Re-Assembling Osiris: Rule 23, the Black Farmers Case, and Reparations

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Abstract

This Article examines why the Black Farmers case, a series of legal events involving claims of racial discrimination by African-American farmers against the federal government, may technically qualify as a slavery reparations case. This Article also explores how the case became a viable slavery reparations case in a legal and political environment hostile to race-based claims and fatal to slavery reparations-related litigation. In doing so, this Article offers a legally cognizable definition for slavery reparations and a viable path for future reparations-related litigation.

The procedural mechanisms at play in the Black Farmers case substantially reduced the barriers between race-aggrieved status and recovery. This Article posits that a close relationship between race-aggrieved status and recovery and central to any definition of reparations.

One procedural mechanism that helps to convert the Black Farmers case into a slavery reparations case is the highly controversial class action device. Commentators critical of the class action device argue that the coercive force of class actions gives plaintiffs inordinate power to force the settlement of meritless claims. This Article suggests that the class action device was used in the Black Farmers case not to circumvent merit, but to vindicate it.

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I. INTRODUCTION

The slavery reparations debate—the debate concerning the alleged debt owed to African Americans for the continuing harm caused by slavery—has long since subsided, with reparations opponents seeming to have carried the day.[1] However, it may well be that the dead have arisen, newly incarnated, in the Black Farmers case cluster.[2] The Black Farmers case is a massive race discrimination case originally filed by a class of black farmers in August of 1997 as *Pigford v. Glickman*.[3] The plaintiffs claimed that the U.S. Department of Agriculture ("USDA") discriminated against them systematically in the awarding of farm ownership and operating loans.[4] The *Pigford* case ended in an unprecedented civil rights settlement of over a billion dollars.[5] More than 15,000 farmers recovered,[6] and an additional 65,000 claimants[7] may

1. *See* Eric K. Yamamoto et al., *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 22–27 (2007).

2. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012, 122 Stat. 1651, 2209–12; *In re* Black Farmers Discrimination Litig., 820 F. Supp. 2d 78 (D.D.C. 2011); Pigford v. Glickman (*Pigford II*), 185 F.R.D. 82, 86 (D.D.C. 1999); see *infra* notes 106–20 and accompanying text for a discussion of the cases and controversies that create the Black Farmers case cluster.

3. *Pigford II*, 185 F.R.D. 82 (D.D.C. 1999); Pigford v. Glickman (*Pigford I*), 182 F.R.D. 341 (D.D.C. 1998).

4. *Pigford I*, 182 F.R.D. at 342–43.

5. *See* TADLOCK COWAN & JODY FEDER, CONG. RESEARCH SERV., RS20430, THE *PIGFORD* CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 4–6 (2013), *available at* http://bit.ly/1ja82Ns.

6. *Id.*

7. *See* John Zippert, *Judge to Make 'Prompt' Decision in* Pigford II *Black Farmers Case Settlement*, GREENE COUNTY DEMOCRAT, Sept. 8, 2011, http://bit.ly/HXEKXc.

yet recover under a new iteration of the Black Farmers case, *In re Black Farmers Discrimination Litigation*,[8] which was recently settled.

In December 2010, President Obama signed into law a bill, the Claims Resolution Act of 2010, providing $1.1 billion to fund the settlement of *In re Black Farmers Discrimination Litigation*.[9] The bill was passed over the objections of some lawmakers in Congress, including Representative Steve King from Iowa, who argued that the Black Farmers case was just a slavery reparations case in disguise.[10] His argument was that due to the low burden of proof that claimants had to meet in order to recover, and the lack of procedural safeguards against fraud, most of the African Americans who stood to recover had no connection to farming.[11] Representative King further asserted that this sort of loophole was intended by the congresspersons, in particular then-Senator Barack Obama, who enabled various pieces of legislation along the case's trajectory, including a bill tolling the statute of limitations in the case.[12] Although this Article characterizes the issue much differently, it agrees with Congressman King that the procedural mechanisms at play in the Black Farmers case substantially reduced the barriers between race and recovery. This Article also does not deny that the Claims Resolution Act could be seen as reparations, and furthermore, it is argued here that a close relationship between race and recovery is central to any workable definition of reparations.

The Black Farmers case may constitute a technical reparations effort or, put differently, a reparations-related action, because of the nature of the relief sought, the historical circumstances justifying relief, and the technical processes that enabled recovery. This Article focuses on the technical processes that enabled recovery. It does so because technical issues, such as standing, statute of limitations, and causation, have been at the heart of the failure of slavery reparations litigation since the beginning.[13] What is so remarkable about the Black Farmers case is that it was able to surmount these procedural and technical obstacles. At

8. *In re* Black Farmers Discrimination Litig., 820 F. Supp. 2d 78 (D.D.C. 2011).

9. Claims Resolution Act of 2010, Pub. L. No. 111-291, § 201, 124 Stat. 3064, 3070–72.

10. *See* Editorial, *Probe* Pigford *Fraud*, INVESTOR'S BUS. DAILY, July 22, 2011, at A12, *available at* http://bit.ly/1cxeBrc.

11. *See* Rachel Slajda, *Steve King: Black Farmers' Settlement Is "Slavery Reparations" (Video)*, TALKING POINTS MEMO (Nov. 30, 2010, 5:43 PM), http://bit.ly/gwmJoZ; *see also* Press Release, Office of Congressman Steve King, King: "Stage Set for Investigation of *Pigford II* Fraud" (June 17, 2011), *available at* http://1.usa.gov/17wHCAi.

12. *See* sources cited *supra* notes 10–11.

13. *See* Amy J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J.L. & POL. 183, 186 (2006).

the core of the black farmers' feat are two primary mechanisms: class certification and claims adjudication.

This Article examines why the Black Farmers case may technically qualify as a slavery reparations case. It explores how the case became a viable slavery reparations case in a legal and political environment hostile to race-based claims and slavery reparations-related litigation. In doing so, this Article offers a legally cognizable definition for slavery reparations and a viable path for future reparations-related litigation. In describing the path for future reparations litigation, this Article highlights the role of the class action device as essential to the reparations equation in the Black Farmers case.

Commentators critical of the class action device argue that the coercive force of class actions gives plaintiffs inordinate power to force the settlement of meritless claims.[14] It is argued here, however, that in the Black Farmers case, the class action device was not used to circumvent merit, but instead to vindicate it. This Article is divided into the following parts: Part II provides an overview of the reparations debate; Part III discusses some prominent reparations-based cases and highlights lessons to be accounted for in future litigation; Part IV discusses the Black Farmers case cluster; Part V examines the role of Rule 23 of the Federal Rules of Civil Procedure in the success of the Black Farmers case; Part VI explores how the case can be used as a model for future litigation-based reparations; and Part VII discusses strategy for litigation-based reparations going forward.

II. THE REPARATIONS DEBATE

A. Reparations Defined

Reparations are defined here as relief afforded to members of a racial, cultural, or ethnic group to repair the presumed harm caused by a historic injustice.[15] African-American reparations are, more particularly, defined as a debt owed to African Americans to repair the presumed harm caused by slavery and its vestiges.[16] Various models exist for the acquisition of reparations. At issue in this Article is the litigation-based model for reparations. Litigation-based reparations or, more generally,

14. Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1391–92 (2000); *see also* Andrei Greenawalt, Note, *Limiting Coercive Speech in Class Actions*, 114 YALE L.J. 1953, 1986–87 (2005).

15. *See* Antonio Raimundo, Comment, *The Filipino Veterans Equity Movement: A Case Study in Reparations Theory*, 98 CALIF. L. REV. 575, 581–84 (2010).

16. Adjoa A. Aiyetoro, *Why Reparations to African Descendants in the United States Are Essential to Democracy*, 14 J. GENDER RACE & JUST. 633, 660–61 (2011).

lawsuits premised upon the notion of group harm, shall be defined as equitable relief afforded to a class of plaintiffs to repair the presumed harm caused by a historic injustice.

Katrina Miriam Wyman, in her article *Is There a Moral Justification for Redressing Historical Injustices?*, defines historic injustices as:

> [W]rongs that share four characteristics: (a) they were committed or sanctioned at least a generation ago; (b) they were committed or authorized by one or more collective agents, such as a government or corporation; (c) they harmed many individuals; and (d) they involved violations of fundamental human rights, often discrimination based on race, religion, or ethnicity.[17]

The repair element of litigation-based reparations broadly equates to "restoring the recipients to their rightful position."[18] This would mean economic damages for loss of intergenerational wealth,[19] as well as other relief aimed at "rebuilding communities," repairing the psychological harm[20] caused by slavery, and removing the stigma that continues to beset the descendants of slaves.[21]

Many advocates of slavery reparations have argued for financial compensation to the individual descendants of slaves.[22] Others have argued that any financial compensation should be placed in a trust for the social, educational, and economic benefit of slave descendants and paid from the general revenue of the United States.[23] Implicit in the trust concept of compensation is the recognition that while the primary harm of slavery was to the slaves themselves, the harm to their descendants is systemic and psycho-cultural.[24] Scholars who espouse the group-harm theory of reparations seek relief that will repair the economic and psycho-spiritual harm suffered by slave descendants as a socioeconomic class.[25]

17. Katrina Miriam Wyman, *Is There a Moral Justification for Redressing Historical Injustices?*, 61 VAND. L. REV. 127, 134 (2008).

18. Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 542 (2003).

19. *See* Kyle D. Logue, *Reparations as Redistribution*, 84 B.U. L. REV. 1319, 1353–54 (2004).

20. *See* Brophy, *supra* note 18.

21. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 381–82 (1987).

22. *See In re* Afr.-Am. Slave Descendants Litig., 375 F. Supp. 2d 721, 731–33 (N.D. Ill. 2005) *aff'd in part as modified, rev'd in part*, 471 F.3d 754 (7th Cir. 2006).

23. RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 244–45 (2001).

24. *See* JOY DEGRUY LEARY, POST TRAUMATIC SLAVE SYNDROME: AMERICA'S LEGACY OF ENDURING INJURY AND HEALING 119–25 (2005).

25. *See* Brophy, *supra* note 18, at 509.

This Article advocates the group-harm theory of reparations. Thus, it argues for relief crafted to cure the harm caused by slavery and its vestiges. To this end, reparations must be distinguished from compensatory damages. Compensatory damages are usually awarded to compensate a victim for his or her injury.[26] Thus, one may be compensated for pain and suffering, but it would be impossible to repair past pain and suffering. It is argued here that, technically, reparations should not be offered to compensate the descendants of slaves, but to redress the lasting social and economic harm presumably caused by the institution of slavery. Ideally, reparations litigation and other actions involving group harm should pursue equitable and non-individuated monetary relief. As shall be discussed, having a technical definition of litigation-based reparations that concentrates on injunctive and declaratory relief may alleviate some of the procedural challenges facing group-harm litigation.

Central to a litigation-based reparations model is the notion of presumed harm, the idea that harm flows directly and almost inexorably from membership in a race-aggrieved group, meaning that individual harm is presumed from group harm. Under this conception of reparations, proof of an express link between a plaintiff's injury and the defendant's acts or omissions would be unnecessary. Thus, it is presumed that the defendant's actions contributed to the state of being of the plaintiff and that the defendant's actions are proof of the plaintiff's exposure to racially mal-active circumstances, the creation of which can be traced back to the defendant. Such a presumption of harm approach is illustrated in the Black Farmers case's processes for claims resolution.

B. Philosophical Arguments for and Against Reparations

Proponents of slavery reparations argue generally that the U.S. government and, in some instances, state governments and private corporations owe relief to the descendants of African-American slaves due to both the harm caused to slaves and to their descendants, and the economic benefit slavery bestowed upon America as a growing nation.[27] Advocates also point to what they assert is the continuing harm caused by the vestiges of slavery as evidenced by the statistical disparities that continue between blacks and whites in education, employment, rates of

26. Carey v. Piphus, 435 U.S. 247, 254–55 (1978).

27. *See* Wendy B. Scott, *"CSI" After* Grutter v. Bollinger*: Searching for Evidence to Construct the Accumulation of Wealth and Economic Diversity as Compelling State Interests*, 13 TEMP. POL. & CIV. RTS. L. REV. 927, 929–30, 933–34 (2004).

incarceration, and wealth.[28] Advocates also mention the relief for historic injustices provided by our government to other races or culturally aggrieved groups, including restitution made to the victims of Japanese internment during World War II[29] and allowances made by the federal government to Native Americans,[30] as well as to survivors of the Holocaust.[31]

The opponents of slavery reparations generally argue that the victims of slavery are dead, as are the culpable parties, and that finding the government or private corporations liable will only punish the innocent.[32] Some commentators suggest that reparations have been paid, in effect, through affirmative action programs and various other social safety nets, including welfare.[33] Some, such as the aforementioned Congressman King, suggest that the sin of slavery was fairly and adequately compensated by the death of white American soldiers who fought in the Civil War.[34] Still others believe that blacks are better off because of slavery.[35]

The slavery reparations debate has taken place in three arenas: Congress and state legislatures, American courts, and international law.[36] Arguments for slavery reparations have failed in all arenas.[37] Representative John Conyers of Michigan has offered a bill to consider the issue of slavery reparations in every congressional session since 1989.[38] The bill has never made it out of committee.[39] Most Americans

28. *See* Michael F. Blevins, *Restorative Justice, Slavery, and the American Soul: A Policy-Oriented Intercultural Human Rights Approach to the Question of Reparations*, 31 T. MARSHALL L. REV. 253, 267–68 (2006).

29. Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 449–453 (1998).

30. Pamela D. Bridgewater, *Ain't I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN'S L.J. 89, 98 (2005).

31. Edieth Y. Wu, *Reparations to African-Americans: The Only Remedy for the U.S. Government's Failure to Enforce the 13th, 14th, and 15th Amendments*, 3 CONN. PUB. INT. L.J. 403, 404 (2004).

32. *See* Brophy, *supra* note 18, at 502–03.

33. DAVID HOROWITZ, UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY 14 (2002).

34. *See* Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 314–15 (2003); *see also Anderson Cooper 360 Degrees: Should Congress Police Itself?; Slavery Reparations?; Child Slavery in America* (CNN television broadcast Dec. 1, 2010).

35. Ryan Fortson, *Correcting the Harms of Slavery: Collective Liability, the Limited Prospects of Success for a Class Action Suit for Slavery Reparations, and the Reconceptualization of White Racial Identity*, 6 AFR.-AM. L. & POL'Y REP. 71, 94 (2004).

36. *See* Van B. Luong, *Political Interest Convergence: African American Reparations and the Image of American Democracy*, 25 U. HAW. L. REV. 253, 255–61 (2002).

37. *Id.* at 255.

38. *See* H.R. 3745, 101st Cong. (1989); Bridgewater, *supra* note 30, at 106.

39. *See* Bridgewater, *supra* note 30, at 107.

are solidly against slavery reparations,[40] and there has never been a reparations movement powerful enough to sway American opinion to force the hand of Congress.[41]

The most recent stage for the reparations debate has been slavery reparations as a question of international law. Proponents of this approach argue that the issue of slavery reparations is also an issue of human rights.[42] The United States, however, would most likely not recognize any judgment of an international tribunal against it or any of its corporate citizens.[43] Considering obstacles facing broad-based slavery reparations in Congress and in courts, a coordination of litigation, based in part on the Black Farmers case model, presents one of the few avenues available for wholesale restorative justice in this area.

III. TECHNICAL HURDLES TO REPARATIONS LITIGATION

Reparations litigation has been all but abandoned. All broad-based reparations litigation and most reparations-related litigation prior to the Black Farmers case have terminated unsuccessfully.[44] The problems with litigation-based reparations have been technical in nature.[45] Such problems typically involve issues of standing, proof, causation, and the statute of limitations.[46] The issue of sovereign immunity also provides a barrier to recovery against national and state actors.[47] One leading reparations scholar, Alfred Brophy, argues that the technical problems with litigation-based reparations stem from the fact that the perpetrators of slavery are dead and from the difficulty of connecting any social injury sustained by an individual descendant to the actions of culpable parties generations removed.[48] Some scholars also argue that any derivative benefit to living defendants is difficult to trace and to quantify, as is the harm caused to individual African Americans by any continuing legacy of slavery.[49]

The foremost challenge to reparations-based actions to date has involved the issue of standing.[50] Standing is a constitutionally based doctrine arising under the "case and controversy" requirement of Article

40. *See* Alfred L. Brophy, *The Cultural War over Reparations for Slavery*, 53 DEPAUL L. REV. 1181, 1182–84 (2004).
41. *See* Blevins, *supra* note 28, at 261–65.
42. *See* Yamamoto et al., *supra* note 1, at 51.
43. *Id.* at 54 nn.258–59.
44. *Id.* at 24–30.
45. *Id.*
46. *Id.*
47. Cato v. United States, 70 F.3d 1103, 1107 (9th Cir. 1995).
48. *See* Brophy, *supra* note 18, at 503.
49. *See* Blevins, *supra* note 28, at 285–86.
50. *See* Fortson, *supra* note 35, at 104–05.

III of the U.S. Constitution.[51] It requires a plaintiff to establish a concrete injury to himself and a connection between the origin of the injury and the actions of the defendant.[52] A plaintiff is also required to show that any injury or threatened injury is redressable by court action.[53]

Standing is a jurisdictional issue.[54] It thus threatens to thwart litigation prior to discovery and before the class action can be certified—in other words, before settlement is an attractive option for the defendant. Consequently, while the class action device can possibly alleviate the standing problem with respect to most members of the class, the active plaintiffs would still have to establish standing.[55] Due to the way courts have interpreted the standing doctrine as it relates to race-based claims, it is questionable whether any African American can establish standing to sue on a broad-based reparations theory.[56]

The standing problem produces several challenges to reparations-related litigation. The first problem relates to individual claims of current injuries stemming from slavery.[57] The standing doctrine requires that the injury alleged by the plaintiff be his own and not that of another.[58] Thus, African Americans are prevented from maintaining a suit based exclusively on the enslavement of their ancestors.[59] The harm to the plaintiff has to be personal.[60] The standing doctrine has also been interpreted to limit claims of group injury[61] or injuries deriving from stigmatization.[62]

One of the most important cases dealing with group injury is *Allen v. Wright*.[63] In *Allen*, a group of African-American parents brought a nationwide class action lawsuit against the Internal Revenue Service ("IRS").[64] The plaintiffs alleged that the IRS failed to adopt sufficient standards and procedures that would prevent the IRS from awarding tax-

51. U.S. CONST. art. III, § 2, cl. 1.

52. Eric J. Miller, *Representing the Race: Standing to Sue in Reparations Lawsuits*, 20 HARV. BLACKLETTER L.J. 91, 92–93 (2004).

53. *See* Heckler v. Mathews, 465 U.S. 728, 739–40 (1984).

54. *See* Allen v. Wright, 468 U.S. 737, 750–51 (1984).

