
Essay

Winning What's Owed: A Litigative Approach to Reparations

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INTRODUCTION

Centuries of enslaved Black labor built the United States into a society and economy that prospers to this day.¹ Slavery was intrinsically tied to the production of early America's two most important exports, tobacco² and cotton.³ Enslaved people themselves were considered so economically valuable that their persons were used to

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1. See David Brion Davis, *Forward* to DAVID ELTIS & DAVID RICHARDSON, *ATLAS OF THE TRANSATLANTIC SLAVE TRADE* xvii (2010) ("By 1820 African slaves constituted some 80 percent of all the people who had embarked for the Americas since 1500 . . . [T]his original black majority of surviving workers became indispensable in creating the prosperous New World . . .").

2. Compare ALLAN KULIKOFF, *TOBACCO AND SLAVES: THE DEVELOPMENT OF SOUTHERN CULTURES IN THE CHESAPEAKE, 1680–1800* 38 (1986) ("Planters . . . eventually replaced indentured servants with black slaves, and by 1700 slaves produced much of the region's tobacco."), with *Colonial American Exports*, COLONIAL WILLIAMSBURG FOUND., <http://www.ouramericanrevolution.org/index.cfm/page/view/m0091> [https://perma.cc/HQ8A-SYY2] ("Tobacco was by far the highest-valued [export] due to the duties assessed on it . . .").

3. See *Cotton Financing IV: Financing American Cotton Exports*, 9 FED. RSRV. BULL. 566, 567 (1923) (finding that cotton accounted for over 50% of the value of all American exports in 1850).

collateralize mortgages⁴ and given as wedding presents.⁵ The economic benefits of America's original sin were felt nationwide⁶ and persist to this day, continuing to accrue to those who profited from the enslavement of Black people.⁷

Meanwhile, the descendants of those enslaved people enjoy precious little of the wealth that birthed this nation.⁸ Despite glaring and persistent disparities in outcomes for Black people across a wide array of socioeconomic metrics,⁹ reparations for the past and present harms of slavery and systemic racism remain overwhelmingly unpopular with the general public.¹⁰ Over 150 years of political and legal efforts to secure reparations¹¹ have not resulted in the sort of recompense that could ameliorate and apologize for those harms.¹² Therefore, this Essay presents an alternative path to justice for Black people.

This Essay proposes that state attorneys general are well-situated to execute a litigative scheme that provides reparative justice to Black people for the historic wrongs and ongoing harms of slavery and systemic racism. Part I first considers the nature of reparations, and

4. Bonnie Martin, *Neighbor-to-Neighbor Capitalism: Local Credit Networks and the Mortgaging of Slaves*, in *SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT* 107, 109–11 (Sven Beckert & Seth Rockman eds., 2016) (discussing loans worth hundreds of millions of dollars in modern day value collateralized against an ownership interest in enslaved people).

5. KULIKOFF, *supra* note 2, at 52 (discussing the use of enslaved people as a dowry).

6. Sven Beckert & Seth Rockman, *Introduction: Slavery's Capitalism*, in *SLAVERY'S CAPITALISM*, *supra* note 4, at 1, 2 ("On the White mountains of New Hampshire we find the sugar of Louisiana, and in the plains beyond the Mississippi the cotton cloths of Rhode Island are domesticated . . .").

7. See, e.g., Zoe Thomas, *The Hidden Links Between Slavery and Wall Street*, BBC NEWS (Aug. 29, 2019), <https://www.bbc.com/news/business-49476247> [<https://perma.cc/8J5H-SFCF>] ("JP Morgan Chase, currently the biggest bank in the US, admitted that two of its subsidiaries . . . accepted enslaved people as collateral for loans.").

8. See *Nine Charts About Wealth Inequality in America*, URB. INST., at tbl.3 (Oct. 5, 2017), <https://apps.urban.org/features/wealth-inequality-charts> [<https://perma.cc/6B44-ZCNC>] (reporting a median \$17,409 in familial wealth for Black families, compared to a median \$171,000 for White families).

9. See *infra* Part I.B.

10. See, e.g., Katanga Johnson, *U.S. Public More Aware of Racial Inequality but Still Rejects Reparations: Reuters/Ipsos Polling*, REUTERS, (June 25, 2020, 6:03 AM), <https://www.reuters.com/article/us-usa-economy-reparations-poll/u-s-public-more-aware-of-racial-inequality-but-still-rejects-reparations-reuters-ipsos-polling-idUSKBN23W1NG> [<https://perma.cc/T75Y-6ET9>] (reporting the results of a June 2020 poll finding that only 20% of Americans support reparations for slavery).

11. See *infra* Parts I.C–D.

12. See *infra* notes 35–46 and accompanying text.

the need for reparations to Black people in order to resolve disparities in health, financial, and educational outcomes. It then provides an overview of political efforts to secure reparations over the years, before concluding with a discussion of the *corpus juris* of reparations case law. Part II begins by laying out a pragmatic framework for creating reparative lawsuits. It continues by arguing that the special standing and procedural doctrines enjoyed by attorneys general make them the ideal parties to exercise such a framework. Finally, this Essay concludes by contemplating a series of existing and proposed lawsuits as examples of reparative actions that could affect meaningful improvements in the outcomes of Black people.

I. REPARATIONS

To underscore why a reparative litigation framework is necessary, this Essay considers the disadvantages Black people experience as a result of the continuing harms of slavery and systemic racism and outlines unsuccessful attempts to obtain remedy throughout history. Section A discusses the definition of reparations, while Section B examines the socioeconomic disparities Black people experience and the ability of reparations to remedy them. Section C provides a brief history of political efforts to secure reparations for slavery. Section D surveys the body of case law concerning civil actions suing directly for reparations. That Section then concludes Part I by synthesizing the forgoing material and suggesting that creative litigation poses the best avenue to seek reparations.

A. WHAT ARE REPARATIONS?

At their most basic level, reparations are “[t]he act of making amends for a wrong” or “[c]ompensation for an injury or wrong.”¹³ In a broad social context, reparations are a remedy for “gross violations of human rights and serious violations of . . . humanitarian law.”¹⁴ Legally, the term generally refers to class-based cash payments for wrongs which were “substantively permissible under the prevailing law when committed” and cannot be remedied under current law.¹⁵

However, in modern American life, “reparations” are almost universally understood to mean “a national apology and [recompense]

13. *Reparation*, BLACK’S LAW DICTIONARY (11th ed. 2019).

14. Off. of the U.N. High Comm’r for Hum. Rts., *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes*, U.N. Doc. HR/PUB/08/1, at 7 (2008) [hereinafter OHCHR, *Reparations*].

15. Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 691 (2003).

for the institution of slavery, its subsequent de jure and de facto racial and economic discrimination against African Americans, and the impact of these forces on living African Americans.”¹⁶ Over 12.5 million Africans passed through the Transatlantic Slave Trade¹⁷ and, when slavery was formally ended with the ratification of the Thirteenth Amendment, at least 4.4 million Black people lived in America.¹⁸ Approximately 30 million direct descendants of enslaved Black people live in America today.¹⁹ Furthermore, the harms resulting from the lasting effects of slavery and systemic racism are felt by the broader population of 44 million Black Americans.²⁰

B. THE NEED FOR REPARATIONS TO BLACK AMERICANS

Over 150 years after the legal end of slavery in America, our country still deprives Black people of their rights to “life, liberty, or property.”²¹ Their health, economic, educational, and carceral outcomes suffer greatly in comparison to their non-Black peers. Black Americans live shorter lives than their non-Black neighbors,²² with infant mortality rates almost double the national average²³ and maternal mortality rates over three times that of White mothers.²⁴ Black people are less likely to be covered by health insurance than White people,²⁵

16. Commission to Study and Develop Reparation Proposals for African Americans Act, H.R. 40, 117th Cong. pmb. (2021).

17. See Davis, *supra* note 1.

18. Compare U.S. CENSUS BUREAU, POPULATION OF THE UNITED STATES IN 1860 ix (1864), with U.S. CONST. amend. XIII.

19. See William Darity, Jr., *Forty Acres and a Mule in the 21st Century*, 89 SOC. SCI. Q. 656, 662 (2008).

20. See *QuickFacts: United States: Black or African American Alone, Percent*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/RHI225219> [<https://perma.cc/BQ2J-YNFJ>] (reporting Census estimates finding that 13.4% of the United States’ 328 million population is “Black or African American”).

21. See U.S. CONST. amend. XIV, § 1.

22. See NAT’L CTR. FOR HEATH STAT., HEALTH, UNITED STATES, 2018, at 26 (2019) (reporting a 74.9 year life expectancy for Black people, compared to 78.5 years for White people and 81.8 years for Hispanic/Latinx people).

23. *Id.* at 27 (reporting 10.88 infant deaths per 1,000 live births for Black mothers, compared to a national average of 5.79 per 1,000).

24. See Emily E. Petersen, Nicole L. Davis, David Goodman, Shanna Cox, Carla Syverson, Kristi Seed, Carrie Shapiro-Mendoza, William M. Callaghan & Wanda Barfield, *Racial/Ethnic Disparities in Pregnancy-Related Deaths — United States, 2007–2016*, 68 MORBIDITY & MORTALITY WKLY. REP. 762, 763 tbl.1 (2019) (reporting 12.7 pregnancy-related deaths per 100,000 live births for White mothers, and 40.8 per 100,000 for Black mothers).

25. See NAT’L CTR. FOR HEATH STAT., SUMMARY HEALTH STATISTICS: NATIONAL HEALTH INTERVIEW SURVEY, 2018: TABLE P-11, at 2 tbl.P-11a (2019) (finding that Black people

and less likely to receive mental health services as well.²⁶ The median Black family has just over one-tenth the wealth of the median White family,²⁷ earns 36% less income than White families,²⁸ and is 30% less likely to own the home they live in than White families.²⁹ Despite decades of improving educational metrics, Black people are still less likely to graduate high school than White people, and almost half as likely to graduate college.³⁰ Perhaps most striking is the disproportionate criminalization of Black Americans. Black “adults are 5.9 times as likely to be incarcerated than White people,”³¹ receive sentences roughly 19% longer than similar White offenders,³² and are seven times more likely to be wrongly convicted of murder.³³

The transfer of wealth to Black people will not instantly solve these problems. To quote the author who inspired this Essay’s title: “Financial restitution cannot end racism.”³⁴ However, the financial impact of reparations would undoubtedly change many of the

under age 65 are 1.3% more likely to be uninsured, and 13.1% more likely to be covered by Medicaid than such White people).

26. See *Mental Illness: Mental Health Services — AMI*, NAT’L INST. OF MENTAL HEALTH, at fig.2, <https://www.nimh.nih.gov/health/statistics/mental-illness.shtml> [<https://perma.cc/S2NW-WZN7>] (reporting a 50.3% mental health service rate for White adults, compared to 32.9% for Black adults).

