almost certainly apply to any class action suit brought on behalf of slaves. The problem then becomes finding a common question of law upon which to base the suit.

3. Retroactivity

One of the primary problems with any attempt to recover for the harms caused by slavery is that until the ratification of the Thirteenth Amendment in 1865, slavery was legal in the United States. In fact, the Supreme Court in the infamous Dred Scott case of 1856 held that slaves were not, under the language of the Constitution, citizens with standing to sue in federal courts but rather were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges." While certainly unjust, it is unclear how one can recover for a situation that was legal at the time it existed. Constitutional amendments do not apply retroactively.

169. FED. R. CIV. P. 23(b)(1).
170. FED. R. CIV. P. 23(b)(2).
171. FED. R. CIV. P. 23(b)(3).
173. Id. at 404–05.
Thus, any attempt to sue for the act of slavery itself prior to the passage of the Thirteenth Amendment must necessarily fail.

Court decisions are also not retroactive.\(^{174}\) Prudential reasons prevent a finding in one trial from opening up all past cases decided the other way or on different grounds. For example, if a retroactivity principle had been applied to *Miranda v. Arizona*,\(^{175}\) the case that established the warning of rights police must give when placing someone under arrest, the prisons would have been emptied. Furthermore, there is a “traditional presumption”\(^{176}\) against applying statutes passed by Congress retroactively unless Congress expressly states otherwise.\(^{177}\) Retroactivity created by Congress almost invariably applies only to cases pending at the time the law was passed and does not create a broader application to past wrongs over which suit has yet to be brought.\(^{178}\) The contention that court action, even in civil law, could be brought for actions legal at the time they were committed is highly problematic. Thus, while it is quite unlikely that Congress would create a retroactive statute assessing liability for civil actions taken in relation to slavery,\(^{179}\) it is clear that the courts cannot create this retroactivity on their own.

If one were to sue over mistreatment of emancipated slaves after the passage of the Thirteenth Amendment,\(^{180}\) a path largely beyond the scope of

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174. The decision would be binding on cases not yet decided, even if suit had already been filed and the cases were pending. Refusing retroactivity here simply means that one cannot reverse past decisions (except through the standard appeals process).


176. Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994).

177. *Id.* at 280, 286 (holding that Congress did not intend §102 of the Civil Rights Act of 1991 [creating the right to recover compensatory and punitive damages for intentional discrimination in violation of Title VII] to be retroactive to cases pending on appeal at the time of the passage of the law); see also Martin v. Hadix, 527 U.S. 343 (1999) (holding that Congress did not intend the provisions limiting recovery of fees in the Prison Litigation Reform Act to apply retroactively); Rivers v. Roadway Express, 511 U.S. 298, 311 (explaining that a “restorative” statute does not carry a presumption that Congress meant it to be retroactive); Hicks v. Brown Group, Inc., 982, F.2d 295, 298 (9th Cir. 1992) (holding that Congress, not the courts, should determine retroactivity of statutes).

178. It is possible that Congress could pass a statute creating retroactivity for civil cases conclusively decided, but this would violate obvious principles of justice and is thus quite unlikely. I am unaware of instances in which Congress has done this. There can be no retroactivity creating new criminal laws due to the prohibition against ex post facto laws in Article I, Section 9, Clause 3 of the United States Constitution.

179. None of this prevents Congress from legislating direct transfers to minority groups they view to be disadvantaged by government action. As with the law granting reparations to Japanese Americans interned during World War II, Congress would probably have to establish some sort of fact-finding commission to justify the expenditures of funds. *See generally* 102 Stat. 903 (1988). This is one of the purposes of the commission that Rep. Conyers has proposed. Rep. Conyers has introduced his bill calling for an investigation of the possibility of slavery reparations in each session of Congress and each time the bill has failed to make it out of the House subcommittee. *See supra* note 13.

180. Many academic arguments for slavery reparations begin with a long argument covering not only the harms committed to slaves but also the discrimination that existed against African Americans for decades after that, frequently including statistics on present-day disparities.
this article, charges of Equal Protection Clause violation could be brought against both the federal and state governments, but this has in most instances yielded equitable relief or changes in the law but not monetary compensation. Brown v. Board of Education mandated school desegregation, but did not provide restitution for black children, let alone their parents and grandparents, who had been excluded from white schools. Voting rights cases brought about changes in the ways elections were conducted, but they did not order new elections. Shelley v. Kraemer held that the government cannot enforce racially restrictive housing covenants, but said nothing of compensation for the government’s prior enforcement of racially restrictive housing covenants. While monetary recovery may be obtained for routine civil rights violations in Section 1981 cases, these cases involve violations of civil rights by particular individuals and not the broader systematic violations with which I am here concerned.

See, e.g., Robinson, supra note 19; Westley, supra note 78; Chisolm, supra note 14; Levitt, supra note 78; Gary et al., supra note 20.

181. Vincene Verdun—while arguing in favor of slavery reparations from a moral standpoint—admits that while there is little chance of success for a lawsuit for reparations based on slavery, the chances of success for a similar suit based on systematic discrimination is not much better. Vincene Verdun, If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans, 67 Tul. L. Rev. 597, 641–42 (1993).

182. Randall Robinson contends that the case for reparations is made stronger by the segregation and racial discrimination that extended beyond the end of legalized slavery. Robinson, supra note 19, at 226. While this argument may work from a moral standpoint, it is hard to see how it can be translated into a legal claim. In other words, from a legal standpoint, the fact that discrimination existed after slavery was declared unconstitutional has no bearing on the events that took place in relation to the institution of slavery itself prior to that point.


184. See, e.g., Guinn v. United States, 238 U.S. 347 (1915) (holding unconstitutional an Oklahoma law written such that it disenfranchised only descendants of slaves); Nixon v. Herndon, 273 U.S. 536 (1927) (holding unconstitutional a Texas law excluding Blacks from participation in primary elections); Smith v. Allwright, 321 U.S. 649 (1944) (extending Nixon v. Herndon to hold that political parties become agents of the state with regard to primary elections because the primary process is an integral part of the election process; thus, political parties cannot exclude Blacks from voting in party primaries).

185. 334 U.S. 1 (1948).

186. There are few instances where monetary compensation can be obtained for class action based governmental wrongs. Wiley v. Sinkler, decided in the days before class action suits, left open the possibility of monetary damages for a voter alleging he was unjustly denied the right to vote. 179 U.S. 58 (1900). South Carolina law only allowed registration to vote on one day each election cycle, almost certainly as a means to prevent Blacks from registering. The plaintiff, whose race was not disclosed, showed up at the polls on election day and demanded to vote, but was turned away. The case, which turned on jurisdiction issues, did not decide the substantive issue before it and regardless would have left the damages determination up to a jury. Id. at 65, 67. This case, however, does not appear to have been taken as binding precedent by any future cases, nor is it clear how a jury would have calculated damages had the case on remand been decided in favor of the plaintiff.

More recently, the one billion dollar settlement of Pigford v. Glickman provided fifty thousand dollars each tax free for African American farmers due to discriminatory administration of federal farming programs, but only if the individual farmer could document that he or she had personally been the victim of discrimination. Press Release, Conlon, Frantz, Phelan, & Pires,
4. Cato as an Example of an Attempted Lawsuit for Slavery Reparations

The legal problems with bringing a suit for reparations were addressed directly in Cato v. United States,\textsuperscript{187} in which a group of black plaintiffs brought suit against the United States "for damages due to the enslavement of African Americans and subsequent discrimination against them."\textsuperscript{188} The specific charges for which Cato sought relief were "forced, ancestral indoctrination into a foreign society; kidnapping of ancestors from Africa; forced labor; breakup of families; removal of traditional values; deprivations of freedom; and imposition of oppression, intimidation, miseducation and lack of information about various aspects of their indigenous character."\textsuperscript{189} Cato proceeded from a shaky legal foundation.\textsuperscript{190} The Ninth Circuit, and the district court before it, tried to find some basis by which Cato could state a cognizable claim, but determined it could not do so.\textsuperscript{191} Ultimately, the Ninth Circuit concluded, any redress for harms must take place in the legislature and not the courts.\textsuperscript{192}

Cato's claim is not legally cognizable for several reasons. The first problem is standing. In order to bring suit, a claimant must show a personal

\textsuperscript{187} 70 F.3d 1103 (1995).
\textsuperscript{188} Id. at 1105.
\textsuperscript{189} Id. at 1106 (explaining that Cato's complaint "did not refer to any basis upon which the United States might have consented to suit"). To be sure, many of these assertions have present-day corollaries as well, such as that Cato herself, as an African American, had been denied her cultural heritage and been subject to lingering harms as a result. This may very well have been Cato's motivation in bringing the case, but it is not how the case was framed and neither was it how the case was addressed by the Ninth Circuit.