55. *See* Miller, *supra* note 52, at 92–94; *see also supra* notes 153–56 and accompanying text (discussing active and absent plaintiffs in the context of class actions as representative litigation).

56. *Id.*

57. *Id.* at 92–95.

58. *In re* Afr.-Am. Slave Descendants Litig., 375 F. Supp. 2d 721, 752–54 (N.D. Ill. 2005), *aff'd in part as modified*, *rev'd in part*, 471 F.3d 754 (7th Cir. 2006).

59. *See* Miller, *supra* note 52, at 92–94.

60. Allen v. Wright, 468 U.S. 737, 751 (1984).

61. *See* Miller, *supra* note 52, at 94.

62. *Allen*, 468 U.S. at 755.

63. Allen v. Wright, 468 U.S. 737 (1984).

64. *Id.* at 739.

exempt status to private schools that excluded black applicants.[65] The Supreme Court held that the parents did not have standing to sue, reasoning in part that the parents could not claim an injury based solely on the social stigmatization that African Americans suffered from discrimination perpetuated by segregated private schools.[66] The Court did find, however, a degree of merit in the parents' assertion that the IRS's actions decreased their children's chances of being educated in an integrated environment.[67] The Court held that this constituted a legally cognizable injury, but that the plaintiffs still lacked standing because the injury was not "fairly traceable" to the conduct of the IRS.[68] The Court concluded that the causal connection between the IRS's grant of tax-exempt status to segregated schools and the injury to the plaintiffs' children was too indirect to meet the Article III standing requirement.[69] The Court explained:

> The diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration.[70]

The leading case on slavery reparations, *Cato v. United States*,[71] is illustrative of the potential problems facing all reparations-related litigation. In *Cato*, a group of pro se African-American plaintiffs brought claims against the U.S. government for damages and equitable relief arising out of the enslavement, kidnapping, transshipment, and miseducation of African-American people.[72] The suit also made claims of continued discrimination.[73] The plaintiffs' theory of the case turned on an interpretation of the Thirteenth Amendment requiring the federal government to proactively rid the country of the "badges and indicia of slavery."[74] The U.S. Court of Appeals for the Ninth Circuit upheld the district court's dismissal of the complaint, citing issues related to standing and sovereign immunity.[75] With regard to standing, the Ninth

65. *Id.*
66. *Id.* at 753–55.
67. *Id.* at 756.
68. *Allen*, 468 U.S. at 756–57.
69. *Id.* at 757–58.
70. *Id.* at 758.
71. Cato v. United States, 70 F.3d 1103 (9th Cir. 1995).
72. *Id.* at 1106.
73. *Id.*
74. *Id.* at 1108–09.
75. *Id.* at 1111.

Circuit held that the named plaintiff, Cato, had to show a personal injury derived from specific government inaction and that Cato did not have standing to litigate claims on behalf of all African Americans injured by racial discrimination.[76] The court reasoned that "[w]ithout a concrete, personal injury that is not abstract and that is fairly traceable to the government conduct that she challenges as unconstitutional, Cato lacks standing."[77] The court's reasoning turned on two aspects of standing: (1) Cato's failure to identify a particular government agency or official to whom to attach responsibility; and (2) Cato's failure to allege and explain how she was personally affected by such a party's actions or inactions.[78]

Cato is also useful in exploring another major hurdle to reparations: the statute of limitations. The United States argued in *Cato* that the plaintiffs' claims founded on wounds inflicted during and as a result of slavery were barred by the statute of limitations.[79] Interestingly, however, the court seemed to imply that, had Cato met the standing requirement, her slavery-based claims would have survived a statute of limitations challenge.[80] In doing so, the court gave some credence to Cato's argument that the repercussions of slavery were ongoing and thus covered by the continuing violations doctrine, which tolls the statute of limitations for an initial violation when subsequent violations extend into a period within the statute of limitations.[81]

The Ninth Circuit held that Cato's monetary claims against the government under the Federal Tort Claims Act[82] were barred by the doctrine of sovereign immunity.[83] Sovereign immunity is a federal doctrine that shields the U.S. government and its agencies from civil liability.[84] Thus, in order for a party to maintain suit against the federal government, the party must show that the government has explicitly waived its immunity either in a specific instance or regarding a particular law.[85] The *Cato* court held that although Cato's monetary claims were barred by sovereign immunity, the doctrine did not preclude Cato's equitable claims.[86] This portion of the court's holding is based on the

76. *Cato*, 70 F.3d at 1109–10.
77. *Id.* at 1109.
78. *Id.*
79. *See id.* at 1107–08.
80. *Id.*
81. *Cato*, 70 F.3d at 1108–09.
82. 28 U.S.C. § 1346 (2006).
83. *Cato*, 70 F.3d at 1111.
84. Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 440 (2005).
85. *See Cato*, 70 F.3d at 1110.
86. *Id.* at 1111.

federal government's waiver of immunity in the Administrative Procedure Act[87] from all suits seeking non-monetary relief.[88] As to the efficacy of Cato's equitable claims, the court ruled that Cato lacked standing to assert even non-monetary claims for discrimination based on group stigmatization.[89]

Although the plaintiff in *Cato* was unsuccessful, the case does present a few lessons for litigation-based reparations going forward. First, the Ninth Circuit's hostility toward abstract injuries should be viewed in light of the Supreme Court's findings in *Allen* regarding stigmatizing injuries.[90] Specifically, injuries deriving from group stigmatization are cognizable under the standing doctrine so long as the stigmatizing injury can be directly linked to the defendant and is personal to the plaintiff.[91] Second, the continuing violations doctrine may, conceivably, be used to overcome issues with the statute of limitations when slavery itself is used as the origin of injury.[92] Last, litigation pursuing non-monetary damages stands a better chance of overcoming procedural obstacles because such litigation is less likely to provoke questions of government immunity and, as shall be discussed, is more likely to procure the benefits associated with class action treatment.[93]

The U.S. Court of Appeals for the Seventh Circuit's analysis in *In re African-American Slave Descendants Litigation*[94] illustrates the difficulties facing litigation-based reparations and provides further direction for such litigation going forward.[95] *In re African-American Slave Descendants* was a slavery reparations class action brought by a class of African Americans against several domestic and foreign corporations with links to the slave trade.[96] The plaintiffs alleged that these corporations, primarily banks and insurance companies, benefited from the slave trade by, for example, insuring slave ships or slaves.[97] The U.S. District Court for the Northern District of Illinois dismissed the litigation on several grounds.[98] Central to the district court's holding, however, was the issue of standing.[99] On appeal, the Seventh Circuit

87. 5 U.S.C. § 553 (2006).
88. *Id.* § 702.
89. *Cato*, 70 F.3d at 1111.
90. Allen v. Wright, 468 U.S. 737, 755 (1984).
91. *Id.*
92. *See* 28 U.S.C. § 1346 (2006); *Cato*, 70 F.3d at 1108–09.
93. *See* 5 U.S.C. §§ 553, 702; *Cato*, 70 F.3d at 1110–11; Sisk, *supra* note 84, at 440.
94. *In re* Afr.-Am. Slave Descendants Litig., 471 F.3d 754 (7th Cir. 2006).
95. *See generally id.*
96. *See In re* Afr.-Am. Slave Descendants Litig., 375 F. Supp. 2d 721, 738 (N.D. Ill. 2005), *aff'd in part as modified, rev'd in part*, 471 F.3d 754 (7th Cir. 2006).
97. *Id.* at 738–40.
98. *Id.* at 780–81.
99. *Id.* at 743–52.

remarked that "[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 of that conduct."[100]

First, the court held that lineage in and of itself was insufficient to confer standing, stating "the wrong to the ancestor is not a wrong to the descendants."[101] The court also deflected the plaintiffs' argument that the defendants' actions increased or prolonged slavery and thus robbed their ancestors of the opportunity to create wealth as freemen and, by extension, decreased the plaintiffs' chances of receiving this wealth as an inheritance.[102] The court found that the "causal chain is too long and has too many weak links for a court to be able to find that the defendants' conduct harmed the plaintiffs at all, let alone in an amount that could be estimated without the wildest speculation."[103]

In re African-American Slave Descendants seems to have signaled the death knell for slavery reparations through litigation. However, the holding in the case is not as comprehensive as it first appears. The Seventh Circuit's findings are in conflict with the Supreme Court's reasoning in *Allen* to the extent that the Seventh Circuit implies that the plaintiffs' claim of decreased chance of inheriting wealth[104] is not a cognizable injury under the Standing Clause of Article III. In *Allen*, the Supreme Court found that a decreased likelihood of being educated in an integrated school is an injury cognizable under the doctrine of standing.[105] Arguably, another court or circuit could take a more expansive view of the injury, the defendant, and/or the injury connection. Thus, the standing doctrine should not discourage the filing of reparations-related litigation. Such claims can be filed in different circuits or based on different legal theories in the same circuits. To this end, it is useful to explore a piece of reparations-related litigation that worked—the Black Farmers case.

IV. THE BLACK FARMERS CASE CLUSTER

The Black Farmers case is composed of three legal events: (1) *Pigford v. Glickman*;[106] (2) the enactment of Section 14012 of the

100. *In re* Afr.-Am. Slave Descendants Litig., 471 F.3d 754, 759 (7th Cir. 2006).
101. *Id.*
102. *Id.* at 759–60.
103. *Id.* at 759.
104. *Id.* at 759–60.
105. Allen v. Wright, 468 U.S. 737, 756 (1984).
106. *Pigford II*, 185 F.R.D. 82 (D.D.C. 1999).