27. See URB. INST., *supra* note 8.

28. Compare U.S. CENSUS BUREAU, HINC-01. SELECTED CHARACTERISTICS OF HOUSEHOLDS BY TOTAL MONEY INCOME: 2019 (WHITE ALONE OR IN COMBINATION) (2020) (reporting a median White family household income of \$71,972), with U.S. CENSUS BUREAU, HINC-01. SELECTED CHARACTERISTICS OF HOUSEHOLDS BY TOTAL MONEY INCOME: 2019 (BLACK ALONE OR IN COMBINATION) (2020) (reporting a median Black family household income of \$46,073).

29. JANELLE JONES, JOHN SCHMITT & VALERIE WILSON, ECON. POL. INST., 50 YEARS AFTER THE KERNER COMMISSION 4 (2018) (reporting a 41.2% homeownership rate for Black households, compared to a 71.1% rate for White households).

30. See *id.* at 3 (reporting that Black people are 3.3% less likely to graduate high school than White people, and 19.3% less likely to graduate college).

31. THE SENT’G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 1 (2018).

32. U.S. SENT’G COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 2 (2017).

33. See SAMUEL R. GROSS, MAURICE POSSLEY & KLARA STEPHENS, NAT’L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES ii (2017).

34. Nikole Hannah-Jones, *What Is Owed*, N.Y. TIMES MAG. (June 30, 2020), <https://www.nytimes.com/interactive/2020/06/24/magazine/reparations-slavery.html> [<https://perma.cc/EFJ9-LC6S>]. See, e.g., JOHN R. LOGAN, US2010 PROJECT, SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS AND ASIANS IN METROPOLITAN AMERICA 5 (2011) (reporting that Black families earning more than \$75,000 per year lived in poorer neighborhoods, on average, than White families earning less than \$40,000 per year).

above-mentioned disparities for the better. Keeping the spirit of General William T. Sherman's wartime promise of "40 acres and a mule"³⁵ could increase the average Black family's net worth more than eleven-fold,³⁶ putting them at the current sixty-first percentile of net worth for U.S. households.³⁷ Such an increase in familial wealth could go a long way towards closing the gaps in health, housing, and education outcomes for Black people. The largest driver of the racial wealth gap is the negative disparity in Black homeownership,³⁸ and a full 20% down payment on the average home in the United States is \$80,720.³⁹ The ability to afford health insurance helps reduce racial disparities in healthcare.⁴⁰ The average cost of obtaining a four-year degree is about

35. See L.M. Dayton, *Special Field Orders, No. 15, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES*, ser. 1, vol. XLVII, pt. 2, at 60–62 (1895). General Sherman's field orders formally granted the forty acres, while various reports find that the mules were provided as a practice. See, e.g., Henry Louis Gates, Jr., *The Truth Behind '40 Acres and a Mule'*, PUB. BROAD. SYS., <https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/the-truth-behind-40-acres-and-a-mule> [<https://perma.cc/Y7UW-XSSH>].

36. Compare URB. INST., *supra* note 8 (reporting a median \$17,409 in wealth for Black families), with Patricia Cohen, *What Reparations for Slavery Might Look Like in 2019*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/business/economy/reparations-slavery.html> [<https://perma.cc/83ZC-JJ68>] ("What would Sherman's promise be worth today . . . ? [I]t worked out to about \$80,000 a person."), and U.S. CENSUS BUREAU, *AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: TABLE AVG1 (2019)*, <https://www.census.gov/data/tables/2019/demo/families/cps-2019.html> [<https://perma.cc/EZJ8-VV92>] (reporting an average household size of 2.47 for Black households). This per capita form of reparations would give the average Black family \$197,600 for a new median net worth of \$215,009.

37. See *Net Worth Percentile Calculator for the United States in 2020*, DON'T QUIT YOUR DAY JOB, <https://dqydj.com/net-worth-percentile-calculator-united-states> [<https://perma.cc/N6EM-ARUY>] (using data from the Federal Reserve Survey of Consumer Finances to create a net worth percentile calculator).

38. See CHRISTOPHER E. HERBERT, DANIEL T. MCCUE & ROCIO SANCHEZ-MOYANO, HARVARD UNIV., JOINT CTR. FOR HOUS. STUD., *IS HOMEOWNERSHIP STILL AN EFFECTIVE MEANS OF BUILDING WEALTH FOR LOW-INCOME AND MINORITY HOUSEHOLDS? (WAS IT EVER?)* 24 (2013) (finding that, from 1984 to 2009, the median wealth gain for White families was \$152,000 greater than that for Black families, and "that the single largest driver of this divergence in wealth was the additional time [W]hites spend as homeowners.").

39. See *FRED Economic Data: Average Sales Price of Houses Sold for the United States*, FED. RSRV. BANK OF ST. LOUIS., <https://fred.stlouisfed.org/series/ASPUS> [<https://perma.cc/5ATZ-QBTG>] (reporting a nationwide average sale price of \$403,600 for homes sold in the fourth quarter of 2020).

40. Cf. SUSAN L. HAYES, PAMELA RILEY, DAVID C. RADLEY & DOUGLAS MCCARTHY, COMMONWEALTH FUND, *CLOSING THE GAP: PAST PERFORMANCE OF HEALTH INSURANCE IN REDUCING RACIAL AND ETHNIC DISPARITIES IN ACCESS TO CARE COULD BE AN INDICATION OF FUTURE RESULTS*, at 6 ex. 4 (2015) (finding that health insurance coverage roughly equalized the percentage of people who received care, regardless of race).

\$80,000 at a public university, and \$172,000 at a private university,⁴¹ and evidence suggests that increased access to higher education makes great strides in erasing persistent racial pay disparities.⁴²

In addition to financial repair, reparations may offer spiritual repair as well. Studies report that Black people tend to hold pessimistic views on the potential for racial equality in America.⁴³ While those beliefs are well-earned by decades of empirical support,⁴⁴ the hope for meaningful change that reparations might inspire could have a positive effect. Making cash reparations, along with a fulsome apology, to Japanese Americans for their displacement and internment during World War II “produced ‘a wonderful feeling’” in that community, with recipients feeling as if they “were made whole again as American citizens.”⁴⁵ While money and expressions of regret alone will not dispel “the on-going effects of the institution of slavery and its legacy of persistent systemic structures of discrimination,”⁴⁶ such a gesture could be part of a process that results in a more equitable society for Black people.

41. See *Tuition Costs of Colleges and Universities*, NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=76> [<https://perma.cc/S2TQ-GG3E>] (reporting Department of Education data for tuition, fees, room, and board).

42. Cf. Stephen Miller, *Black Workers Still Earn Less than Their White Counterparts*, SOC’Y FOR HUM. RES. MGMT. (June 11, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/racial-wage-gaps-persistence-poses-challenge.aspx> [<https://perma.cc/3PVM-RP9G>] (finding that when Black men are similarly situated to their White peers, with equal experience and education, their pay gap shrinks from -13% to -2%).

43. See, e.g., PEW RSCH. CTR., *ON VIEWS OF RACE AND INEQUALITY, BLACKS AND WHITES ARE WORLDS APART* 46 (2016) (reporting that 43% of Black adults believe America “will never make the changes needed for [B]lacks to have equal rights with [W]hites.”).

44. See, e.g., URB. INST., *supra* note 8 (reporting 107% wealth growth for Black families from 1983 to 2016, compared to 184% growth for White families over that period); JONES ET AL., *supra* note 29, at 1 (“While African Americans are in many ways better off in absolute terms than they were in 1968, they are still disadvantaged in important ways relative to whites.”).

45. Adeel Hassan & Jack Healy, *America Has Tried Reparations Before. Here Is How It Went*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/us/reparations-slavery.html> [<https://perma.cc/85VR-JWP4>] (quoting the late United States Representative Robert T. Matsui, a California Democrat who was interned with his parents as a child.”).

46. Commission to Study and Develop Reparation Proposals for African Americans Act, H.R. 40, 117th Cong. § 2(4) (2021).

C. POLITICAL EFFORTS FOR REPARATIONS

While the United States has paid reparations to other groups of people deserving of such recompense,⁴⁷ reparations for slavery and the historical disenfranchisement of enslaved peoples and their descendants remain unpaid and unpopular with a majority of Americans.⁴⁸ Numerous attempts to deliver reparations to Black people have failed as a result of political resistance. Land captured by the Union Army during the Civil War and granted to Black people freed from slavery was quickly returned to its antebellum owners by a president hostile to reparations.⁴⁹ Since then, various political attempts to secure reparations from outside the government⁵⁰ and from within⁵¹ have historically been met with institutional indifference⁵² or outright hostility.⁵³

47. See Posner & Vermeule, *supra* note 15 (discussing reparations programs enacted for Native peoples and Japanese Americans, among others).

48. See, e.g., Perry Bacon Jr., *What Americans Think About Reparations and Other Race-Related Questions*, FIVETHIRTYEIGHT (Feb. 26, 2019, 6:01 AM), <https://fivethirtyeight.com/features/what-americans-think-about-reparations-and-other-race-related-questions> [<https://perma.cc/3FVE-XZJE>] (reporting polls from 2016 and 2017 finding that only 26% of Americans support reparations from slavery); Mohamed Younis, *As Redress for Slavery, Americans Oppose Cash Reparations*, GALLUP (July 29, 2019), <https://news.gallup.com/poll/261722/redress-slavery-americans-oppose-cash-reparations.aspx> [<https://perma.cc/B4PG-ALT>] (reporting survey results, from June and July 2019, finding that 67% of Americans believed Black people should not be paid cash reparations for slavery); Johnson, *supra* note 10 (finding about 20% of Americans in support of reparations for slavery as of June 2020).

49. See Adjoa A. Aiyetoro & Adrienne D. Davis, *Historic and Modern Social Movements for Reparations: The National Coalition of Blacks for Reparations in America (N'COBRA) and Its Antecedents*, 16 TEX. WESLEYAN L. REV. 687, 697 n.31 (2010).

50. See, e.g., *id.* at 702–05 (discussing the early twentieth century attempts of Callie House and the National Ex-Slave Mutual Relief, Bounty and Pension Association to secure pensions for formerly enslaved people).

51. Commission to Study Reparation Proposals for African Americans Act, H.R. 3745, 101st Cong. (1989).

52. In April 2021, the late Representative John Conyers, Jr.'s bill forming a commission to study proposals for reparations for slavery was passed out of committee for the first time, despite being introduced to every Congress since 1989. See Maya King, *Reparations Bill Approved Out of Committee in Historic Vote*, POLITICO (Apr. 15, 2021, 12:35 PM), <https://www.politico.com/news/2021/04/15/reparations-bill-committee-historic-vote-481811> [[https://perma.cc/45P\]-4JEC](https://perma.cc/45P]-4JEC)].