\textsuperscript{190} If plaintiffs could sue for "removal of traditional values," one can only imagine the range of suits that would be brought.
\textsuperscript{191} Id. at 1105.
\textsuperscript{192} "While plaintiff may be justified in seeking redress for past and present injustices, it is not within the jurisdiction of this Court to grant the requested relief. The legislature, rather than the judiciary, is the appropriate forum for plaintiff's grievances." Id. (quoting Judge Armstrong's district court opinion).
and not an abstract injury.\textsuperscript{193} For present-day African Americans, the only demonstrable injuries would be generalized injuries, since the harms occurred so long ago. To be sure, many African Americans still feel the effects of slavery, but this harm is so spread out over the entirety of the black population that it would almost certainly be considered a generalized harm. In order to have standing, Cato had to allege "a concrete, personal injury that is not abstract and that is fairly traceable to government conduct that she challenges as unconstitutional."\textsuperscript{194} This she did not do. If Cato had sued on behalf of slaves themselves instead of on her own behalf, it might have been possible to get around the personal injury requirement, because the real harms to slaves could be more easily documented, at least in some instances if not universally. Presumably, any class action suit for slavery reparations would use this strategy.\textsuperscript{195} The more problematic standing issue is that claimants do not have standing to bring suit on the basis of stigmatization caused by racial discrimination.\textsuperscript{196} The reasoning by the Supreme Court on this issue in \textit{Allen v. Wright} was that if standing were granted for stigmatization alone, "standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating," effectively removing most limits on standing and transforming federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders."\textsuperscript{197}

In addition, even if plaintiffs brought suit in a class action reparations case on behalf of slaves themselves and not on behalf of those who presently feel the stigmatization of slavery, this limitation threatens to restrict such a suit to either the economic harms of being deprived of one's wages or the physical harms and resulting psychological traumas\textsuperscript{198} caused to slaves.\textsuperscript{199} Yet, the valuation of these harms is difficult to accomplish. Furthermore, it is not certain that economic harms create a legally cognizable cause of action, given that a strong

\begin{itemize}
  \item \textsuperscript{193} \textit{Id.} at 1109; \textit{Lujan v. Defenders of Wildlife}, 504 U.S. 555 (1992) (holding that members of an environmental organization did not have standing to sue under the Endangered Species Act because they could not show that they themselves would be harmed by extinction of the particular animal); \textit{Allen v. Wright}, 468 U.S. 737, 753 (1984) (holding that parents of black children in school districts undergoing desegregation did not have standing to sue the IRS for allegedly providing tax exemptions to racially discriminatory private schools).
  \item \textsuperscript{194} \textit{Cato}, 70 F.3d at 1109.
  \item \textsuperscript{195} Normally, suit cannot be brought on behalf of third parties, but that rule is waived when parties cannot assert their rights, which is obviously the case here. Plus, if a class included descendants of those definitively harmed by slavery and suing on their behalf, there would really be no third party, since in effect the deceased slaves would be suing and only the recovery would go to the living plaintiffs. However, such a class would still need to allege that the cause of action is discernable and that it is appropriate for the class.
  \item \textsuperscript{196} \textit{See} \textit{Cato}, 70 F.3d at 1109-10; \textit{Allen}, 468 U.S. at 755-65.
  \item \textsuperscript{197} 468 U.S. at 755-56 (quoting \textit{United States v. SCRAP}, 412 U.S. 669, 687 (1973)).
  \item \textsuperscript{198} Not surprisingly, laws against mistreatment of slaves were rather limited. However, some laws did exist and widespread treatment in violation of those laws would potentially be grounds for bringing suit. For an overview of laws concerning slavery prior to the Civil War, see \textit{FRIEDMAN, supra} note 98, at 218-29.
  \item \textsuperscript{199} The awareness of one's status as a slave would apparently not be grounds for recovery.
\end{itemize}
argument could be made that no laws were broken in the economic exploitation of slaves, which was constitutional in southern states up until the passage of the Thirteenth Amendment. Even physical harms might face similar problems, since slaves often possessed few rights with regard to their physical safety. Finally, if not all slaves experienced physical abuse, the “common question” requirement of a class action suit would arguably not be satisfied since there may be a significant number of potential class members that did not suffer the extent of physical harm that others did. Would one need to prove that one’s slave ancestor had been severely beaten in order to qualify for a reparations award? As difficult as it might be to trace lineal heritage directly to a slave, the determination that that slave had been beaten would almost certainly be nearly impossible using commonly accepted standards of legal proof.


One other possible theory of recovery is to draw comparisons between the situation of African Americans and reparations paid by the United States to Native Americans and those Japanese Americans interned during World War II. From a moral or political standpoint, these comparisons might be quite strong. Just like interned Japanese Americans, slaves were forcibly confined with government approval, though there is certainly a difference in that Japanese Americans were confined through direct action of government actors while slaves were confined by private actors operating in a legally recognized system. As with Native Americans, slaves were deprived of their means to make a living and placed in an economically disadvantageous position for years. Both of these groups received some form of compensation for the harm done to them. The Japanese-American victims of World War II’s xenophobic hysteria received twenty thousand dollars per person interned, paid either to the survivor or a beneficiary of the survivor. There are many instances of

200. Many southern states had laws on the books prohibiting the “mistreatment” of slaves and even occasionally enforced these laws, but this protection did not extend, for example in Louisiana, to whipping a slave as a form of punishment. FRIEDMAN, supra note 98, at 225–26.
201. Korematsu v. United States, 323 U.S. 214 (1944) (holding that the internment of Japanese Americans during World War II was a constitutional exercise of the war powers of Congress and the Executive to protect national security). For a brief overview of this case and the history behind it, see Alfred C. Yen, Introduction: Praising with Faint Damnation — The Troubling Rehabilitation of Korematsu, 40 B.C. L. REV. 1 (1998).
203. It is interesting to note that had a case been brought—assuming a legally cognizable case could have been brought and prevailed—it is highly likely that a jury would have awarded much more than twenty thousand dollars to each victim as compensation for being unjustly imprisoned for four years. This may point to the moral insufficiency of the amount Congress appropriated, but in so doing it also points to the likely monetary limits that a political solution would provide.
204. 102 Stat. 903, §105. Although lesser known, this act also covered Aleuts living on the
the federal government providing some sort of restitution to Native Americans. One such example is the Alaska Native Claims Settlement Act, passed in 1971, in which a trust fund was established so that profits from resource extraction from certain tracts of federal land in Alaska, along with $462.5 million from the general treasury fund, could be distributed amongst all Native Alaskan tribes.

However, theoretical and legal problems exist with both comparisons. On the theoretical level, one may question how similar the position of slaves was to either interned Japanese Americans or to Native Americans. Japanese Americans during World War II were functioning members of society who the government removed from their livelihoods and permanently dispossessed of most of their worldly possessions. It would be hard to say the same things for slaves, who while forcibly removed from Africa and frequently relocated without their consent once in America, never had a socially and economically integrated life in America of which they were then deprived. Thus, while

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Pribilof Islands who were relocated to temporary camps during World War II so that military bases could be constructed. *Id.* at § 2(b). Poor care in these camps resulted in widespread disease and death. *Id.* Consequently, Congress decided to award relocated Aleuts the same amount of money given to interned Japanese Americans.

205. 43 U.S.C. §§ 1601–42.

206. 43 U.S.C. §§ 1604–8. The money was first disbursed to thirteen “regional corporations” (including one for Native Alaskans living outside of Alaska) and then within those to various “village corporations.” For more information on implementation, visit the website for the ANCSA Resource Center at http://www.lbblawyers.com/ancsa.htm.