2008 Farm Bill;[107] and (3) *In re Black Farmers Discrimination Litigation*.[108] The *Pigford* case was brought by a class of African-American farmers against the USDA for claims rooted in historic discrimination against black farmers in the provision of farm loans and benefit services.[109] The *Pigford* plaintiffs alleged: (a) systematic discrimination in the award of farm ownership, operating loans, other credit services, and program benefits; and (b) a systematic failure to process and investigate complaints of discrimination.[110] The *Pigford* case ended in a historic settlement agreement that created a claims process by which aggrieved class members could have their claims heard.[111] Successful claimants received monetary relief as well as class-wide injunctive relief, including debt discharge and restoration of foreclosed property.[112] However, the majority of would-be claimants were left out of the *Pigford* settlement because they attempted to file after the claim deadline had passed.[113] There were so many farmers left out that Congress conducted hearings on the adequacy of the notice provided to potential class members regarding the settlement.[114] Congress determined that notice was inadequate and enacted the second legal event in the Black Farmers case: Section 14012 in the Food, Conservation, and Energy Act of 2008.[115]

Section 14012(a)(4) gave a cause of action to all black farmers who met the *Pigford* class definition[116] and attempted to file a claim in the *Pigford* settlement; however, those who did not file a claim on time did not receive a determination on the merits.[117] Section 14012 codified the

107. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012, 122 Stat. 1651, 2209–12.

108. *In re* Black Farmers Discrimination Litig., 820 F. Supp. 2d. 78 (D.D.C. 2011).

109. *Pigford II*, 185 F.R.D. at 86.

110. *See id.* at 92–95.

111. *Id.* at 97.

112. *Id.*

113. *See* COWAN & FEDER, *supra* note 5, at 4.

114. *"Notice" Provision in the* Pigford v. Glickman *Consent Decree: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 1 (2004).

115. *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012, 122 Stat. 1651, 2209–12; *see also Pigford II*, 185 F.R.D. at 88–89.

116. *See* § 14012, 122 Stat. at 2210. The *Pigford* court defined the class as:

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

Pigford II, 185 F.R.D. at 92.

117. § 14012, 122 Stat. at 2210.

claims process outlined in the *Pigford* consent decree.[118] The third legal event, of course, was the litigation that arose out of Section 14012, brought by the late-filers to the *Pigford* settlement; the litigation consisted of 17 putative class actions, which were consolidated under the heading *In re Black Farmers Discrimination Litigation*.[119] *In re Black Farmers* ended in a settlement boasting even more favorable terms than did *Pigford*, further reducing the claimants' barriers to recovery.[120]

A. The Historical Circumstances Justifying Relief

The Black Farmers case qualifies as a reparations case in part because of the historical circumstances justifying relief. The idea of reparations connotes past injuries not redressed at the time of their creation but left to fester over time. These historical circumstances are also integral to understanding why the *Pigford* case was certified as a class action, and thus able to circumvent the hurdles preventing successful reparations-related litigation.

The original black farmers were farmers-by-force—in other words, slaves. General T. Sherman of the Union Army issued a field order at the close of the Civil War, which promised 40 acres and a mule to the newly freed victims of slavery.[121] The government promised to sell or lease land to the freed slaves and to loan a government mule to ready the land.[122] The federal government also created the Bureau of Refugees, Freedmen, and Abandoned Lands ("Freedman's Bureau") to assist with the former slaves' transition from slavery to freedom.[123] The Freedman's Bureau provided a range of social and economic support. Approximately 40,000 African Americans were able to purchase or lease property pursuant to this plan.[124] However, the Freedmen's Bureau was soon stripped of its powers and much of the property that African Americans were able to acquire was confiscated and transferred to loyalists of the Confederacy.[125] Despite these odds, African Americans were able to procure a substantial amount of property by the 1920s.[126] This acquisitive resilience would be further challenged, however, by the actions of an institution many African-American farmers regarded as

118. *Id.* at 2209–12.
119. *In re* Black Farmers Discrimination Litig., 820 F. Supp. 2d. 78, 78–80 (D.D.C. 2011).
120. *Id.* at 82–84.
121. *See* Blevins, *supra* note 28, at 261.
122. *See id.*
123. *Id.*
124. *See* Blevins, *supra* note 28, at 261.
125. Kristol Bradley Ginapp, Note, *Jim "USDA" Crow: Symptomatic Discrimination in Agriculture*, 8 DRAKE J. AGRIC. L. 237, 239 (2003).
126. *See id.* at 241.

"the last plantation"[127]: the USDA. Between 1900 and 1999, there was a 98 percent decrease in the amount of black farmers in this country.[128] In 1920, there were 925,000 African-American farms, while there were less than 18,000 in 1999.[129] Much of this attrition is attributable to the USDA.[130]

Although the belief that the USDA was involved in a "conspiracy to force minority and socially disadvantaged farmers off their land through discriminatory loan practices" is widespread,[131] the decrease can be traced more objectively to a post-New Deal restructuring of the USDA. This diminution was then accelerated in the 1980s by the dismantling of the USDA's Office of Civil Rights Enforcement and Adjudication ("OCREA").[132]

As a result of the New Deal, the power to decide USDA loan and benefit applications was transferred to local county committees.[133] Farmers in each county would elect a group of farmers from their ranks to serve on a three- to five-person committee that determined farm loan and benefit applications.[134] The committee would then appoint a county executive who would be charged with the responsibility of helping farmers to complete farm and benefit applications.[135] The county committee members, despite awarding federal money and being paid from federal funds, were not considered federal employees.[136] More importantly, as the court observed in *Pigford*, "[t]he county committees do not represent the racial diversity of the communities they serve."[137] Unfortunately, this disparity in representation affected the type and quality of loans, if any, provided to African Americans. For decades, African-American farmers complained that the county committees discriminated against them.[138] This discrimination took several forms,

127. CIVIL RIGHTS ACTION TEAM, U.S. DEP'T OF AGRIC., CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE: A REPORT BY THE CIVIL RIGHTS ACTION TEAM 2 (1997) [hereinafter CRAT REPORT], *available at* http://bit.ly/1hM3stz.

128. Mark A. Bunbury, Jr., *"Forty Acres and a Mule" . . . Not Quite Yet: Section 14012 of the Food, Conservation, and Energy Act of 2008 Fails Black Farmers*, 87 N.C. L. REV. 1230, 1234 (2009).

129. *Pigford II*, 185 F.R.D. 82, 85 (D.D.C. 1999).

130. *Id.*

131. *See* CRAT REPORT, *supra* note 127, at 2.

132. Monica M. Clark, *So Near, Yet So Far: The Past, Present, and Future of the Complaints Process Within the USDA*, 32 S.U. L. REV. 139, 147 (2005).

133. Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 528 (2001).

134. *Pigford II*, 185 F.R.D. at 86.

135. *Id.*

136. *Id.* at 86–87.

137. *Id.* at 87.

138. *See id.*

including denying loans, refusing to give African-American farmers loan applications, providing loans late, attaching restrictive conditions, or granting loans in insufficient amounts.[139]

Prior to 1983, farmers who were the victims of discrimination could appeal to a state body and then, if necessary, a national body, to have the challenged loan decision potentially reversed.[140] However, in 1983, OCREA was dismantled.[141] While the USDA had an extensive bureaucracy set up to deal with complaints of discrimination, complaints ultimately had to go through OCREA.[142] The formal complaint structure within the USDA was gutted with the dismantling of OCREA.[143] Most complaints of discrimination filed by farmers were ignored and, in some cases, even thrown into the trash.[144] Thus, African-American farmers had no effective recourse within the USDA. As a result, the loss of black-owned farmland through foreclosures and failed operations due to financial difficulties increased markedly.[145]

In 1994, the USDA commissioned a study to examine the treatment of African Americans in the USDA's loan and credit services.[146] The study revealed large disparities between minorities and their white counterparts in participation in USDA programs.[147] In 1996, the Secretary of Agriculture, Dan Glickman, appointed a Civil Rights Action Team to investigate racial bias in the USDA's farm loan programs.[148] The Action Team concluded that "[m]inority farmers have lost significant amounts of land and potential farm income as a result of discrimination by [Farm Services Agency] programs. . . ."[149]

B. The Technical Processes that Enabled Recovery

Reparations are, at the core, about historic injustices. Because reparations involve injuries occurring over a span of time, the practical application of the concept causes several litigation-related problems. As suggested earlier, the American legal system's technical rules, such as statutes of limitation and standing, are designed to foreclose litigation

139. *Pigford II*, 185 F.R.D. at 87.
140. *Id.* at 88.
141. *Id.*
142. CRAT REPORT, *supra* note 127, at 22–25.
143. *Pigford II*, 185 F.R.D. at 88.
144. *Id.*
145. *Id.* at 87.
146. *See* COWAN & FEDER, *supra* note 5, at 1.
147. *Id.*
148. *Id.* at 2.
149. CRAT REPORT, *supra* note 127, at 30.

under some of the very circumstances that define slavery reparations—time-accumulated injury to a group.[150]

The Black Farmers case managed to circumvent many of the barriers traditionally associated with historic injuries. In order to explore how the Black Farmers case did this, it is necessary to explore further the notion of presumed harm embedded in the idea of litigation-based reparations. Litigation-based reparations have been defined here as equitable relief sought to correct the presumed harmed caused by a historic injustice.[151] In essence, harm to the individual is presumed, to some degree, from harm to the group. Then, in a given legal process, the more closely the relief is conditioned upon membership in an aggrieved group—as opposed to other factors such as causation and discrete injury—the more the case resembles reparations. Thus, the technical processes in the Black Farmers case that closed the gap between race-aggrieved status and recovery are essential to both the technical definition of reparations and to their recovery.