53. See Aiyetoro & Davis, *supra* note 49, at 703–05 (discussing a “twenty-year campaign against [Callie] House and her organization” by the Justice Department, which resulted in House’s imprisonment and NEMRBPA being banned from most uses of the Postal Service for its fundraising activities).

Critics of cash reparations from across the political spectrum have cast them as too “divisive”⁵⁴ or too impracticable to administer.⁵⁵ While widespread evidence suggests that reparations programs for other racial or religious groups have been readily implemented without resulting in social schism,⁵⁶ such skepticism is common within the mainstream political establishment. With 92% of Republicans opposing reparations,⁵⁷ and just one out of twenty-seven Democratic presidential candidates in the 2020 election cycle calling for immediate reparations,⁵⁸ the near-term success of political efforts to achieve

54. For example, during his 2016 Democratic primary campaign, Senator Bernie Sanders stated that cash reparations “would be very divisive.” Igor Derysh, *Bernie Sanders Dismisses Kamala Harris' and Elizabeth Warren's Calls for Slavery Reparations*, SALON (Feb. 28, 2019, 2:10 PM), <https://www.salon.com/2019/02/28/bernie-sanders-dismisses-kamala-harris-and-elizabeth-warrens-calls-for-slavery-reparations> [<https://perma.cc/WR4L-7246>]. Senator Sanders has since co-sponsored Senator Cory Booker's Senate version of H.R. 40. *Booker Reparations Bill Reaches 12 Senate Cosponsors*, SENATE.GOV: CORY BOOKER (June 14, 2019), <https://www.booker.senate.gov/news/press/booker-reparations-bill-reaches-12-senate-cosponsors> [<https://perma.cc/6HZG-3U49>].

55. See, e.g., David Frum, *The Impossibility of Reparations*, ATLANTIC (June 3, 2014), <https://www.theatlantic.com/business/archive/2014/06/the-impossibility-of-reparations/372041> [<https://perma.cc/4MVP-M3PK>] (making a slippery-slope argument about the purported difficulty of figuring out whom to pay reparations to and how much).

56. See *Legacy of the Trans-Atlantic Slave Trade: Hearing Before the Subcomm. on the Const., C.R., and C.L. of the H.R. Comm. on the Judiciary*, 110th Cong. 101 (2007) [hereinafter *H.R. 40 Hearing, 2007*] (discussing reparations paid to Jewish Holocaust survivors and Native Tribes in Alaska, Michigan, and Oregon). An exchange between then-Representative Keith Ellison and Detroit City Councilwoman JoAnn Watson, who served as a delegate to the U.N. Conference on Racism, is illustrative of the general lack of evidence to support the criticism of cash reparations as “divisive.”

Mr. ELLISON. Have those payments worked to further alienate those recipients from American society . . . ? I think there is concern that this is going to somehow harm America because digging up all this old stuff is just going to make us less interested in being part of America.

Ms. WATSON. Some of the largest reparations aren't called reparations. The Homestead Act was reparations for White male property owners . . .

Mr. ELLISON. Are they alienated from the mainstream of American society?

Ms. WATSON. White males . . . ?

Mr. ELLISON. Yes.

Ms. WATSON. I don't think so.

Mr. ELLISON. They are doing okay?

Id.

57. See Younis, *supra* note 48.

58. *Reparations*, POLITICO (Aug. 8, 2019), <https://www.politico.com/2020-election/candidates-views-on-the-issues/economy/reparations> [<https://perma.cc/A3FK-UJW6>] (“Author Marianne Williamson has called for skipping a study and . . . for payments to descendants of slaves ranging from \$200 billion to \$500 billion over a 20-

reparations for Black people seems unlikely. Public opinion remains intractable on the issue. Despite the increase in public empathy for Black people in the aftermath of the murder of George Floyd,⁵⁹ support among White people for reparations has not followed to a significant degree.⁶⁰ Former President Barack Obama has gone so far as to suggest that it would be impossible to “ever be able to garner a majority of an American Congress . . . around providing a benefit specific to African Americans as a consequence of slavery and Jim Crow.”⁶¹

Despite those headwinds, the issue of *studying* reparations has found increased political support in recent years. The H.R. 40 Reparations Commission Bill has attracted 185 cosponsors, up from just 35 when it was introduced in 2017.⁶² In April 2021, H.R. 40 was passed out of committee for the first time in the bill’s thirty-two year history.⁶³ The bill has secured crucial support from Democratic leadership, suggesting it could receive a floor vote, and the Biden administration has indicated that it may act if Congress does not.⁶⁴ In September

year period.”).

59. See, e.g., Nolan D. McCaskill, ‘A Seismic Quake’: Floyd Killing Transforms Views on Race, POLITICO (June 10, 2020, 4:30 AM), <https://www.politico.com/news/2020/06/10/george-floyds-death-transforms-views-on-race-307575> [<https://perma.cc/K92J-ZCQ5>] (reporting year-over-year increases in the percentage of White people who believed that “racism is a big problem,” that “police killings of unarmed black men were signs of a broader problem” within law enforcement, and that our “criminal justice system favors white people over black people . . .”).

60. See Perry Bacon Jr., *White Democrats Are Wary of Big Ideas to Address Racial Inequality*, FIVETHIRTYEIGHT (July 14, 2020, 6:00 AM), <https://fivethirtyeight.com/features/white-democrats-are-wary-of-big-ideas-to-address-racial-inequality> [<https://perma.cc/5SRK-UBEZ>] (reporting results of polls showing that 28–34% of White Democrats supported reparations before May 2020, and that 33–36% support reparations after May 2020); see also Johnson, *supra* note 10 (reporting the results of polls “conducted after the May 25 death of George Floyd” finding that one in ten white people supported reparations, and only one-third of Democrats).

61. Ta-Nehisi Coates, ‘Better Is Good’: Obama on Reparations, Civil Rights, and the Art of the Possible, ATLANTIC (Dec. 21, 2016), <https://www.theatlantic.com/politics/archive/2016/12/ta-nehisi-coates-obama-transcript-ii/511133> [<https://perma.cc/Z5ZS-7T75>].

62. *Compare H.R.40 - Commission to Study and Develop Reparation Proposals for African Americans Act*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/40/cosponsors> [<https://perma.cc/AF4U-R6KH>], with *H.R.40 - Commission to Study and Develop Reparation Proposals for African-Americans Act: Cosponsors*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/40/cosponsors> [<https://perma.cc/7HKK-VZ5B>].

63. See King, *supra* note 52.

64. See Sheryl Gay Stolberg, *House Democrats, with Pelosi’s Support, Will Consider a Commission on Reparations*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/us/politics/house-democrats-reparations.html> [<https://perma.cc/PA5A-QS64>] (discussing House Speaker Nancy Pelosi’s support for H.R. 40); Beatrice

2020, California passed its own version of H.R. 40, creating a “task force” to study reparations proposals.⁶⁵ Going beyond study proposals, some cities have enacted local reparative ordinances.⁶⁶ These city-level reparations measures generally seek to make racially equitable community investments, but none have made cash payments⁶⁷ and some have been beset by political retreat and public opposition.⁶⁸ It is possible that the findings of a Reparations Commission, or the success of local reparative measures, could build public support for reparations. However, even if H.R. 40 passes both House and Senate

Peterson, *After Racial Unrest Across US, Congress Takes Another Look at Reparations*, ABC NEWS (Feb. 17, 2021, 3:27 PM), <https://abcnews.go.com/Politics/racial-unrest-us-congress-takes-reparations/story?id=75925706> [<https://perma.cc/Z5ZS-7T75>] (suggesting that H.R. 40 could see a floor vote this Congress and indicating the Biden administration’s support for H.R. 40 or for enacting a similar measure via executive order based on “where Congress moves on that issue”).

65. Assemb. B. 3121, 2019–2020 Leg. Reg. Sess., at 3 (Cal. 2020) (enacted) (establishing a “Task Force to Study and Develop Reparation Proposals for African Americans” considering “the institution of slavery that existed within the United States and the colonies that became the United States from 1619 to 1865 . . .”).

66. See, e.g., Barbara Durr & Peter H. Lewis, *Reparations, Six Months Later: So Far, Empty Promises*, BLUE RIDGE PUB. RADIO (Feb. 5, 2021), <https://www.bpr.org/post/reparations-six-months-later-so-far-empty-promises> [<https://perma.cc/QV9F-2YAE>] (discussing Asheville, North Carolina’s reparations proposal).

67. See *Reparations*, CITY OF EVANSTON, <https://www.cityofevanston.org/government/city-council/reparations> [<https://perma.cc/9B5A-XRVZ>] (setting aside tax revenue from recreational marijuana sales towards a “Reparations Fund” which will support “initiatives related to workforce development, entrepreneurship, homeownership, education and infrastructure”); *Transcript: Charlottesville VA Backs “Reparations” Fund for Black Residents & Votes to Sell Robert E. Lee Statue*, DEMOCRACY NOW! (Aug. 7, 2017), https://www.democracynow.org/2017/8/7/charlottesville_va_backs_reparations_fund_for [<https://perma.cc/E4NE-M34E>] (discussing an “equity package” containing \$4 million in funding for public housing redevelopment, a parks project in a Black neighborhood, and education funding for low-income residents).

68. The Asheville, N.C., City Council “unanimously passed a Resolution supporting community reparations” in July 2020. Nia Davis, *Asheville Reparations Resolution is Designed to Provide Black Community Access to the Opportunity to Build Wealth*, CITY OF ASHEVILLE (July 20, 2020), <https://www.ashevillenc.gov/news/asheville-reparations-resolution-is-designed-to-help-black-community-access-to-the-opportunity-to-build-wealth> [<https://perma.cc/B53C-C6T5>]. However, separate attempts by the City Council to set aside \$4 million and \$1 million in funding failed to pass, and three of the seven councilmembers who voted for the measure lost reelection bids. Durr & Lewis, *supra* note 66. Almost a year after the original resolution, the City Council will once more vote on whether to fund its as-of-yet undefined reparations program. See Joel Burgess, *Asheville Reparations: \$1.2M Proposed; Biggest Funding Move Since Historic July 14 Vote*, ASHEVILLE CITIZEN TIMES (May 13, 2021, 5:50 AM), <https://www.citizen-times.com/story/news/2021/05/13/asheville-reparations-black-residents-proposed-most-funding-since-july-approval/5059467001/> [<https://perma.cc/EJ24-UQ6K>].

votes,⁶⁹ or a similar measure is enacted by executive fiat,⁷⁰ that report is likely years away and its effectiveness at shifting public opinion or producing tangible outcomes remains uncertain.