The Act made no attempt to distribute profits from lands to the tribes that traditionally lived on those lands, since to do so would deprive a means of subsistence to those tribes who did not traditionally live on lands owned by the federal government and used for resource extraction. The migratory nature of many of the tribes further complicated this problem. Indeed, one of the functions of the Act was to extinguish existing aboriginal claims to the land so that federal lands could be consolidated and redistributed in a way that avoided endlessly complicated lawsuits between tribes. 43 U.S.C. §§ 1601, 1603. There is also the suggestion that the Act implemented this consolidation to give the federal government title to the land necessary to construct the Alaska pipeline. See Yamamoto, *supra* note 12, at 498.

207. This is admittedly a bit of an overstatement, as on its face it suggests that Japanese Americans were not subjected to racism prior to World War II, which is certainly not the case. Indeed, Japanese (and Chinese) immigrants were frequently victims of legalized discrimination in the American West. For an assessment of how land ownership laws perpetuated limitations on citizenship rights of Asian Americans leading up to and contributing to the internment of Japanese Americans during World War II, see Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 40 B.C. L. REV. 37 (1998). The point, though, is that while Japanese Americans may not have been on quite the same level, socially or legally, as Whites, they were able to own businesses and otherwise engage in the economy and society in ways that slaves could not.

208. To be sure, slaves were violently deprived of the life they previously had in Africa. However, this removal was substantively different from the internment of Japanese Americans during World War II for a couple of reasons. First of all, slave capturers and traders were not all American, so assessing blame for the disruption caused is quite complicated. Second, those who did capture and transport slaves were private individuals acting outside of the jurisdiction of the United States, so the aura of government action is certainly lessened. There just seems to be something fundamentally different between removing people from their homeland and depriving
one could make the case that reparations for interned Japanese Americans was meant to restore them to the position they were in prior to their internment,\textsuperscript{209} this claim could not be brought on behalf of slaves. Rather, their claim would be based more on a theory of what they should have achieved, financially and socially, or how they should have been treated had they not been exploited. This may justify some form of reparations on its own merits, but it is in this regard a fundamentally different argument than that made by the interned Japanese Americans.

Problems also exist where legal comparisons are concerned. The first problem in comparing reparations for slaves to that of interned Japanese Americans is that the victims and their beneficiaries are more easily identifiable for interned Japanese Americans than for slaves. While similar problems may exist with determining the amounts of compensation to be given—especially since each interned Japanese American was given twenty thousand dollars and there was no effort made with regard to determining individually the loss of income or property\textsuperscript{210}—at least for the interned Japanese Americans it is in most instances possible to identify who should receive reparations.\textsuperscript{211} A relative lack of documentation of slaves makes it difficult to determine who should be included in the class for a class action suit. Second, where Japanese-American internment is concerned, the defendants are identifiable since the internment was an action taken by the federal government. The question of who can be sued for the harms of slavery is much more problematic.\textsuperscript{212}

The more troubling problem, though, is that the reparations awarded to those interned was not the result of a lawsuit but rather occurred by Congress directly appropriating funds for that purpose.\textsuperscript{213} Since I am focusing my

\textsuperscript{209} This can be inferred from the discussion of the purpose of the act, in addition to issuing an apology and educating the public about what had transpired, as being “restitution.” 102 Stat. 903, §1(1)-(4).

\textsuperscript{210} Even though the statement of purpose of the act mentioned the taking of personal and community property from the Aleuts and broadly discussed “restitution” for Japanese Americans, acceptance of the reparations payment was considered to be “full satisfaction of all claims against the United States” for the actions committed against them. 102 Stat. 903, §§ 1, 105(5).

\textsuperscript{211} See supra note 11.

\textsuperscript{212} I will discuss these problems below in the Identifying Legally Blameworthy Defendants section.

\textsuperscript{213} Following the passage of the Civil Rights Act of 1988, suit was brought over the scope of who should be included in the recovery, namely by Japanese Peruvians brought to the United States and interned for potential use in prisoner exchanges with Japan. Jane Kay, Uprooted, Imported, Held Hostage in U.S.: Japanese from Latin America Sue for Compensation, S.F. EXAMINER, Aug. 26, 1996, at A1; see also generally, Natsu Taylor Saito, Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians — A
analysis on the possibility of a class action lawsuit for the harms of slavery, it appears that the analogy to the reparations given to interned Japanese Americans is unhelpful in this regard, though comparison might still be made for the purposes of political recovery through action by Congress. Yet, if anything, this suggests that a lawsuit to recover slavery reparations is misguided and that a political solution would be more appropriate. In other words, using restitution to interned Japanese Americans as a justification for slavery reparations somewhat undermines the method of a class action to gain recovery. From a moral standpoint, the fact that one racial group harmed directly by government action has received compensation might supply, in a limited way, a justification for other racial groups to receive compensation. This, however, does not generate a legally cognizable claim.

A similar analysis can be applied to the situation involving government restitution paid to Native Americans. The Constitution explicitly states that Congress, as opposed to the States, has plenary power over relations with Indian tribes, thus establishing a definite relationship between Native Americans and the federal government. The Constitution, prior to the Thirteenth Amendment, does not by name address "slavery," though it does certainly imply the institution with its counting of "all other Persons" as three-fifths of a free person for determining the number of Representatives and prohibition of restrictions, other than a tax of up to ten dollars, "of such Persons as any of the States now existing shall think proper to admit" until 1808. Regardless of these brief mentions, it is hard to argue for an obligation of the federal government to those who were slaves, whereas such an argument does exist with regard to Native Americans.

Furthermore, because of the historical circumstances surrounding Native Americans, it is easy to make a justification for the transfer of lands to them in the form of reservations or through legislation such as the Alaska Native

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*Case Study*, 40 B.C. L. REV. 275 (1998). The Japanese Peruvians were eventually offered five thousand each in recovery. *$5000 Apology to World War II Captives: Ethnic Japanese from Latin America Were Locked Up in U.S. Camps*, S.F. EXAMINER, June 12, 1998, at A5. It is not clear why the amount offered was less than that offered to interned Japanese Americans.


215. U.S. Const. art. 1, § 8, cl. 3; *Alaska v. Native Vill. of Venetie*, 522 U.S. 520, 531 (1998) (stating that the federal government has power over relations with Indian tribes).

216. The relationship of the United States as a trustee for Native Americans has been recognized by the Supreme Court: "In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (footnote omitted).


218. U.S. Const. art. 1, § 9, cl. 1. For a further discussion of this clause in establishing slaves as property, see Lancaster, *supra* note 130, 179-80.
Claims Settlement Act.\textsuperscript{219} This form of restitution, even if it is in the form of monetary compensation instead of the actual transfer of land, could be seen as compensation for taking their land\textsuperscript{220} and depriving them of their way of life.\textsuperscript{221} Because slaves were transported from Africa, there is no land within the jurisdiction of the United States of which they can be said to have been deprived.\textsuperscript{222} In essence, Native Americans sought compensation for something that was taken from them. While slaves could argue that their labor was taken from them, labor is not tangible so some may find the argument less convincing if the Takings Clause is interpreted as applying only to physical property.\textsuperscript{223}

It seems, therefore, that scant legal precedent exists for obtaining slavery

\textsuperscript{219} Interestingly, the Supreme Court expressly held that the Alaska Native Claims Settlement Act revoked all reservations in Alaska except one to avoid a “lengthy wardship or trusteeship.” Venetie, 522 U.S. at 533 (quoting 43 U.S.C. § 1601(b)).

\textsuperscript{220} For example, the Alaska Native Claims Settlement Act lists as its first purpose the “need for a fair and just settlement” of “aboriginal land claims.” 43 U.S.C. § 1601(a). The use of the word “aboriginal” suggests a connection to the land that has been disrupted and needs to be restored. The Act could in this way be seen as a Congressional reversal of the Tee-Hit-Ton decision by the Supreme Court, in which an invocation of the Takings Clause was denied, on the grounds that their nomadic lifestyle made the concept of property ownership meaningless, to a group of Native Alaskans laying claim to valuable timberland. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

\textsuperscript{221} When the federal government restored land to Native Americans in the form of reservations, the returned lands often were not able to sustain Native Americans’ former lifestyle; the government provided no means for alternative ways of making a living. As a consequence, many tribes have turned to gambling as a way of providing income. This process has been codified in the Indian Gaming Regulatory Act of 1988. 25 U.S.C. §§ 2701–21. The opportunity to run gambling establishments has had a variety of effects on Native American tribes, depending on their demographics and cultural values. See generally, Naomi Mezey, The Distribution of Wealth, Sovereignty and Culture through Indian Gaming, 48 STAN. L. REV. 711 (1996). Whatever the cultural effects may be, a solution like gambling is particular to the problems of Native Americans because the establishment of casinos is tied directly to the possession of land—usually, though not always, reservation land far away from major metropolitan centers. Not only does the reservation provide a physical location for the casino, it also provides a metaphorical boundary for determining who is in the tribe. The public can accept Indian gambling because it is relatively self-contained. Such a solution would not be available to African Americans. Not only is there no equivalent of “tribal lands,” African Americans are also too diffuse in society to make a localized remedy like the ability to open a gambling casino meaningful. A casino might distribute its profits only to African Americans, but this would be no different than any other funding mechanism for reparations in the distributive problems it would create. The important distinction is that Native-American casinos still retain a connection to the land through their placement on reservations.