The Black Farmers case contains several features indicating the presumption of harm. For example, under the settlement agreement in *In re Black Farmers*, a claimant did not have to produce a similarly situated white farmer to establish her claim.[152] This essentially meant that claimants in *In re Black Farmers* did not have to prove discrimination. They did not have to provide any evidence of discrimination. There was an irrefutable presumption that each claimant was discriminated against based, arguably, on the notion that black farmers were typically discriminated against. This presumption, however, was not endemic to the causes of action on which the Pigford case was based, but was instead forged by the sheer power of another instrumentality—the class action device.

V. RULE 23 AND THE BLACK FARMERS CASE

A class action is litigation by representation. An individual plaintiff or a small group of plaintiffs, called active plaintiffs, represent the legal interests of a larger group of plaintiffs, called absent plaintiffs.[153] Rule 23 of the Federal Rules of Civil Procedure governs federal class actions.[154] The procedural purpose of the class action is judicial

150. *See supra* Part III; *supra* notes 15–26 and accompanying text.
151. *See supra* notes 15–26 and accompanying text.
152. *See generally In re* Black Farmers Discrimination Litig., 820 F. Supp. 2d 78 (D.D.C. 2011).
153. FED. R. CIV. P. 23.
154. *Id.*

economy.[155] The theory is that, if the interests of the active and absent plaintiffs are aligned closely enough, then simply resolving the interests of the active plaintiffs can save time, effort, and expense, thus also resolving the issues of the absent plaintiffs. The close alignment of the interests of the active and absent plaintiffs also ensures due process and fairness.[156]

A case becomes a class action through the process of class certification. This process involves a court examining a number of factors to ensure that the general goals of a class action are met in a particular action.[157] The certification process also requires the putative class to establish that its action fits into one of three types of class actions.[158] When the court is assured that all of the requirements have been met, the court issues an order officially designating the litigation as a class action.[159] The factors the court examines are as follows: commonality, numerosity, typicality, and adequacy of representation.[160] The commonality factor requires that the claims of all the members of the class be so closely related that they are amenable to common solutions.[161] The numerosity factor ensures that there are enough class members to justify the added procedural complications created by the class action device.[162] The typicality factor ensures that the active members will represent properly the interests of the absent plaintiffs by requiring that the claims of the active plaintiffs are of the same variety as the claims of absent plaintiffs.[163] The adequacy of representation factor is meant to ensure that the parties representing the class members, including the lead plaintiffs and class counsel, are capable, experienced, and knowledgeable enough to effectively represent the class.[164]

One of the most important and most litigated factors is commonality.[165] It was the factor most contested during the certification

155. *Developments in the Law—The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 HARV. L. REV. 1806, 1806–07 (2000).

156. ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL 38–39 (3d ed. 2007).

157. *Id.* at 565–66.

158. Mohsen Manesh, *The New Class Action Rule: Procedural Reforms in an Ethical Vacuum*, 18 GEO. J. LEGAL ETHICS 923, 926–27 (2005).

159. *See Pigford I*, 182 F.R.D. 341, 345 (D.D.C. 1998).

160. *See* KLONOFF, *supra* note 156, at 27.

161. *See id.* at 38.

162. *See id.* at 34.

163. *See id.* at 46–47.

164. *See id.* at 51–61.

165. Raul Zermeno, *Supreme Court Raises the Bar for Class Actions*, SOC'Y FOR HUM. RESOURCES MGMT. (Mar. 27, 2013), http://bit.ly/1avbHnl.

of *Pigford*.[166] Again, commonality refers to the claim or claims that unite the class.[167] It is possible for some claims to be eligible for class treatment while other closely related claims are ineligible. For example, the two common issues raised in *Pigford* included allegations of a systematic failure by the USDA to process and investigate complaints of discrimination and the question of whether the statute of limitations on older claims should be tolled for equitable reasons.[168] Allegations of systematic discrimination, the chief cause of action in *Pigford*, failed to satisfy the commonality requirement. The discrimination was varied in circumstance and enacted by many disconnected county committees making independent loan decisions,[169] while the USDA's failure to investigate complaints of discrimination was a central and systemic breakdown traceable to a general departmental failure. Because the court determined that the systematic breakdown of the complaint process did meet the commonality requirement, it became less important for the class to receive class treatment for the more substantive allegations of race discrimination.[170] This is true because of the bargaining power created by the certification of the less substantive issues. Thus, under Rule 23(a)'s commonality requirement, the ability for a party to certify at least one common issue, even if subordinate, and have the entire case proceed can be instrumental in obtaining litigation-based reparations.

The litigation-based reparations strategy should focus not on resolving all of the underlying issues at trial, but on finding one or more common issues on which to hinge class certification. As shall be discussed, the certification of the class is key. The goal of litigation-based reparations is not necessarily to recover reparations through the trial process, but to do so by any lawful means necessary.

As mentioned above, the putative class must establish that the litigation fits into one or more class action types under Rule 23(b).[171] There are three major class action types.[172] Broadly speaking, these are

166. *Pigford I*, 182 F.R.D. 341, 344–49 (D.D.C. 1998).

167. *See* Manesh, *supra* note 158, at 926.

168. *Pigford I*, 182 F.R.D. at 348–49 (noting that the discrimination was too varied in circumstance and manner to lend itself to class action treatment). The court observed that individual instances of discrimination did not arise from a central policy of the USDA but instead were carried about by individual, unconnected county supervisors making independent decisions regarding credit applications. *Id.*

169. *Pigford II*, 185 F.R.D. 82, 86–87 (D.D.C. 1999).

170. *Pigford I*, 182 F.R.D. at 349. The court in *Pigford* also determined that the equitable tolling of the statute of limitations was subject to class treatment, as the underlying issue was whether the circumstances generally called for tolling, as opposed to the individual circumstances of each farmer. *See id.* at 348.

171. *See* Manesh, *supra* note 158, at 926.

172. *See* FED. R. CIV. P. 23(b). A fourth class action type arises under Rule 23(b)(1)(A) and focuses on protecting the defendant from the conflicting judgments that

the limited fund class action, the damages class action, and the civil rights class action.[173] A limited fund class action is authorized if the object of the litigation is an asset of fixed and limited value.[174] The reasoning behind the limited fund class action is to protect non-parties who may have an interest in the diminishable asset.[175] The damages class action, arising under Rule 23(b)(3), presents the most challenges to certification. This is true because damages class actions focus more on monetary relief, and thus present the specter of the court having to individually adjudicate issues related to damages.[176] This, of course, would destroy the efficiency claim justifying the class action. Plaintiffs seeking to rely on this class action type are required to show that the issues common to the class predominate over individual issues and that the class action is the most efficient and just vehicle for handling the claims.[177] The Black Farmers case would have problems satisfying this requirement due to the claims of systematic discrimination and individualized damages.

Civil rights class actions are more readily certified than are damages class actions, due in part to the fact that the civil rights class only has to show one common issue of law or fact, whereas the damages class has to establish that common issues dominate. The civil rights class action, arising under Rule 23(b)(2), focuses on the actions of the defendants as opposed to the injuries of the plaintiffs.[178] It thus authorizes certification if the primary form of relief sought is class-wide injunctive or declaratory relief and if any requested monetary relief is incidental to the request for equitable remedies.[179] *Pigford* was certified as a civil rights class action due to the nature and importance of the injunctive and declaratory relief sought.[180] It was, however, converted to a damages class action as a result of the settlement agreement.[181] Thus, the class was able to negotiate a class status that the court, of its own volition, would have been hard-pressed to justify.

may be imposed if several disconnected actions are pursued. *See* Manesh, *supra* note 158, at 926 (discussing this fourth category of class actions).

173. *See* Manesh, *supra* note 158, at 926–27.

174. *See* Ortiz v. Fibreboard Corp., 527 U.S 815, 815–16 (1999).

175. Manesh, *supra* note 158, at 927.

176. *See* Neil K. Gehlawat, Note, *Monetary Damages and the (b)(2) Class Action: A Closer Look at* Wal-Mart v. Dukes, 90 TEX. L. REV. 1535, 1547–50 (2012).

177. *Id.* at 1537.

178. *See Pigford I*, 182 F.R.D. 341, 349–50, 351 (D.D.C. 1998).

179. *See* Gehlawat, *supra* note 176, at 1536–37.

180. *Pigford I*, 182 F.R.D. at 351.

181. *Pigford II*, 185 F.R.D. 82, 92 (D.D.C. 1999) ("By Order of January 5, 1999, upon motion of the parties, the Court vacated the Order certifying the class and certified a new class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.").

The civil rights class action, with its focus on righting institutional wrongs, is the ideal vehicle for litigation-based reparations, as "it was designed to provide a remedy to an entire plaintiff class that could root out a complex legal wrong at its source."[182] The civil rights class action under Rule 23(b)(2) has been used as an extension of, and in some cases (including the Black Farmers case) as a catalyst for, mass social movements, and has thus provided a major vehicle for social change in the African-American community for decades.[183] In fact, the advisory comments for Rule 23(b)(2) suggest that that the Rule 23(b)(2) class action was created to enable the certification of civil rights and other group claims.[184] This is why some commentators consider the class action to be a "subversive element" in an otherwise ordered civil action system committed to "party control and focus on the discrete merits of each claim."[185]

While the civil rights class action is well suited for reparations-related litigation, it is not without its limitations for individual plaintiffs. The civil rights class action does not require the court to allow absent members to opt out of the class and pursue their own cases.[186] Thus, the civil rights class action treats the group members as indivisible. In this way it is akin to legislative action, circumventing the traditional litigation model. The very concept of the civil rights class action equates such class actions with the notion of litigation-based reparations.