While it is difficult to speculate on what the public opinion of reparations will be if or when we ever read the H.R. 40 recommendations, current trends do not augur well. It is possible that public support for reparations could grow, but that possibility is entirely speculative. Black people have been waiting over 150 years for American society to make reparations for slavery.⁷¹ In the meantime, they have continued to suffer the ongoing harms stemming from slavery and systemic racism. Over the decades, some groups and individuals have taken it upon themselves to attempt to win reparations on their own. Thus, we have the reparations lawsuit.

D. LITIGATIVE EFFORTS FOR REPARATIONS

Given the longstanding failure of politics to deliver reparations, some groups and individuals have turned to litigation as an avenue to win recompense for slavery and its descendent evils. Often believed to be “the first lawsuit seeking Black reparations” as a class,⁷² 1915’s *Johnson v. McAdoo* sought to capture the proceeds of sales of cotton seized by the U.S. Government during the Civil War for the formerly enslaved people whose labor produced it.⁷³ *Cato v. United States* saw a group of plaintiffs’ *pro se* complaints for damages and “a formal apology from [the federal government], as well as an acknowledgement of ‘the fundamental injustice, cruelty, brutality, and inhumanity of slavery’” rise to the Ninth Circuit Court of Appeals.⁷⁴ Other suits have pursued corporations which profited from slavery⁷⁵ or sued states and municipalities directly for damages stemming from post-slavery

69. There are no available polls studying the popularity of reparations in West Virginia. Cf. David Sirota, *Joe Biden Might Be in the White House, but Joe Manchin Runs the Presidency*, GUARDIAN (Mar. 8, 2021, 10:42 AM), <https://www.theguardian.com/commentisfree/2021/mar/08/biden-manchin-presidency-power-democrats-congress> [<https://perma.cc/ZS8C-RFPH>] (“Even if Democrats were to eliminate the filibuster, they would still need Manchin’s stamp of approval for virtually all legislation, given the Senate’s current 50–50 split.”).

70. See Peterson, *supra* note 64.

71. See Aiyetoro & Davis, *supra* note 49, at 697 n.31 (discussing President Andrew Johnson’s 1865 cancellation of General Sherman’s “40 acres and a mule” field order).

72. See *id.* at 702.

73. *Johnson v. McAdoo*, 45 App. D.C. 440, 441 (D.C. Cir. 1916), *aff’d*, 244 U.S. 643 (per curiam).

74. *Johnson v. United States*, No. 94–1474, 1994 WL 225179, at *1 (N.D. Cal. May 6, 1994), *aff’d sub nom*, *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995).

75. *In re Afr.-Am. Slave Descendants Litig.*, 471 F.3d 754, 757 (7th Cir. 2006).

atrocities, such as the Tulsa Race Massacre of 1921.⁷⁶ Despite over a century of effort, a class-based case seeking reparations to Black people for slavery has never been decided on the merits. Instead, courts have always found the plaintiffs' claims to be barred by procedural concerns, creating an impenetrable network of justiciability defenses shielding defendants from liability in reparations cases.

Courts have exhibited a strong resistance to suits against government defendants for broad claims concerning the harms of slavery. The Ninth Circuit's opinion in *Cato* held that "claims arising out of the fact of slavery, kidnapping, and other offenses to [plaintiff's enslaved] ancestors," filed against the United States, were barred by sovereign immunity, not subject to the Federal Tort Claims Act's waiver of immunity, and that the statute of limitations was not tolled by the continuing effects of slavery and discrimination.⁷⁷ In affirming *Johnson v. McAdoo*, the Supreme Court suggested that it will not allow reparations suits to evade sovereign immunity via claims against government officials.⁷⁸ Other courts have held that statutes of limitations should bar reparations lawsuits against the Federal Government entirely, out of notions of fairness. Judges have opined that it would be an unfair "surprise" to the United States to allow "claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared,"⁷⁹ despite slavery being a well-known and intricately documented aspect of American history.⁸⁰

76. See, e.g., *Alexander v. Oklahoma*, 382 F.3d 1206, 1211 (10th Cir. 2004).

77. *Cato*, 70 F.3d at 1108.

78. 244 U.S. 643 (1916) (per curiam). *McAdoo* held that a suit filed against the Secretary of the Treasury, seeking a sum of money alleged to be wrongfully held in the Treasury under his custody, was barred by sovereign immunity because "[t]he real defendant, therefore, is the United States." 45 D.C. App. at 441. It is possible that the litigation strategy in *McAdoo* was inspired by the doctrine set forth in *Ex parte Young* eight years earlier. It is also possible that the judicial response was inspired by a plaintiff group of formerly enslaved people, compared to the pair of railroad shareholder plaintiffs in *Ex parte Young*. See *Ex Parte Young*, FED. JUD. CTR., <https://www.fjc.gov/history/timeline/ex-parte-young> [<https://perma.cc/6EN5-B8T2>] ("*Ex parte Young* . . . [held] that when a state official attempted to enforce an unconstitutional statute, that official was deemed to be acting in their personal, rather than official, capacity, and was therefore not protected by the Eleventh Amendment's grant to the states of sovereign immunity."); *Ex parte Young*, 209 U.S. 123, 169 (1908) (Harlan, J., dissenting).

79. *Berry v. United States*, No. 94-0796, 1994 WL 374537, at *3 (N.D. Cal. July 1, 1994).

80. See, e.g., *American Slavery, Civil Records*, NAT'L ARCHIVES, <https://www.archives.gov/research/african-americans/slavery-records-civil.html> [<https://perma.cc/24EW-Y9GY>] (listing thousands of historical documents held in the National Archives concerning slavery).

Justiciability has also been the major hurdle placed in front of reparations suits against private defendants. In the seminal case on the matter, the Seventh Circuit ruled that the plaintiffs' claims against a host of corporate defendants, alleging intentional torts and deprivation of constitutional rights,⁸¹ lacked standing because "[i]t would be impossible by the methods of litigation to connect the defendants' alleged misconduct with the financial and emotional harm that the plaintiffs claim to have suffered as a result."⁸² It also held that suits by the estates of formerly enslaved peoples were barred by statutes of limitation because they "had decades of effective access to the courts to seek redress for the wrongs of which they complain."⁸³ In denying certiorari, the Supreme Court made a sub silentio endorsement of this reasoning.⁸⁴

To summarize that pattern of jurisprudence: the United States government is immune from liability for the harms it caused by permitting and perpetuating slavery. Its officers and officials cannot be sued for enabling derivative harms of slavery. Even if the United States could be properly made a party to a reparations suit, such a suit would be time-barred because claims arising from centuries of enslavement and subjugation would be a "surprise." In suits against private defendants, it is "impossible" for descendants of enslaved people to prove they suffered harm as a result of corporations profiting from the enslavement of their ancestors. Furthermore, formerly enslaved people and their descendants have had plenty of time to pursue their claims, despite a century-and-a-half of prejudice, discrimination, and disenfranchisement. Thus, the statute of limitations on any such claims have run, and they cannot be tolled as a result of ongoing harms or as a matter of equity.⁸⁵ Lawsuits suing directly for reparations for slavery cannot overcome these procedural barriers. Given that there have been no major cases of this kind since *In re African-American Slave Descendants Litigation* was denied certiorari, it seems as though the reparations suit is dead as a theory of law.

81. See Christina E. Lutz, *The Death Knell Tolls for Reparations in In re African-American Slave Descendants Litigation*, 3 SEVENTH CIR. REV. 532, 545 (2008). The plaintiffs sued companies which profited from the transportation of enslaved people, from life insurance policies placed on them, and from the use of enslaved people as collateral for loans. *Id.*

82. *In re Afr.-Am. Slave Descendants Litig.*, 471 F.3d 754, 759 (7th Cir. 2006).

83. *Id.* at 762.

84. The Supreme Court denied two separate appeals from *In re Afr.-Am. Slave Descendants Litig.* at 552 U.S. 941 (2007).

85. See *Berry v. United States*, No. 94-0796, 1994 WL 374537, at *3 (N.D. Cal. July 1, 1994) ("[N]or does any good reason exist, for equitable tolling of the statute.").

Although political support for the Reparations Commission Bill has grown recently after years of stagnation,⁸⁶ the political road to reparations is long and uncertain. Legislative efforts should be pursued as a matter of justice and moral duty, but White slaveowners likely collected more cash as reparations for slavery in 1862 than Black Americans ever will.⁸⁷ With the legal system just as unlikely to award systemic reparations, where does the effort to win recompense for slavery go from here? It is up to creative attorneys to find solutions to such intractable problems.

II. A PRAGMATIC REPARATIVE LITIGATION FRAMEWORK FOR STATE ATTORNEYS GENERAL

The marked disparities Black people face in almost every facet of their daily lives should be heard as a call to action. But with political intervention uncertain, and direct lawsuits for reparations forestalled by justiciability barriers, how can we secure remedies for Black people that address the harms of slavery and systemic racism? This Part argues that a theory of litigation based on a broader definition of “reparations” could achieve such recompense. Section A uses the United Nations’ reparations program for post-conflict states to construct a reparative framework for litigation. Section B argues that state attorneys general are uniquely situated to execute such reparative litigation, given their enhanced standing and procedural advantages in aggregated litigation. Sections C through E discuss examples of lawsuits aimed at closing three major areas of discrepancy for Black people: health, financial, and educational outcomes.

A. CONSTRUCTING A REPARATIVE FRAMEWORK

A look at the various elements of reparations is illustrative in deciding how to shape reparative litigation. The traditional American

86. In 2019, the House Judiciary Subcommittee held a hearing on H.R. 40 to coincide with the Juneteenth holiday. *Hearing on Slavery Reparations*, C-SPAN (June 19, 2019), <https://www.c-span.org/video/?461767-1> [<https://perma.cc/CPB4-TAWV>]. Before that, the last Congressional hearing on H.R. 40 took place in December 2007. *See H.R. 40 Hearing, 2007*, *supra* note 56. In 2021, the House Judiciary Committee passed H.R. 40 out of committee for the first time in the thirty-two year history of the bill, auguring well for a vote by the full House sometime during the 117th Congress. *See King, supra* note 52.