\textsuperscript{222} One could make the argument that the United States government should help African Americans establish a new homeland in Africa. While this separatist philosophy has been advocated by Marcus Garvey and others, it is hard to imagine the logistics of how this would take place today. See MILLER, supra note 105.

\textsuperscript{223} This argument only applies when one assumes the government, not the slaveholders, took labor from slaves. Any profits slaveholders accrued from slave labor have long since been absorbed by private business and dispersed all over the globe. While the federal government can dispose of federal lands however it wishes, it cannot hand over private industries to the descendants of slaves, at least not without compensating those from whom the businesses are taken. Accordingly, analogy to Native Americans fails for lack of a comparable identifiable remedy.
reparations through a class action lawsuit. *Cato v. United States* rejects such a suit by individual plaintiffs. While a class action suit in which descendants of slaves sue not on their own behalf but on behalf of their ancestors might avoid some of the initial standing problems in *Cato*, problems would still exist to the extent that courts consider the grievance to be either overly generalized or legally dubious. Attempts to draw analogies to the restitution given to interned Japanese Americans in World War II or to Native Americans are equally unconvincing. In short, the hopes for a lawsuit to recover slavery reparations rest on shaky foundations.

6. *Whiteness as Property as a Theory of Recovery*

Whiteness as property provides at least a partial response to the legal barriers to a class action suit for slavery reparations. In essence, whiteness as property is its own theory of recovery. Focusing on redistribution instead of a lawsuit based implicitly on placing blame eliminates the troubling causation issues associated with a lawsuit over slavery. Furthermore, the present-day status of whiteness as property arguments, in addition to the fact that they make largely a political and not a legal claim, negate the problem of the past legality of actions taken against slaves. There is no retroactivity problem if existing disparities are being addressed. Whiteness as property also creates an identifiable injury—though admittedly not one committed against a particular individual—around which a redistributive framework can be constructed. Unlike the legal realm, group-based harms are perfectly "cognizable" in the political realm. Indeed, in the political arena, remedies for group-based harms are more persuasive than remedies for individual harms. Furthermore, these harms are more convincing when examined in terms of the present instead of arguing over the past only indirectly to benefit those alive today.

Supreme Court jurisprudence on affirmative action reflects the dismissal of group-based harms in a legal context. For example, by invalidating the minority contracting requirements in *Croson* for lack of a direct linkage between the harm and the remedy, the Court reifies whiteness as property. Harris argues, by overlooking the social conditions that created the disparities in the first place. This emphasis on individual harms is why the Supreme Court in *Croson* required that the city of Richmond demonstrate a history of specific discrimination against Blacks before affirmative action programs could be put in place. Because the Court views affirmative action as corrective and not redistributive, it cannot embrace group-based remedies. Harris objects to granting whiteness the same level of protection (strict scrutiny), especially considering that Whites received ninety-nine percent of the construction contracts, that ought to exist for the very social groups subordinated by

224. Harris, supra note 24, at 1775.
225. 488 U.S. at 499.
whiteness. In other words, whiteness is not in need of equal protection analysis when it comes to obviously racially disparate contracting processes because the only reason the disparate impact exists is due to the advantages that whiteness as property has already granted in the form of differing educational opportunities and social contacts. Refusing to look at group claims of harm, instead admitting only specific histories of discrimination, serves to reinforce the social status of whiteness as a form of property. By failing to recognize this, the Supreme Court inevitably further secures the position of whiteness as property.

The question that Harris does not address is whether whiteness as property can find a way around the juridical problems created by Croson and Adarand. In all honesty, it probably cannot. If the Court wanted to adopt a group-based or structural view of affirmative action at the time they decided these cases, they were free to do so. While whiteness as property offers a transformation of affirmative action from a vindication of personal claims of merit to a

226. Id. at 469. Harris, supra note 24, at 1774-75.
227. Harris makes a similar point about the protection of a property interest in whiteness in her discussion of Bakke. Harris, supra note 24, at 1770. Harris’s point is slightly misplaced here. Powell’s plurality opinion sanctioned giving preferences to racial minorities, just not the practice of explicitly setting aside admissions slots for them. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316-17 (1978). Thus, it is not necessarily the point, as Harris asserts, that the Supreme Court validated Mr. Bakke’s expectation of admission and subjected it to equal protection when compared with the admissions expectations of minorities. Harris, supra note 24, at 1770. Rather, the important point is that the plurality rejected the contention that preference for minority groups could be based upon correcting past wrongs unless such wrongs could be conclusively demonstrated. Bakke, 438 U.S. at 307-09. Instead, Powell based his acceptance of racial preferences on the ground that they accomplished the valid goal of increasing racial diversity. Id. at 315. One could somewhat cynically conclude from this that minorities are to be admitted to higher education only to the extent that they benefit the Whites that predominate these schools. Whiteness in this sense becomes another form of property in controlling the terms of admission to elite professions. However, it is by no means necessary to adopt this stance, which would in effect reject much of the legally accepted justification for affirmative action. Because I see affirmative action as one of the responses under a view of whiteness as property to racial disparities, I also reject an interpretation of diversity as serving the interests of Whites. As has been discussed, Harris herself embraces affirmative action as “a method of attacking whiteness as property.” Harris, supra note 24, at 1780.

228. Vincene Verdun argues that Whites and Blacks possess different conceptions of responsibility. Dominant culture consciousness rests upon a model of individual responsibility, which leads to all court cases being framed in terms of two parties, one side against the other. Verdun, supra note 181, at 620. African-American consciousness, on the other hand, views responsibility more collectively. Id. at 625-27. This divide can be seen in the debate over slavery reparations. Whites have trouble justifying reparations because they are unable to affix blame upon a particular party, whereas “[b]lack] reparationists have no trouble linking the wrongs against [their] ancestors to the condition of living descendants.” Id. at 632. Whiteness as property becomes a way of arguing for this collective responsibility.

229. Eric Yamamoto argues for a similar need to shift from individual to group rights in his comparison of reparations for Japanese Americans interned during World War II and slavery reparations. Yamamoto, Racial Reparations, supra note 12, at 521-23. Though he does not use the language of whiteness as property, much of his discussion of using reparations to “restructure” societal attitudes is compatible with this perspective. Id. at 518.
redistribution of property, it requires a corresponding shift in conceiving of rights as, at least in some situations, group-based rather than always attached to individuals, a move that the Supreme Court, from Bakke\textsuperscript{230} to Croson,\textsuperscript{231} has not been willing to make. The Court has consistently required a demonstration of specific harms—a focus on the individual—before it allowed remedial action.

The hope for a view of whiteness as property is that by disassociating affirmative action from a rhetoric of “lost opportunities” by one side or the other, the equal protection concerns that the Supreme Court has with regard to affirmative action could be viewed more broadly to encompass the totality of social and economic relations instead of being limited to the rules of the game once one reaches the starting line.\textsuperscript{232} By disassociating justice from the correction of individual harms, whiteness as property shows the need for more to be done to prepare racial and ethnic minorities to have equal opportunities to excel when they enter competitive situations, such as job hiring processes or school admissions, even if this means tilting the rules slightly in favor of those who have been previously disadvantaged as a way of equalizing the situation. Perhaps, though, this shaping of the rules of the game ought to be avoided by the courts, where equal treatment of all is the overriding principle, and best left to the political process, where such differentiations can be made. When using the political process to combat group-based harms and racial disparities, the courts would only intervene—following the emphasis on protecting “discrete and insular minorities” from the famous Caroline Products footnote,\textsuperscript{233}—when government policy had the effect of increasing the property interest in whiteness, not when it sought to decrease that interest.