A. Increase in the Size of Class and Bargaining Power

In order to put the effect of the certification of the *Pigford* class into its proper context, it is necessary to examine the procedural history of the case. The lawsuit was filed in August of 1997 as a putative class action.[187] Three named plaintiffs represented a putative class of 641.[188] The lawsuit was stayed in December of 1997 so that the parties could pursue mediation.[189] However, the Justice Department refused to negotiate the possibility of class-wide relief, instead insisting on a process that involved, exclusively, individual claims resolution.[190]

182. Gehlawat, *supra* note 176, at 1544.

183. *See generally* Fred D. Gray, *The* Sullivan *Case: A Direct Product of the Civil Rights Movement*, 42 CASE W. RES. L. REV. 1223 (1992) (book review) (detailing the landmark *New York Times v. Sullivan* case and its impact on civil rights).

184. *See* FED. R. CIV. P. 23(b)(2) advisory committee's note.

185. David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 561 (1987).

186. *See* Gehlawat, *supra* note 176, at 1548.

187. *See* COWAN & FEDER, *supra* note 5, at 2.

188. *Pigford II*, 185 F.R.D. at 89.

189. *Id.*

190. *Id.* at 90.

Litigation resumed in March of 1998 and trial was set for February 1999.[191] In October of 1998, the district court issued its opinion certifying the class.[192] In January of 1998, Congress, under intense pressure from advocacy groups and a social movement that had sprung from the case, passed legislation tolling the statute of limitations for claims arising between January 1, 1981 and December 31, 1996.[193] A few short weeks thereafter, on April 14, 1999, the court entered a consent decree incorporating the terms of the parties' settlement agreement.[194] The consent decree identified class-wide injunctive and declaratory relief and created a claims process for the adjudication of individual damage claims.[195]

Before certification, the number of estimated class members in *Pigford* increased from 661 to 2,000.[196] When all was said and done, well over 22,000 timely claims were filed, and of those, upwards of 13,000 were approved.[197] Moreover, while a few claimants' late applications were accepted, the majority—an estimated 70,000—of claimants who filed late were excluded from the *Pigford* settlement.[198] These potential class members would be the subjects of the 2008 Farm Bill, which authorized the re-opening of the litigation.[199] Thus, due to the certification of the class in *Pigford*, the class members were able to increase their numbers exponentially and, by extension, their bargaining power.

The size of the class increased in large part due to class notification. The process of class certification under Rule 23(b)(3) requires that potential class members be notified.[200] Notice is optional under Rule 23(b)(2).[201] Depending on the type of class and number of potential class members, notice is accomplished through individual mailings, publications in magazines and newspapers, and through television and radio networks.[202] The notification process invariably increases the size of the class, and thus the magnitude of the defendant's liability and/or responsibility. That is, due to class certification and notification, more people stand to recover than would recover if they filed individual

191. *Id.*
192. *Pigford I*, 182 F.R.D. 341, 351–52 (D.D.C. 1998).
193. *See* COWAN & FEDER, *supra* note 5, at 3.
194. *Id.*
195. *Id.* at 3–4.
196. *See id.* at 2.
197. *Id.* at 5.
198. *See* COWAN & FEDER, *supra* note 5, at 5.
199. *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012, 122 Stat. 1651, 2209–12.
200. FED. R. CIV. P. 23(c)(2)(B).
201. *Id.* 23(c)(2)(A).
202. *See* Manesh, *supra* note 158, at 925.

claims.[203] A defendant's opponents are multiplied, and, as in the Black Farmers case, they are often multiplied exponentially. The risk of losing on a major issue and almost instantaneously becoming liable to thousands of people is harrowing for defendants.[204] Due to the tremendous bargaining power created by the certification of the class in *Pigford*, the class members were able to negotiate a claims structure that amounted to reparations.

B. The Claims Process Enabled the Reparative Relief

The claims process is at the heart of what makes the Black Farmers case procedurally a slavery reparations case.[205] In examining the claims process, the most important aspect of recovery is race.[206] The harms of discrimination and economic loss are presumed to a certain degree. These presumptions can be gleaned from the low burden required to establish the elements of class membership and the low level of attention given to ensure that claimants were actually members of the class.[207]

In *Pigford*, an initial part of the claims process required claimants to establish that they were members of the class.[208] They were required to establish that they: (1) were African American; (2) farmed or attempted to farm between 1981 and 1996; (3) applied or attempted to apply for a credit transaction or benefit service; (4) believed they were discriminated against; and (5) made a complaint of discrimination.[209] Establishing class membership entailed completing a signed affidavit under penalty of perjury attesting to the facts comprising the class requirements.[210] In *Pigford*, membership attestations also had to be corroborated by the declaration of a non-family member.[211]

The second part of the claims process involved the election of tracks. There were two tracks or routes to recovery in the *Pigford* consent decree.[212] The first track, Track A, involved liquidated damages of $50,000 and an attenuated claims process.[213] The second track, Track B, involved a process more akin to regular litigation, such as binding arbitration, where claimants have to establish their claims by a

203. *See* Rosenberg, *supra* note 185, at 567.
204. *See* Manesh, *supra* note 158, at 925.
205. *See generally In re* Black Farmers Discrimination Litig., 820 F. Supp. 2d. 78 (D.D.C. 2011).
206. *See infra* notes 208–09 and accompanying text.
207. *See infra* notes 208–11 and accompanying text.
208. *Pigford II*, 185 F.R.D. 82, 92 (D.D.C. 1999).
209. *Id.*
210. *Id.* at 96.
211. *Id.*
212. *Id.*
213. *Pigford II*, 185 F.R.D. at 96–97.

preponderance of the evidence.[214] Due to the fact that many of the claimants (a great deal of whom were filing on behalf of deceased relatives) possessed no documentary evidence,[215] only 169 claimants elected Track B.[216] Thus, the Track A process was central to the success of *Pigford*. It has allowed tens of thousands of farmers to recover[217] with little or no documentary proof.[218]

The burden of proof for Track A claimants was reduced drastically as compared to Track B claimants. Instead of claimants having to prove the elements by a preponderance of the evidence, they only have to provide substantial evidence. The consent decree defined substantial evidence as "relevant evidence as a reasonable mind might accept to support [the] conclusion, even when a plausible alternative interpretation of the evidence would support a contrary view."[219]

Under the *Pigford* consent decree, Track A claimants had to establish five elements of proof: (1) that they owned, leased, or attempted to own or lease farmland; (2) that they applied for a loan or benefit; (3) that the loan or benefit was denied, delayed, or decreased by the USDA; (4) that a similarly situated white farmer was treated more favorably; and (5) that as a result, the claimant suffered economic loss.[220]

Under the *Pigford* claims process, 69 percent of the class members recovered.[221] More than 22,000 class members recovered under Track A, and the government paid out damages exceeding one billion dollars.[222] Although the recovery rate in *Pigford* was above average, it was hampered by some of the provisions in the consent decree. The most notable of these provisions required claimants to identify a similarly situated white farmer.[223] Additionally, the Justice Department was empowered to pay the decisionmakers, the arbitrator, and the claims facilitator directly,[224] which arguably had an effect on how the decisionmakers viewed the claims and resolved close factual questions.

214. *Id.* at 97.
215. *See* COWAN & FEDER, *supra* note 5, at 4.
216. OFFICE OF THE MONITOR, STATISTICS REGARDING *PIGFORD V. VILSACK*: TRACK A IMPLEMENTATION AS OF FEBRUARY 16, 2012 (2012), *available at* http://1.usa.gov/1e8DMCi.
217. *Id.*
218. *See Pigford II*, 185 F.R.D. at 96.
219. *Id.* (citation omitted) (internal quotation marks omitted).
220. *Id.*
221. *See* COWAN & FEDER, *supra* note 5, at 6.
222. *Id.*
223. *See id.* at 4.
224. *Id.* at 3 (citing 31 U.S.C. § 1304 (2006)).

More importantly, the Justice Department had the right to provide documentary evidence contesting the attestations of the claimants.[225]

Over 9,000 claims were rejected as result of the documentary evidence provided by the Justice Department.[226] However, the *In re Black Farmers* class members were able to negotiate these provisions out of the claims process due to the continuing snowball effect produced by the certification of the *Pigford* case.[227] Theoretically, the claims process outlined in the *In re Black Farmers* litigation should increase the rate of recovery for the claimants in that case. The *In re Black Farmers* settlement is a remarkable example of the snowball effect produced by class certification.

The claims process in *In re Black Farmers*, as an evolution of the process originating in *Pigford*, provides the best model for reparations in the context of litigation. In *In re Black Farmers*, the cause of the claimants' injuries, race discrimination, was presumed.[228] The claimants were not required to introduce proof tending to show that they were discriminated against.[229] They were only required to assert that they applied or attempted to apply for a loan or farm benefit, and that they did not get the service requested.[230] Thus, the reason for the denial, discrimination, is presumed from the denial itself. This is what reparations should look like in the context of litigation.