87. *See* Tera W. Hunter, Opinion, *When Slaveowners Got Reparations*, N.Y. TIMES (Apr. 16, 2019), <https://www.nytimes.com/2019/04/16/opinion/when-slaveowners-got-reparations.html> [<https://perma.cc/BDV8-RSKJ>] (discussing the 1862 District of Columbia Emancipation Act, which “paid those loyal to the Union up to \$300 for every enslaved person freed”).

conception of reparations to Black people for slavery has two key components: cash payments to reconcile discrepancies in outcomes and apologies to provide spiritual repair and reconciliation.⁸⁸ These are admirable and necessary goals, and Black people have waited a century-and-a-half for public opinion or political currents to shift in favor of accomplishing them.⁸⁹ While money damages and apologies are certainly achievable remedies, there are broader visions of what reparations could be. This consideration is equal parts philosophical and practical. Not all harms are entirely resolved by the award of money damages. Powerful forms of equitable relief, such as consent decrees, can provide meaningful, judicially monitored remedies for large groups of people on an ongoing basis.⁹⁰ By expanding our notions of what reparations can be, and how they can operate, attorneys can open more doors to reparations while still leaving money damages on the table.

There is strong guidance on what an expanded view of reparations could encompass. The United Nations has found that winning reparations cases “is one way of guaranteeing that there will be a close connection between the reparations awards and other justice measures inherent in the judicial process.”⁹¹ The U.N. provides a framework for five general categories of reparative remedies: compensation, restitution, rehabilitation, guarantees of non-repetition, and satisfaction. “Compensation” encompasses the economic recompense most commonly associated with reparations, suggesting they be provided for “any economically assessable damage” including “lost opportunities, loss of earnings and moral damage.”⁹² “Restitution” is akin to our common law models of equitable relief, focusing on “restor[ing] the victim to the original situation before the gross violations” against them through reaffirmations of personal liberties, re-establishing personal statuses such as employment, and returning

88. See *supra* notes 15–16 and accompanying text.

89. See *supra* note 71 and accompanying text.

90. Imagine a school district that continually discriminated against Black students. What would money damages be for a class of high school sophomores seeking relief for their school’s discriminatory failure to administer a calculus program? Would money damages adequately address the harm incurred by reduced academic opportunities? It is doubtful that a single student’s award would be large enough to cover remediation methods for the derivatives and integral curves they were deprived of. Is an apology enough? Equitable relief forcing the implementation of a calculus program is not typically considered an aspect of reparations. In this case, however, it would serve a reparative purpose by working to counteract the educational disparities suffered by Black people. See, e.g., *supra* note 23; *infra* note 170.

91. OHCHR, *Reparations*, *supra* note 14, at 35.

92. *Id.* at 7.

property.⁹³ “Rehabilitation” focuses on ameliorating the harms suffered by individuals through “medical and psychological care as well as legal and social services.”⁹⁴ “Guarantees of non-repetition” involve broad societal reform, across a variety of civic structures, to ensure that the violation of rights does not occur again.⁹⁵ Finally, “satisfaction” considers matters of philosophical and moral repairs to society, such as “truth-seeking, the search for the disappeared, the recovery and reburial of remains, public apologies . . . commemoration and memorialization.”⁹⁶

Attorneys should consider each of these theories of reparations when selecting cases and crafting remedies. They can do this by identifying the reparative theories that best address the disparities and harms suffered by Black people as a result of slavery and institutional racism, and shape their litigation accordingly. Admittedly, this approach undercuts a major purpose of reparations for slavery: to provide a symbolic apology and humbling of the oppressing party in hopes that the recipients of the apology can be “made whole again as American citizens.”⁹⁷ This has been a key aspect of legislative reparations proposals,⁹⁸ and remains a worthwhile goal. Still, sacrificing apologies may provide a pragmatic benefit if more reparative suits can be won by skirting unpopular, hot-button issues.⁹⁹ While failing to provide spiritual repair, the money damages and equitable relief serve at least some reparative purposes. There are far worse outcomes, especially when such actions are positioned as an incremental piece of a larger sociopolitical strategy to provide repair for the harms of slavery.

This broader, utilitarian view of reparations has been endorsed by the elected officials leading the effort to pass H.R. 40. Bill sponsor Representative Sheila Jackson Lee discussed the international origins of reparative concepts,¹⁰⁰ and U.N. officials were in attendance at the

93. *Id.*

94. *Id.*

95. *Id.* at 7–8 (suggesting human rights reforms for military and law enforcement entities, judicial systems, media companies, and industry).

96. *Id.* at 7.

97. Hassan & Healy, *supra* note 45.

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

99. *See supra* notes 48, 60 (discussing poll results concerning the public popularity of reparations).

100. *See* Peterson, *supra* note 64 (quoting Rep. Jackson Lee) (“H.R. 40 is an ‘international legal concept; it’s not something we’ve created here. It deals with restorative and repair, which is needed in this nation.’”).

February 2021 House Judiciary subcommittee hearing on the bill.¹⁰¹ Conversely, the U.N. has recognized “that the judicial resolution of individual reparations cases has often played a very important role in catalysing the willingness of Governments to establish massive reparations programmes.”¹⁰²

So then, who should execute this reparative litigation scheme? Enter the state attorney general. The widely accepted *parens patriae* role of the attorney general positions that office to accomplish the end-goals of reparations through lawsuits that address the net effects of slavery and systemic racism. By forming their litigation slate around a reparative framework, an attorney general can obtain remedies that serve as *de facto* reparations, delivering much needed relief to their constituents.

B. WHY THE STATE ATTORNEY GENERAL?

An attorney general is the enforcer of their state’s sovereign *parens patriae* “interest in its citizens’ health, safety, and welfare.”¹⁰³ Attorneys general may “sue, as *parens patriae*, to vindicate the state’s and its citizens’ interests.”¹⁰⁴ While this interest extends over all citizens, attorneys general must make judicious use of their limited resources to provide the best possible protection of that interest. The continued disparities between Black and non-Black Americans make a strong case that those resources should be deployed in service to those who most need an equalizing force.¹⁰⁵ However, attorneys general would likely face the same justiciability concerns as private litigants in suits for direct reparations.¹⁰⁶ In addition, an elected attorney general who sued for reparations could face steep political consequences, given the general unpopularity of reparations.¹⁰⁷ Accordingly, I propose that attorneys general use the reparative litigation framework outlined in Part II.A to reduce the discrepancies in health, economic, and educational outcomes experienced by Black people.¹⁰⁸

101. *See id.*

102. OHCHR, *Reparations*, *supra* note 14, at 34.

103. Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1863 (2000).

104. *Id.* at 1864. “These interests include the state’s interest in enforcement of its civil and criminal laws and its interest in protecting and vindicating the health, safety, and welfare of its people.” *Id.*

105. *See supra* Part I.B.

106. *See supra* notes 77–85 and accompanying text.

107. *See supra* note 48.

108. *See supra* Part I.B. The carceral disparities faced by Black people are likely

This approach would avoid public backlash against political advocacy for reparations,¹⁰⁹ and evade justiciability barriers to direct suits for reparations.¹¹⁰

These ends are well-served by the traditional consumer protection domain of the attorney general,¹¹¹ which creative attorneys general have used to address systemic harms such as climate change.¹¹² Their status as frequent litigants against the Federal Government is also helpful when considering suits against federal agencies engaging in conduct that perpetuates such disparities.¹¹³ By engaging in multi-state litigation, attorneys general could pursue even those defendants with the greatest legal resources.¹¹⁴ While many actions that attorneys general already take serve reparative goals, this Essay proposes that choices to engage in litigation could be calibrated to maximize their reparative effects. This can be accomplished by using the reparative framework discussed in Part II.A as a guide to identify and

best addressed by attorneys general outside of civil litigation, either through their discretionary authority in criminal prosecutions or via legislative advocacy. While the disproportionate criminalization of Black people is a critical issue, this Essay focuses on a different angle of approach to the problem of racial inequity.

109. See, e.g., Johnson, *supra* note 10 (reporting that only one in three Democrats support reparations).

110. See *supra* Part I.D.

111. See, e.g., MINN. STAT. § 8.31, subdiv. 1 (2021) (“The attorney general shall investigate violations of the law of this state respecting unfair, discriminatory, and other unlawful practices in business, commerce, or trade . . .”).

112. See *Minnesota Attorney General Sues Exxon Over Climate Change*, NAT’L. PUB. RADIO (June 29, 2020, 4:00 PM), <https://www.npr.org/2020/06/29/884958624/minnesota-attorney-general-comments-on-the-states-climate-change-lawsuit> [<https://perma.cc/7296-J6RB>] (discussing a lawsuit filed by the Minnesota Attorney general alleging “that [Exxon Mobil, Koch Industries, and the American Petroleum Institute] violated Minnesota laws against consumer fraud, deceptive trade practices and false statements in advertising.”).

113. See *Multistate Lawsuits vs. the Federal Government – Totals*, ATTORNEYSGENERAL.ORG, <https://attorneysgeneral.org/multistate-lawsuits-vs-the-federal-government/statistics-and-visualizations-multistate-litigation-vs-the-federal-government> [<https://perma.cc/99QG-F2GR>] (last updated Jan. 19, 2021) (finding that state attorneys general have filed 156 suits against the federal government since 2017); see, e.g., *infra* notes 154–160 and accompanying text (identifying such a potential suit against the Internal Revenue Service concerning racial disparities in the individual income tax audit rate).

114. See, e.g., *Federal Government and State Attorneys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses*, DEP’T OF JUST. (Feb. 9, 2012), <https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest> [<https://perma.cc/R586-FB9G>] (“[T]he federal government and 49 state attorneys general have reached a landmark \$25 billion agreement with the nation’s five largest mortgage servicers.”).

prioritize lawsuits with reparative effects to Black people for the ongoing harms of slavery and systemic racism.

Key to this litigative scheme is the fact that *parens patriae* principles allow attorneys general to sue on behalf of large groups of people without meeting the stringent procedural requirements placed on class action lawsuits.¹¹⁵ For example, where many civilian lawsuits based on this reparative framework would face procedural challenges under the Supreme Court's strict commonality requirements for class certification,¹¹⁶ the nature of attorneys general suits require them to "allege an injury to the citizens [they] represent[], thereby alleging issues or questions common to the group."¹¹⁷ Attorneys general bypass typicality challenges because "the state need not assert that *it* has suffered . . . damages, but may simply claim an interest in remedying the . . . injur[ies] suffered by its citizens."¹¹⁸ Finally, "there is no mechanism for an inquiry into the adequacy of representation in *parens patriae* suits," thus freeing attorneys general from the class counsel restrictions of Federal Rule of Civil Procedure 23(g).¹¹⁹ Because the *parens patriae* standing of attorneys general avoids these procedural roadblocks to aggregate reparative litigation, state litigants can more easily achieve large scale relief for widespread harm.

