REPARATIONS 4.0: TRADING IN OLDER MODELS FOR A NEW VEHICLE

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Reparations reappeared in the news even before the murders of George Floyd, Breonna Taylor, Ahmaud Arbery, and others made headlines as modern-day lynchings. As data continue to show the perpetuation of social and economic harm and hardship that Black Americans suffer for being Black Americans, notions of fairness and justice suggest redress for slavery and its rippling harms should be possible. But is it? Generations of powerful Black Americans have spoken against the bitter realities of American law, from Frederick Douglass to Martin Luther King, Jr. to Ta-Nehisi Coates, yet the history of reparations and response by the courts show that moral wrongs do not create legal rights. This Note revisits reparations to examine past efforts and considers how reckoning with and atonement for the past might be successful today. Older models of reparations focused on monetary compensation, but race-conscious remedies are unlikely to survive the Supreme Court's scrutiny. Instead, reparations emphasizing rehabilitative benefits may be a more effective vehicle today.

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INTRODUCTION

Redressing grievances through the courts has roots in U.S. common law[1] and constitutional law,[2] from trivial matters to topics of fundamental justice and fairness.[3] According to Justice Cardozo, a person owed a duty to society "never to permit a legal right to be wantonly infringed" because enforcing one's rights "may often be a moral duty," even if the controversy was a hotel bill.[4] Yet moral wrongs might not infringe legal rights. Justice Oliver Wendell Holmes noted the "confusion" that resulted from assuming that legal rights (in the sense of the Constitution and the law) were those same rights from a moral sense.[5]

Slavery is a moral wrong, and those who have experienced the rippling harms from slavery have lacked legal rights in the courts. Slavery was a legal institution in the United States until the ratification of the Thirteenth Amendment in 1865, and enslaved people had no constitutional rights, as noted by Chief Justice Taney.[6] State-sanctioned segregation over the next 100 years followed the abolishment of slavery.[7] Civil rights legislation in the 1960s offered a brief respite

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1. *See* OLIVER WENDELL HOLMES, *Early Forms of Liability*, *in* THE COMMON LAW 3, 4–5 (1881). Early forms of legal procedure were grounded in vengeance, and compensation recovered in the appeal of a wrong was the alternative to vengeance. *Id.* Notions of actual intent formed liability for consequences of one's own acts, *id.* at 6, though "loss from accident must lie where it falls." *Torts: Trespass and Negligence*, *in* THE COMMON LAW, *supra*, at 71, 87.

2. U.S. CONST. amend. I; *see also* Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C.D. L. REV. 1741, 1777 (2017) (stating the deliberate language of the amendment implied the Framers' intent to open the judiciary to legal petitions from injured parties seeking individualized relief from the courts).

3. *Compare* Morningstar v. Lafayette Hotel Co., 211 N.Y. 465, 468 (1914) (concerning excessive charges at a hotel), *with* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (concerning public school segregation).

4. *Morningstar*, 211 N.Y. at 468.

5. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459–60 (1897), *reprinted in* 78 B.U. L. REV. 699, 701 (1998) (noting that many laws enforced in the past and enforced currently are likely condemned by the most enlightened opinion of the time or "pass the limit of interference as many consciences would draw it").

6. Dred Scott v. Sandford, 60 U.S. 393, 411 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV ("[T]here are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.").

7. *See* Plessy v. Ferguson, 163 U.S. 537, 544 (1896) ("The object of the [Thirteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality,

from overt racial discrimination, but race-conscious remedies have suffered in the Supreme Court.[8]

This Note returns to the long-standing problem of how to reckon with slavery and its lingering blight of racial discrimination. Reparations would seem to be a logical approach, given that the purpose of reparations is to remedy past harms by the government against large groups, but the bill to form a commission to study and develop reparation proposals has never reached the floor of the House.[9] Past approaches to reparations sought a path to monetary damages; this Note reviews shortcomings of these approaches and considers how reparations could become a vehicle for change given the limitations imposed on broad remedies.

Part I reviews the harms suffered; Part II examines successful reparations in the past to consider the legal boundaries; Part III reviews alternative legal approaches pursued outside reparations; Part IV considers constitutional limitations to race-conscious remedies; and Part V explores a positive future for reparations. Old sins cast long shadows, but perhaps one day we will emerge from the darkness.[10]

I. HARMS

Slavery directly, physically harmed Black Americans, none of whom were compensated for harms suffered. The ratification of the Thirteenth Amendment ended government-sanctioned slavery,[11] and the Fourteenth Amendment refused compensation to slave owners for emancipated enslaved people.[12] Neither

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or a commingling of the two races upon terms unsatisfactory to either."); *Brown*, 347 U.S. at 490–91 (stating the doctrine of "separate but equal" appeared in *Plessy v. Ferguson* and the courts have labored with the doctrine since 1896).

8. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 201 (1995) (holding that strict scrutiny applies to all racial classifications promulgated by the federal government, including "benign" classifications for remedial programs).

9. H.R. 40, 116th Cong. (2019). On June 19, 2019, the House Judiciary Subcommittee held a hearing on the legislation to study slavery reparations. Press Release, House Committee on the Judiciary, House Judiciary Subcommittee to Hold Hearing on H.R. 40, Legislation to Study Slavery Reparations (June 13, 2019), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2059. John Conyers, who first proposed the bill, had questioned why no one—not Democrats, not Republicans—was interested in the study of reparations when we study everything. TA-NEHISI COATES, WE WERE EIGHT YEARS IN POWER: AN AMERICAN TRAGEDY 179 (2017) [hereinafter COATES, EIGHT YEARS IN POWER] ("We study the water, the air. We can't even study the issue? This bill does not authorize one red cent to anyone." (quoting Nkechi Taifa of N'COBRA)).

10. Polls from the Pew Research Center indicate that recent protests of police brutality have spurred discussions about race and racial equality, with the majority of Americans supporting the Black Lives Matter movement. Kim Parker, Juliana Menasce Horowitz & Monica Anderson, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RES. CTR. (June 12, 2020), https://www.pewsocialtrends.org/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/.

11. U.S. CONST. amend. XIII, § 1.

12. U.S. CONST. amend. XIV, § 4.

amendment determined how former enslaved people directly harmed by slavery should be compensated.[13]

General Sherman issued Special Field Order No. 15 on January 16, 1865, to allocate coastal lands from Charleston, South Carolina, to St. John's River, Florida, for settlement by enslaved people freed during the course of the Civil War and by President Lincoln's Emancipation Proclamation.[14] Military authorities oversaw the partition of tillable ground into 40-acre homesteads and enforced possessory title.[15] General Sherman later authorized the army to loan mules to the freed families to work the land.[16] Within six months, over 40,000 people had settled on over 400,000 acres of land.[17]

This did not last. That same year, President Johnson's amnesty policy stripped the freed people of this property by restoring property rights to pardoned Confederates.[18] Furthermore, the North's desire for abundant, cheap cotton and a maximized return on investment for lands purchased after the Civil War undermined efforts for equitable land redistribution.[19]

The continuing harms to Black Americans under Jim Crow segregation that followed the post-Reconstructionist period were numerous and terrible.[20] Northern states did not adopt institutionalized segregation, but deeply-rooted racial prejudice imposed de facto segregation.[21] In both the North and South, residential segregation denied Black Americans access to schools, quality housing, and hospital services, and employment segregation constrained opportunities for the skill growth needed

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13. One theory is that constitutional compensation clauses appearing after the Articles of Confederation in 1777 showed an intellectual shift from republicanism to more Lockean or liberal ideas that were more protective of private property rights. Stephan Stohler, *Slavery and Just Compensation in American Constitutionalism*, 44 LAW & SOC. INQUIRY 102, 106–07 (2019).

14. Jeffrey R. Kerr-Ritchie, *Forty Acres, or, An Act of Bad Faith*, *in* REDRESS FOR HISTORICAL INJUSTICES IN THE UNITED STATES: ON REPARATIONS FOR SLAVERY, JIM CROW, AND THEIR LEGACIES 222, 223 (Michael T. Martin & Marilyn Yaquinto eds., 2007).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 227.

19. *Id.* at 231–32.

20. *See* William Darity Jr. & Dania Frank, *The Political Economy of Ending Racism and the World Conference Against Racism*, *in* REDRESS FOR HISTORICAL INJUSTICES IN THE UNITED STATES: ON REPARATIONS FOR SLAVERY, JIM CROW, AND THEIR LEGACIES, *supra* note 14, at 249, 250 [hereinafter Darity, *Economy of Ending Racism*]. There were at least 406 cases of Black landowners who had farms and timberland stolen from them for 24,000 acres in total, and there were 239 reported cases of "whitecapping" in Mississippi in which white night riders confiscated land from vulnerable black landholders. *Id.* Annihilation of prosperous Black communities occurred in Wilmington, North Carolina, in 1898, Tulsa, Oklahoma, in 1921, and Rosewood, Florida, in 1923. *Id.* at 250–51.