Although the structure of the claims process in *In re Black Farmers* and in *Pigford* has a lot to do with the bargaining power of the plaintiffs, much of the bargaining power resulted from the widespread nature of the harm and the USDA's failure to keep accurate records of the evidence of the harm. Thus, the USDA's failure to preserve evidence reduced the claimants' responsibility to provide it, and the USDA's culpability in creating a system of discrimination reduced the claimants' burden to prove individual instances of discrimination. So, to some degree, the USDA was held accountable not just for the harm it allegedly caused the individual plaintiffs, but for the systemic nature of the harm—for the harm it caused the group. Similarly, in the context of reparations, courts evaluating issues of standing and causation should take into account the breadth of the harm and the culpability of the defendants in creating procedural burdens.

225. Consent Decree at ¶¶ 8–10, *Pigford II*, 185 F.R.D. 82 (D.D.C. 1999) (No. 97-1978), *available at* http://bit.ly/HQU33o.

226. OFFICE OF THE MONITOR, *supra* note 216.

227. Stephen Carpenter, *The USDA Discrimination Cases:* Pigford, In re Black Farmers, Keepseagle, Garcia, *and* Love, 17 DRAKE J. AGRIC. L. 1, 27–32 (2012).

228. *See generally In re* Black Farmers Discrimination Litig., 820 F. Supp. 2d 78 (D.D.C. 2011).

229. *See generally id.*

230. *See Pigford II*, 185 F.R.D. 82, 96–97 (D.D.C. 1999).

C. The Reparative (Reparations?) Relief Structure

In essence, reparations are damages or relief. Litigation-based reparations are the relief acquired through litigation and structured to repair a historical wrong. So at a very basic level, the relief sought by the farmers in the Black Farmers case constitutes reparations. In addition to monetary damages, the *Pigford* consent decree, as well as the settlement agreement in *In re Black Farmers*, provide for extensive class-wide relief.[231] Successful claimants are entitled to loan forgiveness, return of foreclosed property, priority treatment in applications for future loans, priority treatment in the acquisition of inventory property, and assistance with the completion of any credit or farm services application.[232] This relief looks a lot like the relief offered to newly freed slaves by the Freedman's Bureau, the property promise made by the U.S. government giving the newly freed the right to lease or to purchase the uninhabited or abandoned government land confiscated from the Confederacy, and the promise of assistance with reviewing contracts with white farmers.[233]

VI. THE BLACK FARMERS CASE AS A MODEL FOR FUTURE REPARATIONS CASES

The Black Farmers case provides a new framework for slavery reparations, making the concept better suited for the traditional litigation model. Again, the conceptual framework is as follows: the more recovery is premised upon race-aggrieved status, and the less it turns on other aspects of proof, such as injury or causation, the more it fits the litigation model of slavery reparations. The ultimate reparations case, requiring the lowest amount of proof, would be the case where recovery is premised on proof of race-aggrieved status alone.

The trick for litigants of reparations-related cases is to close the gap between race-aggrieved status and recovery. As described above, this can be accomplished most effectively through the use of a combined class action and social movement strategy.[234] The class action should be used as a blunt instrument to tear down procedural barriers, and as a tool to organize class members and other interested parties to take steps to externally influence the outcome of the litigation. This strategy was used in the Black Farmers case to procure recovery for thousands of black

231. *See generally In re* Black Farmers Discrimination Litig., 820 F. Supp. 2d 78 (D.D.C. 2011); Consent Decree, *Pigford II*, 185 F.R.D. 82 (D.D.C. 1999) (No. 97-1978), *available at* http://bit.ly/HQU33o.

232. *Pigford II*, 185 F.R.D. at 97.

233. *See generally* Blevins, *supra* note 28, at 261; Ginapp, *supra* note 125, at 239.

234. *See supra* text accompanying notes 178–86.

farmers and/or their descendants, who, without documentary proof or good recollection, would not have stood a chance of recovering at trial. Additionally, the social movement strategy, with the integration of several organizations, including farmers' advocacy groups, was able to influence Congress to toll the statute of limitations.[235]

In addition to providing direction for litigants, the Black Farmers case is instructive in terms of how courts should process future reparations-related litigation or group-harm cases. Courts should treat the issue of standing in cases involving group harm in the same or similar manner in which class membership was determined in *Pigford*. In order to establish standing to sue, a plaintiff should only be required to prove by substantial evidence that: (1) she is an African American; (2) she has an ancestor who was enslaved; (3) she was denied some right, privilege, benefit, or opportunity; and (4) the denial occurred because she is a descendant of slaves. At a minimum, a plaintiff would have to submit an affidavit and a declaration by a third party supporting her standing allegations. The genetic component of standing could be established through genealogical research or genetic mapping.[236] Establishing these factors would create a rebuttable presumption that the plaintiff has standing to sue. The defendant would then have to prove by a preponderance of the evidence that at least one of the factors has not been met. Such a judicial interpretation of standing is not outside the purview of federal courts, as this formulation meets the general concerns of the standing requirement.

A relaxed notion of standing is not foreign to our system of civil justice. In the mass tort area, courts often find ways to resolve difficult issues related to standing, which one scholar refers to as "act attenuation."[237] As Kaimipono David Wenger observes, "slavery itself can be viewed as one of the earliest mass torts."[238] Indeed, mass tort litigation and reparations-related litigation face common challenges. In both areas "there is a potential connection between claimants and payers, but it is of undeterminable strength. It is hard to match the victim to the wrongdoer and to match the parties to the harm."[239]

Wenger suggests a few mass tort tools, like statistical analysis and the substantial factor test, for establishing the "link between slavery and

235. *See* COWAN & FEDER, *supra* note 5, at 3; Kelly Toledano, *Making Good on Broken Promises: How the* Pigford *Settlement Has Given African-American Farmers a Second Chance*, 5 S. REGION BLACK L. STUDENTS ASS'N L.J. 68, 85 (2011).

236. *See* Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2542–47 (2001).

237. Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279, 290–93, 306 (2006).

238. *Id.* at 306.

239. *Id.*

current harms."[240] In the mass tort context, due to the difficulty of tracing the origin of the plaintiff's injuries, courts often deal in probabilities.[241] If, for instance, it is likely that a particular defendant's product caused the injury, then the causal factor is met.[242] Likewise, when several factors contribute to the plaintiff's injuries, then the causal link is established if the defendant's actions contributed substantially to the injury.[243]

Therefore, it is not beyond courts' powers to take a more expansive view of the standing doctrine. Courts' failure to do so may be due to the failure of past litigants to make the connection between mass torts and slavery reparations or due to courts' own biases against the claims. In any respect, the factors for assessing standing outlined above provide a workable framework for a willing judge.[244]

VII. STRATEGY GOING FORWARD

For reasons seen in this Article, it is unlikely that a single piece of litigation will ever resolve the issue of reparations for the African-American descendants of slaves. A reimagining of the slavery reparations effort is in order. Litigation modeled on the Black Farmers case, while concentrating on equitable relief and targeting discrete manifestations of the badges and incidents of slavery, should provide the focus. The Egyptian myth of Osiris provides a conceptual strategy for addressing the reparations question using litigation as the catalyst.

Osiris was an ancient Egyptian deity who, emblematic of the setting sun, was dubbed "lord of the perfect black," or, in some interpretations, "the perfect black."[245] To the extent that perfection implies completeness and wholeness, the myth of Osiris and his reassembly after decapitation provides an interesting analogy to the quest for procuring African-American reparations.

In many accounts, the myth of Osiris is an astrological play on the movement of the celestial bodies and the corresponding changes in seasons. In the myth, Osiris is portrayed as a god who left the heavens to become an earthly king. He was opposed by Set, his brother. Set and his companions plotted the death of Osiris. They fashioned a coffin for him and then, at a party, cajoled him to enter it by offering a present to anyone whose body was an exact fit. Once Osiris took the bait, the

240. *Id.* at 316.
241. *See id.* at 308–11.
242. *See* Wenger, *supra* note 237, at 288–89.
243. *See id.*
244. *See supra* text accompanying notes 236–43.
245. Deborah King, *Isis and Osiris: The Love Story of Ancient Egypt*, DEBORAH KING CENTER (Sept. 14, 2011, 8:09 AM), http://bit.ly/1btgZxa.

coffin was shut and the lid sealed. Set and his companions then hoisted the coffin into the Nile River. The coffin soon washed ashore and a tree sprung up around it, completely encasing it. A Phoenician king, filled with admiration for the tree, cut it down and took it to his palace in Byblos. Osiris's wife, Isis, traveled the world in search of her husband, and eventually happened upon Byblos. She collected the body, returned it to Egypt, and hid it. But one night, Set discovered the hidden chest and cut the body into fourteen pieces. He then scattered the fragments throughout the land of Egypt. Isis, upon discovering what had happened, went around the country collecting the pieces. She found all, save one. Some versions of the story tell of the gods helping to reassemble Osiris, whereupon the breath of life returned to him. He was thereby resurrected from the dead and brought back to life.[246]

It is here suggested that African-American reparations effort be re-envisioned as a series of class actions aimed at microcosmic ills, mirroring Osiris's fragments, which themselves may be symptomatic of broader, more rudimentary causes, such as those that have proved unredressable within the current legal construct. In this regard, the reparations effort going forward should be cast as a piecemeal addressing of the wrongs engendered during the course, and as a consequence, of the African-American experience in America.