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\item 230. Even in Bakke, which established that race could be used as a factor in determining admissions to institutions of higher learning, Justice Powell’s plurality asserted that the Supreme Court only privileges individual, not group, rights. Bakke, 438 U.S. at 298.
\item 231. Remember that the affirmative action plan in Croson was rejected because the defendants could not directly connect the racial groups listed to a history of disparate treatment. Croson, 488 U.S. at 469, 479-80.
\item 232. In unveiling affirmative action as a new government policy, President Lyndon B. Johnson prefaced the program by asserting: “You do not take a person who for years has been hobbled by chains, and liberate him, bring him up to the starting line of a race and then say ‘you are free to compete with all the others. . . .’” Lyndon B. Johnson, Commencement Speech at Howard University, N.Y. TIMES, June 4, 1965, at A14.
\item 233. While it did not rule on this issue, the footnote states that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938). The interpretation I suggest is a “reverse” or “corollary” Carolene Products, where the courts give more deference to those laws which enhance the status of minorities (in addition, of course, to stricter scrutiny to those laws which further disadvantage minorities).
7. Whiteness as Property Addresses Racism’s Current Effects

Where does this leave whiteness as property? The conceptualization of whiteness as property shifts the focus of slavery reparations from the past, where it is of little good in a legal sense and of only limited benefit theoretically, to a concern with the present. Because of the problems discussed above with regard to affirmative action, whiteness as property is unlikely to provide an alternative legal theory for bringing a class action suit on behalf of slaves. Any government program meant to redress the distributive disparities that arise when one sees whiteness as a form of property would necessarily be, on its face, racially discriminatory. However, the present-oriented focus of whiteness as property suggests that this goal is misguided in the first place. Whiteness as property, by unmasking the hidden racism in ostensibly neutral policies, creates a means for reconciling race relations that is less about the divisiveness between the races that a lawsuit would necessarily create and more about racial healing through a redistributive framework. Reconceiving affirmative action as redistributive—in the sense that it starts from existing racial disparities—rather than corrective, fosters this healing. As Harris argues:

The distributive justice lens, then, would refocus the question of affirmative action on what would have been the proper allocation in the absence of the distortion of racial oppression. By not descending into the warp of sin and innocence, doctrine and legal discourse would be redirected toward just distributions and rights rather than punishment or absolution and wrongs.

Whiteness as property can therefore move beyond the failings of a lawsuit for slavery reparations to address more constructively the actual discrimination that descendants of slaves face. As Harris states, “[f]ormal equality overlooks structural disadvantage and requires mere nondiscrimination of ‘equal treatment’; by contrast, affirmative action calls for equalizing treatment by redistributing power and resources in order to rectify inequities and to achieve real equality.” In this way, whiteness as property makes reparations, of which affirmative action would be but one example, both more politically palatable and better situated to help overcome some of the non-monetary racial disparities in contemporary society. Thus, although the chances for victory in a court of law are small, whiteness as property provides other avenues for responding to the legacy of slavery in this country. Because the political arena is better suited to address group-based harms than the court system, this is

234. Even in the educational context, taking account of race as a factor for admissions is justified, at least legally in Bakke as achieving a diverse student body, not as compensation for past wrongs.
235. Harris, supra note 24, at 1784.
236. Id. at 1788.
CORRECTING THE HARMS OF SLAVERY

perhaps the best that can be hoped for.

D. Identifying Legally Blameworthy Defendants

1. The Federal Government

The Eleventh Amendment doctrine of sovereign immunity establishes that one cannot sue the government without the government’s express consent.\(^{237}\) This may be one of the reasons Congress is reluctant to take action on John Conyers’ (D-Michigan) repeated attempts\(^{238}\) to have Congress establish a commission to study the possibility of reparations for slavery, lest it expose the United States government to liability for the harms committed against Blacks that were legally protected by the government prior to the Civil War. While Conyers’ bill does not expressly call for reparations, only a commission to study the possibility of monetary compensation to descendants of slavery along with other goals such as a formal apology and greater efforts toward public education about the history of slavery,\(^{239}\) even the possibility of paying reparations out of government funds likely kills the chance of this bill going very far. Consequently, the prospect of the government voluntarily paying significant reparations to slave descendants is probably equally slim. To date more than ten cities, including Chicago, Detroit, Cleveland, Dallas, and Washington, D.C., have passed resolutions calling on the federal government to inquire into the effects of slavery.\(^{240}\) However, this level of support might not be present were the cities opening themselves up to financial liability.

Similar reasons likely also explain Congressional inaction on Rep. Tony Hall’s (D-Ohio) bill in 2000 calling for a formal resolution to acknowledge the government’s role in perpetuating slavery and apologize for its actions, even though the closest the bill comes to mentioning reparations is a call for “an attempt at real restitution.”\(^{241}\) Former President Clinton, citing the many

\(^{237}\) United States v. Sherwood, 312 U.S. 584, 586 (1941) (holding that contractor could not sue the federal government for breach of contract to build a post office).

\(^{238}\) See supra note 13.

\(^{239}\) See H.R. 40, 107th Cong. (2001). The language in question, listed in the duties of the proposed commission, is to determine “[w]hether, in consideration of the Commission’s findings, any form of compensation to the descendants of African slaves is warranted.” § 3(b)(7)(C). Rep. Hall, who is white, introduced a one sentence resolution in 1997 apologizing for slavery. The resolution was not warmly received, even by some Blacks who believed it would lessen the possibility of monetary reparations. Michael A. Fletcher, For Americans, Nothing Is Simple About Making Apology for Slavery; Congressman’s Suggestion Draws Fire From All Sides, WASH. POST., Aug. 5, 1997, at A1.

\(^{240}\) Shepard, supra note 7; Smith, supra note 22, at 24.

\(^{241}\) H. Con. Res. 356, 106th Cong. (2000). As with Conyers’ bills, this bill has yet to make it out of the House Civil and Constitutional Rights Subcommittee. It should be noted that both bills claim to be brought on behalf of “4,000,000 Africans and their descendants . . . enslaved in the United States and colonies that became the United States from 1619 through 1865.” H.R. 40, 107th Cong. §2(a) (2001) (H. Con. Res. 356 substitutes “13 American colonies” for “colonies
generations that have passed since the end of slavery, suggested that reparations for black Americans would not be feasible, but expressed a willingness to consider the possibility of issuing an apology.\footnote{Merida, supra note 4.} To date, the present Bush administration has not been any more receptive to an apology. Regardless, the chances of Congressional reparations for slavery, or even an apology that might open the federal government up to possible litigation, must be considered remote at best.\footnote{By way of comparison, the bill for providing reparations to Japanese interned during World War II had 166 co-sponsors. H.R. 442, 100th Cong. (1988). Rep. Tony Hall’s bill calling for a formal apology for slavery had twenty-six co-sponsors. H. Con. Res. 356, 106th Cong. (2000). Rep. Conyers’ most recent bill to establish a commission to study the effects of slavery had only thirty-seven co-sponsors. H.R. 40, 107th Cong. (2001).} On the other hand, Representative Conyers wrote legislation calling for a national holiday honoring Martin Luther King, Jr. only four days after Dr. King was assassinated and the holiday was not established for more than fifteen years,\footnote{Whether one wants to put a positive spin on reparations by viewing it as strategically genius or instead cynically, calling for reparations may serve as an effective tool for rallying support for other African-American issues, even if one does not believe reparations themselves will ever either be won or granted. Indeed, Courtland Milloy suggests that educating America about the “peculiar institution” of slavery is one of the primary purposes of the Reparations Movement. Courtland Milloy, Editorial, \textit{Cash Alone Can Never Right Slavery’s Wrongs}, WASH. POST, Aug. 18, 2002, at C1. If public education were truly the sole purpose of the Reparations Movement, then this article would be somewhat of an academic exercise. However, the public debate about reparations and surveys on the subject focus on at least the possibility of recovering monetary reparations for the “unpaid labor and the untold horrors of bondage” resulting from slavery. Manny Fernandez, \textit{Thousands to Rally for Reparations: Apology Also Sought for Slave Descendants}, WASH. POST, Aug. 16, 2002, at B1. Furthermore, opinion polls on the topic of slavery reparations also address not public education but rather the monetary issue, though questions are sometimes asked about the appropriateness of an apology for slavery or about establishing scholarships for descendants of slaves. CNN.com Law Center, supra note 15.} so perhaps with persistence Conyers’ reparations efforts will also succeed.\footnote{Levitt, supra note 78, at 37.}