This strategy is piecemeal in nature and could result in a patchwork of inconsistent outcomes between states. A failure to enact a broad, powerful reparations measure is certainly an undesirable result, but that is the world we already live in. Some reparative relief is better than no reparative relief. The elected nature of most attorneys general¹²⁰ puts the choice directly into the hands of those who will be affected by this litigation strategy. If the people of a state want to effect a reparative litigation scheme, or improve the one they have, candidates for attorney general can market themselves accordingly. Furthermore, multistate litigation often results in settlements involving

115. See Gabrielle J. Hanna, Comment, *The Helicopter State: Misuse of Parens Patriae Unconstitutionally Precludes Individual and Class Claims*, 92 WASH. L. REV. 1955, 1958, 1975-77 (discussing the ways in which "*parens patriae* suits are largely free from the procedural restraints curtailing private class actions.").

116. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) ("[C]laims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor.").

117. Hanna, *supra* note 115, at 1976.

118. Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 502 (2012).

119. *Id.*

120. Justin G. Davids, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 COLUM. J.L. & SOC. PROBS. 365, 369 (2005).

most of the country's attorneys general, meaning that the largest reparative outcomes would likely be shared by a wide majority of states.¹²¹

The following Sections discuss suits targeting disparate health, financial, and educational outcomes for Black people in turn. Some of these lawsuits fall within existing practices, and some suggest extensions of those practices which could prove effective in achieving outcomes reparative of the harms of slavery and racism. This Essay strives to promote a practice of developing and engaging in litigation to shape outcomes towards such reparative effects. The cases below, real or proposed, are put forth to provide examples of what the process and remedies of a reparative framework of litigation could look like. There may be other legal or practical difficulties prevailing in the actions discussed below. This Essay's objective is to connect harms disproportionately falling on Black people with the injuring party who can most effectively provide relief, and suggest remedies that could accompany money damages to achieve further reparative effects.

C. REPARATIVE SUITS TARGETING HEALTH OUTCOMES

Black people have statistically worse health outcomes than non-Black people.¹²² Given that attorneys general already commonly take on healthcare concerns,¹²³ these suits could be calibrated to address those particular deficits. Take the example of menthol cigarette litigation. In passing the Family Smoking Prevention and Tobacco Control Act, Congress had a particular concern for "the historic targeting of African Americans for menthol cigarette use by tobacco companies" and "higher rates of lung cancer documented among African American smokers as compared to non-African American smokers."¹²⁴ A Food and Drug Administration (FDA) committee found that a 2010 ban on menthols would have prevented the premature deaths

121. See, e.g., Michael Forsythe & Walt Bogdanich, *McKinsey Settles for Nearly \$600 Million Over Role in Opioid Crisis*, N.Y. TIMES (Feb. 3, 2021), <https://www.nytimes.com/2021/02/03/business/mckinsey-opioids-settlement.html> [https://perma.cc/AY9F-DWT3] (reporting that the attorneys general of forty-seven states, D.C., and five territories settled for \$573 million with a consulting company that marketed the "OxyContin painkiller amid an opioid crisis in the United States that has contributed to the deaths of more than 450,000 people over the past two decades.").

122. See *supra* notes 22–24 and accompanying text.

123. See, e.g., Jan Hoffman, *\$26 Billion Settlement Offer in Opioid Lawsuits Gains Wide Support*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/2020/11/05/health/opioids-settlement-distributors.html> [https://perma.cc/CS55-TVDA].

124. H.R. REP. NO. 111-58, pt. 1, at 38 (2009).

of 4,700 Black people.¹²⁵ However, in the twelve years since the Act's passage, the FDA has failed to ban menthol cigarettes despite an agency commitment and proposed administrative rule to do so.¹²⁶ An attorney general could join the lawsuit filed by the African American Tobacco Control Leadership Council seeking to compel the FDA to complete its back-burnered rulemaking on menthols via the Administrative Procedures Act.¹²⁷ In addition, litigation could also pursue menthol cigarette manufacturers for that "historic targeting" of Black people and the resulting "higher rates of lung cancer" they experience as a result.¹²⁸ Attorneys general could leverage their consumer protection powers to prosecute menthol manufacturers for "any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice"¹²⁹ involved in marketing that targets Black people. Alternatively, theories of state standing from the 1990s cigarette suits, concerning damages to state Medicaid systems, would be equally available.¹³⁰ Taken together, those suits could result in a ban on a product that disproportionately affects the health of Black people as well as provide affected individuals with money damages stemming from cigarette manufacturers' targeting of them on the basis of race. That strategy could be replicated for other products with harmful health effects disproportionately targeted at Black people,

125. Complaint at 24, *Afr. Am. Tobacco Control Leadership Council v. U.S. Dep't of Health & Hum. Servs.*, No. 20-CV-04012, 2020 WL 3629299 (N.D. Cal. June 17, 2020).

126. *Id.* at 32–35.

127. *Id.* at 44. While the Biden administration has announced plans to have the FDA engage in notice and comment rulemaking to ban menthol cigarettes, a final rule "could take years and would likely be challenged in court by the tobacco industry." Michael Collins & Nada Hassanein, *FDA Announces Plan to Ban Menthol Cigarettes, 'Forever' Targeted at Black Americans*, USA TODAY (Apr. 29, 2021, 11:12 AM), <https://www.usatoday.com/story/news/politics/2021/04/28/report-menthol-cigarette-ban-biden-administration-fda-may-propose/4871444001/> [<https://perma.cc/8WXX-8F5Q>]. This particular lawsuit should not be moot until such a rule is issued. Given that a ban on menthols "has been languishing before the FDA for over a decade," maintaining this suit—even against a seemingly amenable administration—could help ensure that some regulatory action is taken. *Id.*

128. H.R. REP. NO. 111-58, pt. 1, at 38 (2009).

129. MINN. STAT. § 325F.69, subdiv. 1 (2021); *accord, e.g.*, N.J. STAT. ANN. § 56:8-2 (West 2021); S.D. CODIFIED LAWS § 37-24-6(1) (2021); ARIZ. REV. STAT. ANN. § 44-1522 (2021); 815 ILL. COMP. STAT. 505/2 (2021); IOWA CODE § 714.16(2)(a) (2021).

130. See Cliff Sherrill, Comment, *Tobacco Litigation: Medicaid Third Party Liability and Claims for Tobacco Litigation: Medicaid Third Party Liability and Claims for Restitution*, 19 U. ARK. LITTLE ROCK L. REV. 497, 497 ("[P]ointing to the costs incurred by Medicaid in treating tobacco related illness and disease, the state asserts an equitable claim for restitution, independent of the tobacco user.").

like fast food restaurants and junk food brands.¹³¹ A settlement fund for those harmed by products which employed racially targeted advertising could benefit Black people whose health disparities were furthered as a result.

Attorneys general could deploy their broad investigatory powers to look into racial disparities within the healthcare industry.¹³² Investigations into hospital systems and clinic networks could determine whether there is discriminatory treatment leading to worse outcomes for Black patients.¹³³ Health insurance companies could be investigated and sued for damages or injunctive relief from policies that disproportionately impact the health of Black people.¹³⁴ Legal actions of this sort would benefit greatly from the broad fact-finding abilities of the attorney general's office, circumventing many of the restrictions on discovery likely in litigation involving such proprietary and privacy-protected information.

Among other challenges facing individual plaintiffs, the effects of reduced or lower-quality care may take years to manifest or may be difficult to prove as the cause of an individual's injuries. Damages from these suits could be remitted directly to affected parties or used to

131. See Nadra Nittle, *People of Color Have the Highest Obesity Rates in the US. Food Marketing is Part of the Problem.*, VOX (Sep. 28, 2018, 9:50 AM), <https://www.vox.com/the-goods/2018/9/28/17910518/black-hispanic-obesity-rates-food-marketing-mcdonalds-commercials-sprite-fast-food-junk-food> [<https://perma.cc/4EGA-6DVQ>] (“[R]esearch shows that unhealthy food tends to be marketed in venues where you’ve got lower-income people, where you’ve got African Americans . . . Whether that’s conscious or not, the research shows it intersects.”).

132. See, e.g., MINN. STAT. § 8.31, subdiv. 2 (2021) (providing the Minnesota Attorney General the power to issue written interrogatories, take depositions, and require production of documents or things “without commencement of a civil action and without leave of court”). These discovery powers require responses by responding parties in less than three weeks. *Id.*

133. See, e.g., Heidi Ledford, *Millions of Black People Affected by Racial Bias in Health-Care Algorithms*, NATURE (Oct. 26, 2019), <https://www.nature.com/articles/d41586-019-03228-6> [<https://perma.cc/6EQ3-7NGA>] (finding that an algorithm provided Black patients with lower quality of healthcare than equally sick White patients).

134. Compare Susan Stout, *Minnesota Hospital Association Seeks Investigation of BCBS from State Attorney General*, MINN. ORG. OF LEADERS IN NURSING (July 26, 2019), <https://moln.org/news/462992/Minnesota-Hospital-Association-seeks-investigation-of-BCBS-from-State-Attorney-General.htm> [<https://perma.cc/DAU6-NDFT>] (discussing new Blue Cross Blue Shield policies that reduced Minnesotans’ access to colon cancer screening procedures), with *Colorectal Cancer Rates Higher in African Americans, Rising in Younger People*, AM. CANCER SOC’Y (Sep. 3, 2020), <https://www.cancer.org/latest-news/colorectal-cancer-rates-higher-in-african-americans-rising-in-younger-people.html> [<https://perma.cc/G8C3-UVCE>] (finding that Black people “are about 20% more likely to get colorectal cancer and about 40% more likely to die from it than most other [racial/ethnic] groups.”).

establish broader relief funds. Injunctive relief could be used to stop current discriminatory practices and force healthcare firms to develop non-discriminatory practices going forward, enforceable by consent decree. All of these actions would be even more powerful in states where attorneys general have responsibility for the regulation and oversight of nonprofit entities, given the prevalence of nonprofit structures among hospital systems and health insurance providers.¹³⁵

Victory in such actions would be inherently reparative in nature. The disproportionate harms to Black people from the underlying conduct would shape money damages, or reparative “compensation” as the U.N. terms it,¹³⁶ in their favor. Consent decrees or injunctive relief would be the kind of “guarantee[s] of non-repetition” contemplated by the U.N.¹³⁷ Settlement agreements funding healthcare or social services programs for those affected, either through cash or in-kind services, would align with the U.N.’s rehabilitative vision of reparations.¹³⁸ Returning such remedies as recompense for racist business practices takes on the shape of reparations to Black people for the effects of systemic racism.

D. REPARATIVE SUITS TARGETING FINANCIAL OUTCOMES

While attorneys general across the country regularly sue payday lenders for violations of consumer protection and lending regulations,¹³⁹ there is evidence to suggest such lenders could be sued for their common practice of targeting minorities with their services.