Why litigation at all? Post-Reconstruction, most group progress in the African-American community has been preceded by successful litigation.[247] Lawsuits, particularly class action devices, have the ability to organize interests, create publicity, and apply pressure, which have been indispensable in the African-American struggle for social parity.[248] The theory espoused here is that any legislative efforts to make whole the African-American descendants of slaves must be preceded by mass interest and group action. In this regard, class action lawsuits not only energize the potential beneficiaries of the lawsuit, but also have massive potential to spawn powerful social movements.[249] Additionally, successful lawsuits serve to legitimize African-American claims of institutionally engendered disparities in the eyes of an increasingly doubtful public, and thus have great potential to sway public opinion.[250]

246. *Id.*

247. *See generally, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Loving v. Virginia, 388 U.S. 1 (1967); Bailey v. Patterson, 369 U.S. 31 (1962); Brown v. Bd. of Educ., 344 U.S. 1 (1952); Plessy v. Ferguson, 163 U.S. 537 (1896).

248. *See supra* note 183 and accompanying text.

249. *See* Mark Tushnet, *The Significance of* Brown v. Board of Education, 80 VA. L. REV. 173, 179 (1994).

250. *See id.*

Why focus on equitable relief? The court certified *Pigford* as a civil rights class action under Rule 23(b)(2) despite plaintiffs claiming substantial monetary relief.[251] Under the Supreme Court's 2011 decision in *Wal-Mart Stores Inc. v. Dukes*,[252] it is doubtful that the class in *Pigford* would have survived a 23(b)(2) certification analysis and thus the class would have had to endure the more rigorous analysis applied to damages actions certified under Rule 23(b)(3).[253] *Dukes* involved several consolidated putative class actions brought by female employees of Wal-Mart throughout the country alleging sex discrimination by Wal-Mart in the hiring and promotion of female management.[254] The plaintiffs sought both equitable and monetary relief in the form of back pay and punitive damages.[255] The district court certified the class under Rule 23(b)(2), finding that the equitable relief predominated over the request for back pay.[256] The U.S. Court of Appeals for the Ninth Circuit upheld the ruling of the district court, finding that the commonality requirement had been met, and that injunctive and declaratory relief were appropriate.[257] The Supreme Court, however, ruled that the plaintiffs could not proceed collectively because they failed to meet the commonality requirement and because they were seeking substantial monetary damages.[258]

Pursuing class-wide relief increases the possibility of certification because the analysis under Rule 23(b)(2) is less rigorous. As such, excluding requests for individuated monetary damages allows the litigation to retain some of the benefits associated with class action status, namely bargaining power and, potentially, class notification. Furthermore, pursuing equitable relief to the exclusion of monetary damages circumvents the issue of federal sovereign immunity because the government has waived its immunity with regards to non-monetary relief.[259]

Also, absent federal courts adopting the model of standing advanced here and exemplified in the mass tort context, reparations-related litigation should focus on discreet manifestations of the vestiges of slavery. A collaborative group consisting of lawyers, law professors, economists, social psychologists, psychologists, geneticists, political scientists, and other professionals should be assembled to study the effects of slavery and the resulting discrimination, alienation, and

251. *See Pigford I*, 182 F.R.D. 341, 351 (D.D.C. 1998).
252. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).
253. *See* FED. R. CIV. P. 23(b)(3).
254. *Dukes*, 131 S. Ct. at 2547–48.
255. *Id.* at 2548.
256. *Id.* at 2549.
257. *Id.* at 2549–50.
258. *Id.* at 2556–58.
259. *See Cato v. United States*, 70 F.3d 1103, 1111 (9th Cir. 1995).

disenfranchisement from the perspective of each field. The goal would be to provide holistic solutions based on an integrative analysis of the problem and its origins. The problem should be broken down into solvable units, and lawyers should commence litigation to address each unit. The units should contain identifiable victims possessing quantifiable injuries, such injuries being at least statistically linkable to one or more collective agents. All litigation should be launched closely together so that any relief procured may affect as many African Americans as possible, in as many areas of life as is possible, and in as close a time period as is possible, to intensify the effects of the combined relief-synergy. The professionals could also create scholarship and various studies to provide an orchestrated and interdependent body of support for reparations-related litigation and for the problems of standing or causation that may arise.[260]

A. The Need for Litigation Aimed at the Psycho-Cultural Legacy of Slavery

A particular need to contemplate litigation crafted to address the psycho-cultural legacy of slavery exists. Carter G. Woodson, in the astoundingly insightful *The Mis-Education of the Negro*, famously mused:

> When you control a man's thinking you do not have to worry about his actions. You do not have to tell him not to stand here or go yonder. He will find his "proper place" and will stay in it. You do not need to send him to the back door. He will go without being told. In fact, if there is no back door, he will cut one for his special benefit.[261]

Here, Woodson is referring to a mentality that he believed plagued a significant portion of the African-American population in 1933 and that was engrained in the fabric of African-American life.[262] While the great thinker's implication that there had been an organized and intentional effort to perpetuate this result is questionable, there can be little doubt that various psychological control tactics were employed on the slaves themselves, and many such tactics were explicitly used throughout the

260. *See generally, e.g.*, TOM BURRELL, BRAINWASHED: CHALLENGING THE MYTH OF BLACK INFERIORITY (2010) (examining the black inferiority complex as a disability created by slavery and its vestiges).

261. CARTER GODWIN WOODSON, THE MIS-EDUCATION OF THE NEGRO 6–7 (Seven Treasures Publ'ns 2010) (1933).

262. *Id.* at 5.

Jim Crow era on many African-American citizens of the South.[263] Whatever the origin, there seems to be a statistical link between these tactics and the social psychology of far too many in the African-American community. In a test performed several years ago where several African-American children were given a choice between a white doll and a black doll, the children overwhelmingly chose the white doll.[264]

More recently, another study was conducted to measure the effect of racial stigma on scholastic performance.[265] Two groups of black students took the same test.[266] One group was reminded of their race immediately before the examination.[267] This group did markedly worse on the exam.[268] So there can be little doubt that a culture of inferiority developed in many aspects of the African-American community and was, at the very least, passed down from generation to generation.[269]

Many scholars and social scientists agree that such a culture was intentionally and necessarily created to control a population brought here for the very purpose of subservience.[270] Many conservative commentators would also agree that there is a sub-culture of inferiority in the African-American community, although they would dispute the origin of the culture.[271] Many of these scholars seem to believe that this culture was self-created and internally perpetuated, and thus, that the government and the American people are devoid of any social or moral responsibility to correct the issue.[272] These arguments smack of the more primitive arguments of innate black inferiority.[273] If a culture of inferiority exists, and slavery did not create it, and society did not perpetuate it, then there is only one option left!

One potential class action suit could—although this Article makes no claim regarding the viability of such a suit—be premised on the notion that publicly funded institutions have not only failed to help African-American students but have indeed harmed them by facilitating

263. *See* Michele Goodwin, *Race as Proxy: An Introduction*, 53 DEPAUL L. REV. 931, 932–34 (2004).

264. Gwen Bergner, *Black Children, White Preference:* Brown v. Board, *the Doll Tests, and the Politics of Self-Esteem*, 61 AM. Q. 299, 299 (2009).

265. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797 (1995).

266. *Id.* at 799.

267. *Id.* at 808–10.

268. *Id.*

269. *See generally* Goodwin, *supra* note 263.

270. *See id.* at 932–35.

271. *See id.*

272. *See, e.g.*, Gregory Kane, *Why the Reparations Movement Should Fail*, 3 MARGINS: MD. L.J. RACE, RELIGION, GENDER & CLASS 189, 189–90 (2003).

273. *See* Goodwin, *supra* note 263, at 932–34.

the notion of black inferiority, therefore violating the rights of African-American students to equal protection under the Fourteenth Amendment. As a corollary, one could argue that "black inferiority complex" or "internalized oppression" qualifies as a disability under the Individuals with Disabilities Education Act ("IDEA").[274] If so, publicly funded institutions would be required under the IDEA to enact programming, curriculum changes, and educational approaches to accommodate and remedy the disability.[275]

VIII. CONCLUSION

The Black Farmers case presents many lessons for reparations-related litigation going forward due to the bargaining power the farmers amassed. The certification of the class in *Pigford* increased the size and power of the class exponentially and gave the class the bargaining power to create a claims process and relief structure that, in effect, amounts to reparations. The claims process, by allowing claimants to prevail with little to no documented proof, substantially reduces the evidentiary barriers between race and recovery and thus circumvents many of the traditional procedural obstacles precluding successful reparations litigation. The relief structure is, by definition, reparations because its purpose is to repair harm, such as loss of property, farm operations, or income, caused by a historic injustice.

Rule 23(b)(2) requires less for the certification of a class when declaratory and injunctive reliefs are the primary remedies sought. A focus on declaratory and injunctive relief makes the certification of civil rights actions more probable, and, because of the strategic benefits endemic to the class action vehicle, makes relief for individual class members more likely.

The litigation-based conception of reparations contemplates remedies that will fix the problems caused by slavery. This idea of reparations coincides with pronouncements of the Supreme Court regarding remedies meant to address race-borne injuries. As the Supreme Court held in *Swann v. Charlotte-Mecklenburg Board of Education*,[276] "the nature of the violation determines the scope of the remedy."[277] In *Swann*, the Court took a results-oriented approach to desegregating the Charlotte-Mecklenburg school system by requiring that the school actually desegregate as opposed to ceasing policies resulting in segregation—that is, drawing racially neutral attendance

274. 20 U.S.C. §§ 1400–1482 (2006).
275. *Id.*
276. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
277. *Id.* at 16.

zones.[278] Much has changed since *Swann*. The further removed we are from the Civil Rights Movement, the less successful civil rights litigation has become. Yet social ills rooted in racial inequities abound. Creative strategies combining activism with adjudication, such as the strategy employed by the Black Farmers litigators, are necessary to combat these current legal hurdles.

278. *Id.* at 27–30.