There are those who suggest that a domestic failure to waive sovereign immunity can be overcome through international law. Jeremy Levitt, for example, appeals to the Universal Declaration of Human Rights adopted by the United Nations in 1948 as a justification for retroactively assigning liability for the harms of slavery.\footnote{Lancaster, supra note 130, at 200.} Donald Lancaster makes a similar move by attempting to base an international law claim for slavery reparations on the Nuremberg Charter.\footnote{Levitt, supra note 37.} While this recourse would be an intriguing possibility if slavery existed today, in 1865 there were no international treaties upon which a recovery for the harms of slavery could be based. Thus, those appealing to
international law would face the same retroactivity problems as exist for attempts to invoke American law. However, this did not stop slavery reparations from being contentiously debated at a recent United Nations conference on racism in Durban, South Africa.248

Absent Congressional establishment of a waiver of sovereign immunity, there appears to be no way for a case to be brought for slavery reparations. A waiver of sovereign immunity “cannot be implied but must be unequivocally expressed.”249 Cato v. United States raised the issue of sovereign immunity and the ability to sue for slavery reparations. 250 Cato asserted the United States waived sovereign immunity for three reasons; all were rejected by the court. First, Cato analogized the plight of African Americans to that of Native Americans and pointed out that federal courts were willing to hear Indian land claims hundreds of years old.251 The Ninth Circuit rejected this claim, noting that while there may be factual similarities between the treatment of Native Americans and African Americans, treaty obligations signed by Indian tribes placed them in a “unique relationship” to the federal government.252 Second, Cato asserted that a remedy can be provided under the Federal Tort Claims Act for intentional infliction of harm and violation of duty by the federal government.253 This assertion was rejected because the Act only applies to actions after January 1, 1945254 and contains a two-year statute of limitations,255 both of which result in actions relating to the treatment of slaves falling outside of the Act’s limited waiver of sovereign immunity.256

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249. United States v. King, 395 U.S. 1, 4 (1969) (dismissing a suit by a retired army officer requesting that his military records be changed to show that he retired due to disability [as opposed to length of service] because the government had not unequivocally expressed a waiver of sovereign immunity).
250. 70 F.3d 1103 (9th Cir. 1995).
251. Id. at 1108. See Oneida Indian Nation of New York v. New York, 691 F.2d 1070, 1073, 1079 (2nd Cir. 1982) (holding that federal courts could hear claims [to void a sale] arising out of land transfers by treaty in 1785 and 1788; suit is not barred by the Eleventh Amendment).
252. Cato, 70 F.3d at 1108; see Seminole Nation v. United States, 316 U.S. 286, 296 (1942) (finding a “distinctive obligation of trust incumbent upon the Government in its dealings with these dependant and sometimes exploited people”).
253. Cato, 70 F.3d at 1109.
255. 28 U.S.C. §2401(b) (2003). For tort suits under §1983 for civil actions for deprivation of rights, the applicable statute of limitations (ignoring the fact that §1983 was passed after, albeit soon after, the ratification of the Thirteenth Amendment outlawing slavery) is the statute of limitations in the state in which the suit is brought. See Daniel E. Feld, Annotation, What Statute of Limitations is Applicable to Civil Rights Actions Brought Under 42 U.S.C.A. §1983, 45 A.L.R. FED 548 (1979). These state statutes of limitations range in the order of a few years, making it impossible to bring suit for actions that occurred “under color of law” while slavery still existed. In short, any attempt to bring a case under a federal statute is going to run into some sort of statute of limitations law that is substantially less than the amount of time that has passed since the end of slavery.
256. Cato, 70 F.3d at 1107.
Furthermore, the Act only waives immunity in instances where a private person would be liable for the same acts. However, Cato sued over actions by members of Congress, which are absolutely protected by the Constitution. Third, Cato argued that the Thirteenth Amendment creates an implicit waiver of sovereign immunity through its end to slavery and granting to Congress the power to enforce this provision, again analogizing to federal treatment of Native Americans, this time under the Tucker Act. The Ninth Circuit rejected any notion that the Thirteenth Amendment establishes a right to damages and pointed out that, unlike Native-American "reparations", the case for slavery reparations does not involve a statute upon which potential litigants could rely. In short, *Cato v. United States* suggests quite strongly that suit cannot be brought against the federal government for the wrongs of slavery.

2. Private Parties

If one cannot sue the government, then one could attempt to sue private companies or individuals that benefited from slavery. In a suit against private parties, though, there are two serious obstacles to overcome. First, any action would almost certainly be barred by the relevant statute of limitations. Statutes of limitations from breaches of contract, which is presumably the theory upon which a claim for lost wages would be based, vary from jurisdiction to jurisdiction. They can run anywhere from the six month statute contained in federal laws relating to collective bargaining agreements to a period of several years, but are always well short of the many decades that have passed since the slaves were deprived of compensation for their labor. Similar statute of limitations problems would arise in relation to claims of wrongful conversion of property. Even absent statute of limitations obstacles, a court may very well invoke the equitable remedy of the doctrine of laches to say that the time for a remedy had long since passed. The combination of statute of

257. 28 U.S.C. §1346(b).
258. Cato, 70 F.3d at 1110; see also U.S. CONST. art I, § 6, cl. 1.
260. 70 F.3d at 1110, 1111.
261. This would be a difficult claim to bring, as there would have been no written contract between the slaveholder and the slave. One could argue for an implicit contract, though this still runs into the problems with determining the value of the wages, as discussed previously.
263. See, e.g., Anderson v. AT&T Corp., 147 F.3d 467, 474 (6th Cir. 1998) (applying Ohio’s fifteen-year statute of limitations in place of the federal six-month statute).
264. Even if one were to claim that the statute should not have run while Blacks were effectively excluded from the legal system, the delay in bringing suit would still fall outside of the applicable statute of limitations.
265. Jeremy Levitt contends that since African Americans have systematically been excluded from the courts, time bars such as the doctrine of laches should not apply. Levitt, supra note 78. While this would possibly be a consideration of the judge in determining whether to
limitations restrictions and the doctrine of laches makes it highly unlikely that action against private parties could be brought.

However, even putting statute of limitations concerns aside, it is not clear that legal liability can be established for companies that benefited from widespread horrors not entirely under their control. California enacted a law in 1999 requiring insurers doing business in the state to supply the state insurance commissioner with records detailing insurance policies they sold in Europe from 1920 to 1945. The purpose of the Act is to distribute the life insurance claims of Holocaust victims either to the survivors, their heirs, or to an appropriate charity if no beneficiary can be identified. The Supreme Court struck down the California law as an impermissible infringement by the state on the President of the United States' control over foreign relations, including the settlement of claims. Basing this decision on foreign policy concerns makes it difficult to speculate how arguments for life insurance recoveries for Holocaust victims would impact the debate over slavery reparations. The foreign affairs issue would drop away with regard to slavery, but significant due process questions might remain, as the legality of the actions of businesses that profited from slavery cannot be questioned in most instances. It should be pointed out that the Due Process Clause issues would remain regardless of whether or not a statute was passed on the issue.

The California law, along with similar Holocaust recovery laws in

invoke laches, it may not be enough to convince the judge to overlook the time separation between those who committed the harm and those who would benefit from the remedy. Furthermore, this systematic exclusion has been largely eliminated, or at least certainly greatly reduced to the point where it would be a thin justification for the claim Levitt is making.

One perhaps more realistic consideration is the political pressure that will be put on judges not to dismiss cases on the grounds such as a statute of limitations that many might view as a technicality. This pressure becomes stronger the more publicized the case is. This somewhat extra-legal consideration, however, would have to be weighed against the likely backlash were a lawsuit allowed to be waged many decades hence for actions that while deplorable were commonly accepted at the time, especially where strong legal arguments could be made for excluding these cases from court.

Criminal actions for infliction of suffering could not be brought against slaveholders because all are dead (i.e. there is no conceivable remedy) and this type of action could not be brought against their descendants.


Id.


They would also drop away if action were taken by the federal, as opposed to state, government.