135. Compare MINN. STAT. § 8.31, subdiv. 1 (2021) (“The attorney general shall investigate violations of the law of this state . . . specifically, but not exclusively, the Non-profit Corporation Act . . .”), with *Get the Basics on Minnesota Hospital Financing*, MINN. HOSP. ASS’N, <https://www.mnhospitals.org/mn-hospitals/hospital-financing-101> [<https://perma.cc/D2C7-YP42>] (“All but two . . . of Minnesota’s hospitals are not-for-profit or government-owned.”). Some of the largest health insurers in the country operate as nonprofits. Compare, e.g., NAT’L ASS’N OF INS. COMM’RS, 2018 MARKET SHARE REPORTS FOR THE TOP 125 ACCIDENT AND HEALTH INSURANCE GROUPS AND COMPANIES BY STATE AND COUNTRYWIDE 14 (2019), https://www.naic.org/prod_serv/MSR-HB-19.pdf [<https://perma.cc/NN2D-B5HM>] (reporting that the amalgamated Kaiser Foundation Group was the second largest health insurer in 2018, with 8.4% of the national market share), with *Fast Facts*, KAISER PERMANENTE, <https://about.kaiserpermanente.org/who-we-are/fast-facts> [<https://perma.cc/TMG3-56VB>] (“Permanente is one of the nation’s largest not-for-profit health plans . . .”).

136. OHCHR, *Reparations*, *supra* note 14.

137. *Id.* at 7–8.

138. *Id.* at 7.

139. See, e.g., DIANE STANDAERT & BRANDON COLEMAN, CTR. FOR RESPONSIBLE LENDING, ENDING THE CYCLE OF EVASION: EFFECTIVE STATE AND FEDERAL PAYDAY LENDING ENFORCEMENT (2015) (listing numerous lawsuits against and settlements with payday lenders pursued by attorneys general).

Black people are 35% more likely to have used payday lending than White people.¹⁴⁰ One study found that payday lenders were concentrated “three times greater in African-American neighborhoods than in white neighborhoods.”¹⁴¹ This “three-fold disparity” persisted even when the study controlled for other key variables.¹⁴² Such extreme targeting of Black people may run afoul of trade practices law, especially in “Baby FTC” states that incorporate federal standards and tests¹⁴³ prohibiting broad categories of “immoral, unethical, oppressive, or unscrupulous” conduct into state causes of action.¹⁴⁴ Furthermore, the FTC Act and Equal Credit Opportunity Act may provide causes of action for racial targeting by sales lead generators for payday lenders.¹⁴⁵ Alternatively, attorneys general could seek damages based on a cigarette litigation-like theory of standing based on damages to the state and municipalities as a result of bankruptcies, foreclosures, reduced property tax revenue, and increased demand on social services to ameliorate the harms of poverty worsened by payday lenders.¹⁴⁶

Regardless of the theory utilized, such suits could result in highly reparative remedies for Black people. The pervasive nature of payday lenders’ racial targeting behavior, and the potential for high consequential damages, could give rise to large sector-wide damage awards.

140. Donald P. Morgan & Kevin J. Pan, *Do Payday Lenders Target Minorities?*, FED. RESRV. BANK OF N.Y. (FEB. 8, 2012), <https://libertystreeteconomics.newyorkfed.org/2012/02/do-payday-lenders-target-minorities.html> [<https://perma.cc/F8PT-442W>]. Black peoples’ disproportionate use of payday lenders is likely a derivative result of other financial outcome discrepancies. *See id.*

141. URIAH KING, WEI LI, DELVIN DAVIS & KEITH ERNST, CTR. FOR RESPONSIBLE LENDING, RACE MATTERS: PAYDAY LENDERS IN AFRICAN-AMERICAN NEIGHBORHOODS IN NC 16 (2005).

142. *See id.* (controlling for “income, homeownership, poverty, unemployment rate, urban location, age, education, share of households with children, and gender—variables that the payday lending industry asserts as key demographics of its customer base.”).

143. *See, e.g.*, CONN. GEN. STAT. § 42-110b (2021) (expressing legislative intent to “be guided by interpretations . . . of the Federal Trade Commission Act”).

144. *See, e.g.*, Bentley v. Greensky Trade Credit, LLC, 156 F. Supp. 3d 274, 288–89 (D. Conn. 2015) (discussing Connecticut’s use of the FTC’s “cigarette rule” which provides that such conduct may be deemed “unfair” even if it has not “been previously considered unlawful”).

145. *See* ALVARO BEDOYA & CLARE GARVIE, CTR. ON PRIV. & TECH. AT GEO. L, COMMENTS ON “FOLLOW THE LEAD: AN FTC WORKSHOP ON LEAD GENERATION” 11 (2015).

146. *Cf.* Caitlin McCabe, *Wells Fargo to Pay Philly \$10 Million to Resolve Lawsuit Alleging Lending Discrimination Against Minorities*, PHILA. INQUIRER (Dec. 16, 2019), <https://www.inquirer.com/real-estate/housing/philadelphia-settles-lawsuit-wells-fargo-allegations-discriminatory-mortgage-lending-minorities-20191216.html> [<https://perma.cc/9Q7N-TNU4>] (discussing a lawsuit where a city sued a bank for racially discriminatory lending practices based on such a municipal damages theory).

Relief funds established therefrom could provide direct reparative compensation. Furthermore, the social shame associated with conditions of poverty, exacerbated as a result of the debt cycle brought on by defendants' unfair marketing of predatory lending,¹⁴⁷ could be addressed through public admissions of fault by the guilty business. These overt and public efforts to relieve the stigma attached with conditions of poverty serve the reparative ideal of "satisfaction."¹⁴⁸ As discussed above, consent decrees and injunctive relief are directly reparative through their "guarantees of non-repetition."¹⁴⁹ Finally, while likely not desirable from payday lenders,¹⁵⁰ other cases targeting financial disparities could seek relief in line with the U.N.'s "restitution" remedy. The Department of Justice's settlement with KleinBank provides a strong example: to remedy the damage done by its redlining practices, the bank was required "to meet the credit needs of residents located in majority-minority census tracts in Hennepin County[, Minnesota]."¹⁵¹ By ensuring financial services are free from discrimination, attorneys general meet the restitutive ideal by "restoring the victim[s] to the original situation before the [harms]" against them.¹⁵² That is, providing the access to financial services Black people had before the intervening effects of systemic racism.¹⁵³

Another financial disparity well suited to the domain of the attorney general is the racial discrimination present in the Internal Revenue Service (IRS) audit rate. IRS audits are far more common in majority-minority counties than in majority-White counties.¹⁵⁴ The IRS

147. See Scott Horsley, *Payday Loans — and Endless Cycles of Debt — Targeted By Federal Watchdog*, NAT'L PUB. RADIO (Mar. 26, 2015, 4:50 PM), <https://www.npr.org/2015/03/26/395421117/payday-loans-and-endless-cycles-of-debt-targeted-by-federal-watchdog> [<https://perma.cc/Y4K7-XG2Q>] (discussing how "repeat borrowers are the heart of the payday business," with borrowers often "having to get one [loan] to pay another").

148. OHCHR, *Reparations*, *supra* note 14, at 7.

149. *Id.* at 7–8.

150. See PEW CHARITABLE TRS., *PAYDAY LOAN FACTS AND THE CFPB'S IMPACT 1* (2016), https://www.pewtrusts.org/-/media/assets/2016/06/payday_loan_facts_and_the_cfpbs_impact.pdf [<https://perma.cc/25AU-N5PF>] (reporting that the average payday loan has an annual percentage rate of 391%).

151. Settlement Agreement at 1, *United States v. KleinBank*, No. 17-CV-00136 (D. Minn. May 10, 2018).

152. OHCHR, *Reparations*, *supra* note 14, at 7.

153. This sentence charitably presupposes that racism "intervened," rather than "was present all along."

154. See Brentin Mock, *IRS Audits Target the Wealth-Depleted Southern Black Belt*, BLOOMBERG: CITY LAB (Apr. 3, 2019, 9:21 AM), <https://www.bloomberg.com/news/articles/2019-04-03/map-reveals-more-irs-audits-in-southern-black-belt> [<https://perma.cc/KLC3-AKP8>] (discussing the concentration of IRS audits in majority Black

claims that the audit process does not consider race and disclaims the disparity as incidental to higher audit rates of taxpayers claiming the Earned Income Tax Credit (EITC).¹⁵⁵ The “EITC is one of the country’s largest anti-poverty programs,”¹⁵⁶ providing thousands of dollars in refundable tax credits to working families while remaining notoriously “difficult for taxpayers to comply with and difficult for the [IRS] to administer.”¹⁵⁷ While the IRS does not collect or release longitudinal data on the intersections of race and tax policy and procedure,¹⁵⁸ studies suggest that the EITC is used by Black families at more than double the rate of White families.¹⁵⁹ Whether intentional or not, the IRS has created a system that exhibits “racial discrimination in practice.”¹⁶⁰

However, litigative avenues for individual plaintiffs are limited. To suffer damage, one must be wrongly selected for audit to begin with, and estimates suggest that up to 26% of EITC payments to taxpayers may have been made improperly.¹⁶¹ Black taxpayers seeking remedy face the steep challenge of proving their specific audits were motivated by racially discriminatory intent, a difficult task when most audits are initiated by an automated, algorithmically driven process.¹⁶² Even if a wrongly selected taxpayer could prove a Due Process

regions).

155. See Paul Kiel, *Lawmakers Just Confronted the IRS Over Tax Audits That Target the Poor*, PROPUBLICA (Apr. 10, 2019, 4:48 PM), <https://www.propublica.org/article/lawmakers-to-irs-commissioner-charles-rettig-system-stacked-for-the-rich> [https://perma.cc/PMS6-YP9X] (“[IRS Commissioner Charles] Rettig said that . . . the IRS did not screen for race when selecting returns for audit . . . EITC recipients accounted for 36% of all audits.”).

156. *Id.*

157. MARGOT L. CRANDALL-HOLLICK & JOSEPH S. HUGES, CONG. RSCH. SERV., *THE EARNED INCOME TAX CREDIT (EITC): AN ECONOMIC ANALYSIS*, at i (2018).

158. See Aravind Boddupalli & Kim S. Rueben, *How Income Taxes Interact with Racial Disparities*, TAX POL’Y CTR: TAX VOX (Jan. 30, 2020), <https://www.taxpolicycenter.org/taxvox/how-income-taxes-interact-racial-disparities> [https://perma.cc/NG9G-WBRW] (“Because the IRS does not ask for a tax filer’s race or ethnicity on tax forms, examining the relationship between race and the tax system is difficult.”).