The insurance claims would potentially be a breach of contract, since the policies in question did exist prior to and during World War II, but were never collected upon. It is a separate and more difficult question whether California can direct that recovery of untraceable policies be sent to a charity serving Holocaust victims. With regard to slavery, the issue becomes even more problematic, as there is no comparable breach of contract, putting aside the "40 acres and a mule" promise, for which suit could be brought.
Washington and Minnesota, also raises interesting questions of firmly establishing economic links to the beneficiaries of slavery. The insurance company Aetna recently issued a public apology for insuring slaveholders against the loss of their “property” and even mentioned at the time that it would consider paying reparations for its actions, though it stopped short of promising such payment. Aetna has since rejected the notion that it should be required to pay slavery reparations and is fighting such a suit in court. The Hartford Courant, not long after it ran the article detailing Aetna’s apology, itself apologized for running ads for the sale of slaves and the return of runaway slaves. An apology, while not monetary reparations, may have value of its own. Indeed, the Hartford Courant’s apology pleased many African Americans. However, if the issuing of an apology were to lead to a risk of a suit for monetary damages, it is almost certain that very few apologies would be made.

The larger problem is that tracking down all of the beneficiaries of slavery is likely to be quite hard. Many companies that benefited from slavery are no longer in existence, with their assets, assuming there were any at the time of dissolution, scattered to indeterminate places. One could choose to sue individuals whose family wealth is based at least partially on slavery. Undoubtedly, some of the current wealth in the South can be traced back to antebellum times. However, much of that wealth was also diverted into northern hands during the Reconstruction, often without reliable documentation. Furthermore, even while slavery was still in existence, many northern industrialists profited, either directly or indirectly, off of the raw

274. CNN.com Law Center, supra note 15.
276. See Zielbauer, supra note 275.
277. This problem may be decreasing due to new technology. There are an increasing number of databases of slave records. For example, Gwendolyn Midlo Hall has compiled a database of over 100,000 Louisiana slaves, primarily from court records. David Firestone, Identity Restored to 100,000 Louisiana Slaves, N.Y. TIMES, July 30, 2000, at A3. Harvard University has released a database on CD-ROM detailing 27,233 trans-Atlantic slave ship journeys from Africa to the Americas from 1595 to 1866. Patrick Cole, Research, Technology Lead African-Americans to Roots, Feb. 10, 2001, CHT. TRIB., at N1. The Mormon Church recently released a database of records of 72,000 bank accounts opened by slaves soon after the end of the Civil War. Winnie Hu, Mormons Release Database for Blacks Seeking Roots, N.Y. TIMES, Feb. 27, 2001, at B5. On January 1, 2001, a law went into effect in California requiring insurance companies to make public any slave insurance policies they issued. Shepard, supra note 7.
goods produced by slave labor. Inevitably, one would be left suing those few individuals and companies for whom profits from slavery could be proven. Even then, the amount of profits is likely to be minimal and not worth the trouble of the suit in the first place. Plus, the list of defendants that could be proven to have profited from slave labor would be woefully incomplete and thus in some ways prevailing against them would be a hollow victory.

Finally, there is the moral question of whether anyone alive today owes a debt for something that ended over 135 years ago. As Representative Henry Hyde (R-Illinois), chair of the House Judiciary Committee that oversees House bills for reparations put it:

The notion of collective guilt for what people did [100-plus] years ago, that this generation should pay a debt for that generation, is an idea whose time has gone. I never owned a slave. I never oppressed anybody. I don’t know that I should have to pay for someone who did [own slaves] generations before I was born.281

If nothing else, this sentiment—likely to be widespread when Americans are faced with the possibility of increased taxes or decreased services to pay for slavery reparations—suggests the huge political difficulty that any reparations plan would face. This would also raise the problem that many taxpayers immigrated to the United States subsequent to the end of the institution of slavery and thus arguably should not be required to pay for the harms perpetrated by others. Reparations for slavery, especially in the amounts discussed earlier, seem to be, for the time being, politically dead.

E. Collective Liability: Beyond Blame and Forgiveness

As reflected in Representative Hyde’s statement, fundamental questions about blame and forgiveness are at the core of a lawsuit for slavery reparations. Mari Matsuda notes that “[t]he linkage of victims and perpetrators for acts occurring in the immediate past is another trait of standard legal claims.” There is a natural tendency to discount the relevance of blame for actions the longer ago they occurred as the causal connections become more and more attenuated. To the extent that reparations constitute an apology for what has transpired, they would perform a valuable role in validating minority identities:

279. For example, imagine trying to calculate the percentage of the revenues for the Hartford Courant derived from running advertisements related to slavery. Even after adjusting for inflation, such an amount is likely to be quite small and might not rise above court costs.

280. Some efforts were made in Congress immediately following the end of the Civil War to provide some form of reparations for slaves, but all of those efforts failed. See Magee, supra note 79, at 886.

281. Merida, supra note 4.

The grant of reparations declares, ‘You exist. Your experience of deprivation is real. You are entitled to compensation for that deprivation. This nation and its laws acknowledge you.’ An apology, though, cannot come from slaveholders. Would an apology for slavery from those who now denounce the institution be meaningful? Can those who do not see themselves as having done any wrong be expected to take blame for something that occurred before they were even born? Might it not be best to look beyond the past, which while it should not be forgotten also cannot be changed? At some point, the past has to be accepted if the future is to become a possibility. As Thomas Sowell has argued:

If the people who actually enslaved their fellow human beings were alive today, hanging would be too good for them. If an apology would make no sense coming from those who were personally guilty, what sense does it make for someone else to apologize... today? A national apology... also betrays a gross ignorance of history. Slavery existed all over the planet, among people of every color, religion and nationality. Why then a national apology for a worldwide evil? Is a national apology for murder next?

If the harms caused by slavery are to be repaired, this must be done by looking prospectively. Courts, because they are by their structure responsive to the cases brought before them, can only look retrospectively. Even Brown II, which dealt with the process of implementing the decision to desegregate the schools by calling on this to be done “with all deliberate speed,” crafted its remedy in relation to the past. While it is certainly necessary to correct past practices of discrimination, this can only go so far in repairing the social and cultural gap that is race relations. Apologies, even though they address events in the past, look to the future because they seek to make a new beginning. Because they are future-oriented, apologies cannot come through the courts but only from the political process. In this regard, it might be helpful to think of Germany’s actions to try to repair some of the harms caused by the Holocaust.

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283. Quoted in Matsuda, supra note 86, at 390.
286. The arguments surrounding reparations to victims of war crimes (and of punishment to the perpetrators) arguably bears some comparison to the situation of slavery. The closer we view war crimes to murder, as opposed to the routine practice of prosecuting the war, the more likely are we to feel the need for some kind of reparations to the survivors and descendants of the victims (as well as punishment for the perpetrators). See HANNAH ARENDT, EICHMANN IN JERUSALEM 267–79 (1964). Similarly with slavery, one needs to come to grips with whether the
West Germany passed a law in the 1950s giving the equivalent of one billion dollars to Israel in reparations. This arguably showed a genuine desire on the part of the German people to make amends for Nazi persecution. As David Ben Gurion said upon signing the agreement to transfer the money, “[f]or the first time in the history of relations between people, a precedent has been created by which a great State, as a result of moral pressure alone, takes upon itself to pay compensation to the victims of the government that preceded it.”

In other words, collective blame for past actions can be accepted as a moral obligation, but only when this is accomplished through the political system. As I discussed, the possibilities for a political apology for slavery seem slim at best, largely because of the legal threats of liability that this apology would bring. To move toward a meaningful apology for the harms of slavery, even if this apology does not take the form of a formal pronouncement, there must be a rethinking of the fundamental bases of the relationship between the races in this country. This apology comes through an understanding of whiteness as more than just a racial classification, but also as incorporating, as per the discussion earlier of Cheryl Harris, aspects of property ownership.

It may be argued that whiteness as property is no more feasible than a lawsuit for slavery reparations as a way of addressing race relations and disparities in this country. However, viewing racial disparities as a form of abstract property creates a distance and objectivity more amenable to a redistributive solution than an approach that asserts that one side deserves compensation because the other side harmed them. Reparations for a property interest in whiteness does not face sovereign immunity problems because they are brought about through political rather than legal channels. Because whiteness as property is based not upon relics of the past but rather upon existing disparities—albeit disparities that are historically situated—these reconceived reparations avoid the problems associated with tracing money back...
to its original appropriators. But to the extent that the redistributive programs
advanced by whiteness as property would be funded through tax revenue, the
costs would indirectly be borne, in general, by those who have benefited the
most from a property interest in whiteness.