159. See CHUCK MARR & YIXUAN HUANG, CTR. ON BUDGET & POL’Y PROGRESS, *WOMEN OF COLOR ESPECIALLY BENEFIT FROM WORKING FAMILY TAX CREDITS 2* (2019) (finding that Black women and their spouses were over twice as likely to benefit from the EITC as White women and their spouses).

160. Kiel, *supra* note 155 (quoting U.S. Representative Charlie Crist of Florida).

161. See ROBERT GREENSTEIN, JOHN WANCHECK & CHUCK MARR, CTR. ON BUDGET & POL’Y PROGRESS, *REDUCING OVERPAYMENTS IN THE EARNED INCOME TAX CREDIT 1* (2019) (“Concerns are often raised, however, about the EITC’s error rate, which the IRS has previously estimated at about 22 percent to 26 percent.”).

162. See *How Tax Returns are Selected for Audit: Explaining DIF Scores and UI DIF Scores*, BROTMAN L. (Nov. 9, 2013), <https://www.sambrotman.com/blog/how-tax>

or Equal Protection violation in their selection for audit, damages would likely be limited to costs incurred to defend the audit.

The special standing of attorneys general, however, could open a door to suit against the IRS. Despite wrongful EITC claims resulting in just 3% of the country's under-collected taxes, "EITC recipients account[] for 36% of all audits."¹⁶³ EITC audits are often not defended out of fear or lack of understanding of the audit process, and studies have found that such audits may reduce future EITC claims even when taxpayers are eligible.¹⁶⁴ Just as states sued tobacco companies for "the costs incurred by Medicaid in treating tobacco related illness and disease,"¹⁶⁵ so could they sue for lost sales tax revenue resulting from decreased consumption,¹⁶⁶ or for increased state tax administration costs as a result of the IRS's faulty procedure.¹⁶⁷ At the very least, the specter of such a suit might incentivize the IRS to devise a new, less discriminatory audit procedure. Forcing a change in IRS procedure would serve reparative ideals of non-repetition, while settlement funds could be used to fund additional low-income tax representatives in areas with higher audit rates, meeting the rehabilitative ideal. These remedies would disproportionately flow to Black people, suggesting a form of equitable reparations that conveys financial benefits through the removal of obstacles to receiving their rightful Earned Income Tax Credits, as well as decreased costs of defending audits.

-returns-are-selected-for-audit [<https://perma.cc/SE4L-DW6Q>] (explaining the IRS's audit selection procedure based on "a computer program called the Discriminant Inventory Function System").

163. Kiel, *supra* note 155.

164. See Janet Holtzblatt, *How Can the IRS Do Correspondence Audits When It Can't Open Its Mail?*, TAX POL'Y CTR.: TAX VOX (July 15, 2020), <https://www.taxpolicycenter.org/taxvox/how-can-irs-do-correspondence-audits-when-it-cant-open-its-mail> [<https://perma.cc/V8WA-6Z77>] ("One study found a drop in EITC claims after correspondence audits, possibly reflecting both deterrence of noncompliance and fewer claims by people who were eligible but worried about experiencing another audit.").

165. See Sherrill, *supra* note 130, at 497.

166. Consumer spending could be reduced by the loss of EITC funds and sums incurred defending wrongful audits.

167. See *State Information Sharing*, INTERNAL REVENUE SERV., <https://www.irs.gov/government-entities/governmental-liaisons/state-information-sharing> [<https://perma.cc/RLP7-B2KS>] ("IRS and state/local agencies share data with each other through a variety of ongoing initiatives. The information includes: Audit results [and] Federal individual and business return information . . .").

E. REPARATIVE SUITS TARGETING EDUCATIONAL OUTCOMES

In addition to continued litigation against for-profit colleges,¹⁶⁸ whose predatory practices disproportionately affect Black people,¹⁶⁹ attorneys general could extend their enforcement efforts to public school districts. Black children often suffer deep disparities in their primary and secondary school outcomes compared to their White peers.¹⁷⁰ Changing those results typically relies on tortuously slow legislative processes and policy proposals that have an uncertain likelihood of success.¹⁷¹ Even landmark judicial rulings ordering measures to close achievement gaps can be subverted through political negligence and inaction.¹⁷² To that end, attorneys general should

168. See, e.g., Ryan Faircloth, *Minnesota Attorney General Strikes \$39M Deal to Forgive Loans, Compensate Students Defrauded by For-Profit Colleges*, STAR TRIB. (Mar. 17, 2021, 5:49 PM), <https://www.startribune.com/minnesota-attorney-general-strikes-39m-deal-to-forgive-loans-compensate-students-defrauded-by-for-pr/600035535/> [<https://perma.cc/7BUS-VG6F>] (reporting that the Minnesota Attorney General reached a \$39 million settlement with two for-profit colleges which targeted students who were “low-income, often veterans, often people of color” with loans “at ‘predatory’ 18% interest rates” while failing to provide an education adequate to pursue their chosen careers).

169. See Genevieve Bonadies, Joshua Rovenger, Eileen Connor, Brenda Shum & Toby Merrill, *For-Profit Schools’ Predatory Practices and Students of Color: A Mission to Enroll Rather than Educate*, HARV. L. REV. BLOG (July 30, 2018), <https://blog.harvardlawreview.org/for-profit-schools-predatory-practices-and-students-of-color-a-mission-to-enroll-rather-than-educate> [<https://perma.cc/ACR8-9LLF>] (finding that Black and Latino students represent one-third of all college students, but half of all for-profit college students, and that 70% of Black for-profit college students default on their student loans within 10 years).

170. See, e.g., ROB GRUNEWALD & ANUSHA NATH, FED. RSRV. BANK OF MINN., A STATEWIDE CRISIS: MINNESOTA’S EDUCATION ACHIEVEMENT GAPS 19–20, fig. 15 (2019) (finding that Black high school students in Minnesota were 39% less likely to meet college readiness benchmarks than their White peers).

171. See Libby Nelson, *The Scariest Lesson of No Child Left Behind*, VOX (July 27, 2015, 9:10 AM), <https://www.vox.com/2015/7/27/9045491/no-child-left-behind-accountability> [<https://perma.cc/G9KW-RCVT>] (discussing the failure of the No Child Left Behind program to close the achievement gap for Black children after a decade in effect).

172. In the twenty-three years since the New Hampshire Supreme Court held the state’s school funding scheme unconstitutional, the state government has continually failed to comply with the ruling of its high court to develop and implement new standards. See *Claremont Sch. Dist. v. Governor of N.H.*, 703 A.2d 1353, 1360–61 (N.H. 1997); *Report: 20 Years After Claremont Ruling on Education Funding, Property-Poor Towns Still Struggling*, N.H. PUB. RADIO, <https://www.nhpr.org/post/report-20-years-after-claremont-ruling-education-funding-property-poor-towns-still-struggling> [<https://perma.cc/7LML-SX2L>]. Lest this be seen as an isolated incident, the Ohio Supreme Court made a similar ruling in *DeRolph v. State*, requiring “a complete systematic overhaul” of the state’s local-property-tax-based scheme. 677 N.E.2d 733, 747 (Ohio 1997). The Ohio government has failed to fully implement the court’s requirements to this

attempt to close education achievement gaps by seeking consent decrees against school districts with continually poor outcomes for their Black students.

Schools are no strangers to race-based consent decrees,¹⁷³ and they can provide a powerful tool for ensuring that Black students receive their rightful education. Consent decrees can set forth clear requirements for schools concerning personnel certification status and assignments, district-wide racial integration, access to certain courses, and availability of specialized programs like Advanced Placement classes, all under strict judicial observation and enforcement.¹⁷⁴ These consent decrees serve deeply reparative purposes: they publicly acknowledge the wrongs committed against Black students, they seek to guarantee non-repetition of discrimination by schools, and they provide compensation in the form of increased earnings in the future resulting from stronger educational outcomes. With the average Black student in danger of losing 12 months' worth of education due to COVID-19, "compared with four to eight months for white students,"¹⁷⁵ the need for educational reparations is as vital as ever.

CONCLUSION

A pragmatic framework that devises and prioritizes lawsuits based on their reparative outcomes for Black people allows attorneys general to combat the lasting effects of slavery and systematic racism. However, the absence of the "reparations" label means that such suits will not provide the overt societal acknowledgement of, and apology

day, resulting in an "ongoing . . . achievement gap between high poverty and low-poverty districts." Jim Siegel, *20 Years After DeRolph, State Not Even Trying to Determine Legal Duty*, COLUMBUS DISPATCH (Mar. 24, 2017, 6:46 PM), <https://www.dispatch.com/news/20170324/20-years-after-derolph-state-not-even-trying-to-determine-legal-duty> [<https://perma.cc/K8DC-BTS2>].

173. See, e.g., *Latino Consent Decree*, ST. PAUL PUB. SCHS., <https://www.spps.org/Page/5438> [<https://perma.cc/93XF-7W92>] (last visited Feb. 9, 2021) (discussing St. Paul's consent decree, stemming from *Garcia v. Independent School District 625*, setting certain education requirements for Latinx students with "limited English proficiency").

174. See Second Amended Consent Decree, *Andrews v. Monroe City Sch. Bd.*, No. 65-11297, 2018 WL 1541990 (W.D. La. Apr. 14, 2016), <https://www.justice.gov/crt/case-document/andrews-and-us-vs-monroe-city-school-board-second-amended-consent-decree> [<https://perma.cc/5WED-XQ32>] (discussing the 51-year history of the case, the requirements of the consent decree, the remediation techniques employed, and the progress towards attaining the requirements of the decree).

175. See Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis & Ellen Viruleg, *COVID-19 and Learning Loss—Disparities Grow and Students Need Help*, MCKINSEY & CO. (Dec. 8, 2021), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-learning-loss-disparities-grow-and-students-need-help> [<https://perma.cc/5GL7-LJNB>].

for, the harms of slavery to Black people. No practical remedy can “speak to the hurt, and the sense of injustice, and the self-doubt” caused by the racial disparities perpetuated by systemic racism.¹⁷⁶ Legislative efforts for reparations should still be vigorously pursued, both for their practical and symbolic purposes, but reparative litigation is a way of walking and chewing gum at the same time. It has taken 150 years for cash reparations to get a few congressional hearings. The health, financial, and educational outcomes of Black Americans cannot wait to be addressed. An attorney general can serve some of their state’s people with the greatest needs by shaping their litigation dockets to achieve reparative goals which combat the ongoing effects of slavery and systemic racism. Our society will not be fair for anyone until it is fair for everyone. These pragmatic reparative cases cannot make society fair on their own, but they can make them fairer while we work towards that ultimate goal.

176. See Coates, *supra* note 61 (quoting President Obama, who continued: “[I]t makes us sometimes feel as if there must be something wrong with us, unless you’re able to see the history and say, ‘It’s amazing we got this far given what we went through.’”).