Most importantly, whiteness as property also escapes the vexing issue of
collective guilt for the actions of one’s forebears by bringing the harms into the
present. Whiteness as property, by adopting a redistributive emphasis, removes
the “innocence” of contemporary Whites for the past harms of slavery without
subsequently placing blame on them for those harms. As just suggested, the
costs of reparations for whiteness as property are borne by those who otherwise
benefit from their property interest in whiteness, not by distant relatives to
whom the chains of causality are brittle and weak. This satisfies the concerns
of a redistributive framework without the need to single out particular
defendants. The redistributive structure created by viewing whiteness as
property, through creating broad initiatives such as a program of public
education, avoids the tension between perpetrator and victim that is a necessary
component of a lawsuit for slavery reparations. Finally, an apology for
discrimination and disparate treatment would be more meaningful coming from
those who acknowledge an investment in the current system as embodied in
whiteness as property rather than from those who see themselves as having no
connection to the harms caused by slavery and who thus could issue an apology
without taking any responsibility for it. As such, one could say that whiteness
as property circumvents the need to ask whom one should sue for slavery
reparations. Whiteness as property, at its essence, involves an acknowledgment
that racial identity is tied to a property interest by Whites in their power,
privilege, and opportunities. By delegitimizing this property interest, whiteness
as property seeks to redistribute societal resources in a way that equalizes these
resources and promotes racial justice without relying upon a language of
oppression.

IV.
CONCLUSION

Let us review the possibilities for a class action suit for slavery
reparations. Class certification would be difficult because inadequate records
exist of those who were slaves. Identifying the descendants of slaves also
raises the specter of defining who is “black” in a way that does not accurately
reflect contemporary experiences of racism. Were reparations to be granted,
there is little consensus on the amount of money that would be awarded or the
basis for a monetary award, though most estimates advanced by proponents of
slavery reparations place the amount so high that it is most likely politically

290. Harris, supra note 24, at 1782–84.
unfeasible (were a non-legal route to be taken). Credible legal arguments cannot be found for bringing suit for actions that happened many years ago and were within the bounds of the law at the time they were committed. Indeed, the Ninth Circuit dismissed most possible legal arguments for slavery reparations in *Cato v. United States*. Furthermore, it is not clear who could be sued, since the United States would have sovereign immunity against any possible claim. Attempts to sue private individuals or businesses raise troubling questions of responsibility, as well as further documentation issues. In short, a class action suit for reparations for slavery faces serious legal hurdles and theoretical difficulties.

A class action suit for reparations is also misguided. Suing for reparations for harms committed against slaves necessarily focuses on the past and in this way masks present discrimination against and mistreatment of African Americans. If recovery were possible in a slavery reparations suit, then such a suit may be worthwhile, if only to provide resources for those currently suffering from discrimination. Yet, if providing resources for those in the present is the goal, then it is best to address that goal directly rather than through indirect means with questionable prospects of success. Focusing on reparations as the primary remedy for discrimination, runs three major risks in addition to the unlikelihood of success. First, by bringing a lawsuit in which blame for the past is unavoidably placed on those who feel they have done no wrong and feel they are not themselves racist, reparations threaten to exacerbate the racial divide in this country. While it is important to have African-American experiences vindicated, it is hard to see how doing this through a mechanism that is premised on racial divisiveness will promote racial healing. Second, bringing suit for reparations creates a sense of resolution about the harms of slavery that is illusory. If reparations are paid, then Whites will arguably be justified in claiming that their debt has been paid and that there is no more need for affirmative action or other programs meant to equalize

291. There also exists the element of either an official apology that could be gained through Congressional action or a sense of redemption that would come through having one's claim vindicated in a court of law. The significance of this is not to be ignored, but the former could be obtained absent any monetary accompaniment and the latter is unlikely for the many reasons stated earlier in this article.

292. In speaking of a plan to have black churches send delegations of members to walk the halls of Congress demanding reparations, Randall Robinson describes the compensation to be received as necessary "to close the economic and psychic gap between blacks and whites." *Campbell, supra* note 121. If this is to be the purpose of reparations, it is clear that they are not meant primarily as restitution on behalf of slaves.

293. Again, I do not want to discourage suits brought for discrimination in violation of the Fourteenth Amendment or the various statutes meant to ensure racial equality. It is my purpose here only to question both the feasibility and wisdom of bringing a class action suit for slavery reparations.

294. Perhaps the best example of this is the uproar, previously discussed, surrounding David Horowitz's ten point manifesto against slavery reparations. *See* text accompanying note 25.
As Jeff Jacoby puts it, "[e]ven the biggest debt only has to be paid once." Third, and perhaps most importantly, the sense among the general public that moral and economic debts to descendants of slaves still exist might dissolve if African Americans lose their reparations case. If the public feels a fair trial of the harms of slavery has been conducted, they are likely to be less sympathetic to claims of continuing systematic mistreatment, since the justice system would have found this claim to be invalid. Losing a lawsuit for slavery reparations, which I argue is likely, would also be devastating for an African-American community that might see the loss as further confirmation of their socially disadvantaged position. A ruling by the judicial system in a highly publicized case that descendants of slaves have no legally cognizable claims for recovery for the harms to their ancestors would only exacerbate existing racial tensions. If a loss in court is almost a certainty, why further damage race relations? Yet, because a suit exists within a legal framework of winners and losers, even a successful suit for slavery reparations would possibly exacerbate existing racial tensions. For these three reasons, a lawsuit for slavery reparations, successful or not, may not achieve the economic and social integration that has been a cornerstone of the Civil Rights Movement.

Reparations for whiteness as property satisfies many of the concerns and goals of a class action lawsuit for slavery reparations in a way that is not only more likely to succeed but that would also promote racial understanding and healing rather than further divisiveness. In as much as most arguments in favor of monetary reparations start with a long history of the many abuses suffered by African Americans, a form of reparations such as those that would come from a recognition of whiteness as property serves best to acknowledge and redress not only those harms suffered by slaves but also the discrimination and hatred that continues to this day. The experience of being

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295. This would not prevent suits for discrimination if such discrimination could be definitively proven.

296. Jacoby, supra note 123. Columnist Charles Krauthammer has proposed a one-time cash payment of one hundred thousand dollars to every black family of four, to be financed by a ten-year seventy-five cent gas tax, in exchange for "the total abolition of all programs of racial preference." Merida, supra note 4.

297. This assumes a case could be brought in court without being thrown out for various standing, statute of limitations, and immunity issues.

298. See Matsuda, supra note 86, at 395–96 (arguing against the commodification of reparations claims on the grounds that it will terminate any claims over continuing wrongs and deny redress to future generations).

299. What would become of "whiteness," an ideology based upon subordination of minorities, in a fully liberated society is up for debate. One possibility is that whiteness would disappear altogether. The desire to vindicate minority perspectives and bring them out from under the thumb, so to speak, of whiteness is why Joel Olson, rejecting both colorblindness of the law and multiculturalism, calls for the abolition of whiteness. Joel Olson, The Limits of Colorblind and Multicultural Personhood, 2 STAN. AGORA 1, 18 (2001), available at http://www.law.stanford.edu/agora.

300. See, e.g., Westley, supra note 78, at 438–48.

301. Matsuda, supra note 86, at 394 (arguing for the transformative effect of reparations).
a minority in this country goes far beyond what money can compensate. As comedian Chris Rock once said in an act speaking to a white man, “Despite all the changes in society, you wouldn’t trade places with me, a black man... And I’m rich!” Monetary reparations are not enough, nor will they be achieved. Reparations through the recognition of whiteness as property does a better job of acknowledging racism’s current effects and of healing the wounds caused by slavery.

302. Dennis C. Sweet III, Making the Case for Racial Reparations, in HARPER'S MAG., supra note 20, at 45. Andrew Hacker attempted to determine how much money would be necessary to “compensate” a white person for becoming black, everything else equal, by conducting a survey of white students. A common response was that a compensation of fifty million dollars, one million dollars for each year of being black, would be appropriate. HACKER, supra note 2, at 32.