21. *See* ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 64 (2004). Visiting Quaker Pennsylvania, Alexis de Tocqueville noted that "no free man of colour dare present himself to vote at an election. Nominally enfranchised by the laws of the State, they are actually disenfranchised by the more powerful manners of the people." *Id.* at 33.

to increase income.[22] Even during the labor shortages of World Wars I and II, the best-paying jobs divided along racial lines: retail clerks and factory workers were white, while janitors and elevator operators were Black.[23]

Economic data collected by Edward Wolff, an economist at New York University, quantify the grim reality of inequity that continues despite civil rights legislation to reduce future harms from racial discrimination: median income ratios between Black and white Americans have stagnated near 55% since 1983, and median net wealth ratios have decreased from a peak of 12% in 1998 to just 2% in 2016.[24] In the late 1990s, mean stock holdings were $31,767 for Blacks and $162,789 for whites.[25] Home ownership among Black Americans was 46% compared with 70% among whites, largely because Black Americans were less likely to apply for and receive mortgage loans.[26] While some economists argue that wealth gaps could be remedied by removing income disparity alone,[27] Wolff argues inheritance also plays a role; surveys of consumer finances showed that 24% of white households received an inheritance in 1995 compared with 11% of Black

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22. Darity, *Economy of Ending Racism*, *supra* note 20, at 251. Professor Richard Epstein concluded the combination of Jim Crow laws, actual or threatened private violence, and laws that gave monopoly power to racially discriminatory private actors resulted in economic disparity for Black Americans. DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS 112 (2001).

23. BROOKS, *supra* note 21, at 44.

24. Edward N. Wolff, *The Decline of African-American and Hispanic Wealth Since the Great Recession*, NAT'L BUREAU OF ECON. RESEARCH 1, 39 tbl. 1 (Oct. 2018), https://www.nber.org/papers/w25198.pdf [hereinafter Wolff, *Wealth Decline*]. Wolff measures net wealth as the difference between total assets and total liabilities or debt. Edward N. Wolff, *Recent Trends in the Size Distribution of Household Wealth*, 12 J. ECON. PERSP. 131, 133 (1998) [hereinafter Wolff, *Wealth Trends*]. Total assets are the gross value of owner-occupied housing, other real estate owned by the household, cash and demand deposits, time and savings accounts, certificates of deposits, money-market accounts, bonds and other financial securities, cash surrender value of insurance and pension plans, corporate stocks and mutual funds, net equity in unincorporated businesses, and equity in trust funds. *Id.* Total liabilities are the sum of mortgage debt, consumer debt including auto loans, and other debt. *Id.*

25. William A. Darity, Jr. & Melba J. Nicholson, *Racial Wealth Inequality and the Black Family*, *in* AFRICAN AMERICAN FAMILY LIFE: ECOLOGICAL AND CULTURAL DIVERSITY 78, 79 (Vonnie C. McLoyd, Nancy E. Hill & Kenneth A. Dodge eds., 2005) [hereinafter Darity, *Racial Wealth Inequality*].

26. *Id.* at 79, 81. A 1991 Federal Reserve study of 6.4 million mortgage applications revealed that Black applicants were twice as likely to be rejected as white applicants. MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 19 (2d ed. 2006). In major metropolitan cities like Minneapolis, Boston, Philadelphia, and Chicago, these rejection rates rose to three times higher. *Id.* The poorest white applicant was more likely to get a mortgage loan approved than a black applicant from the highest income bracket. *Id.* at 20

27. *See The Colour of Wealth*, ECONOMIST, Apr. 6, 2019, at 24. It is not clear whether the research economists at the Federal Reserve Bank of Cleveland used the median income values cited in the article for their conclusions, but the 2017 figures—approximately $40,000 for Black households and $68,000 for white households—are similar to 2016 figures listed by Wolff in Table 1 ($35,000/$60,000). *Id.*; Wolff, *Wealth Decline*, *supra* note 24, at 39.

households, and the bequest amount was close to four times higher for white households than Black.[28]

This stark wealth gap is generational; the primary sources of personal wealth today are inter vivos transfers for life events like graduation, marriage, home purchase, child birth, and inheritance.[29] Ta-Nehisi Coates reminded members of Congress that "[w]e recognize our lineage as a generational trust, as inheritance, and the real dilemma posed by reparations is just that: a dilemma of inheritance."[30]

One example of this inheritance shortfall is the primary wealth source of most Americans: home equity.[31] An earlier article by Coates described the effects of redlining by the Federal Housing Administration ("FHA") on Black families migrating north.[32] "Redlining" neighborhoods in cities like Chicago refers to the FHA rating system for neighborhoods based on perceived stability: green areas were "in demand" neighborhoods that lacked foreigners or Black people, and red areas were neighborhoods with Black people and low ratings, usually considered ineligible for FHA backing.[33] Banks hesitated to make mortgage loans to working-class families unless the mortgages were insured, and the FHA would not insure mortgages to Black Americans.[34] Without access to a legitimate, government-backed credit system, Black families in Chicago and other cities across the country had few options beyond "contract mortgages" and other usury tactics deployed by unscrupulous lenders preying on the frustrated hopes of the migrating families.[35] Even after the Supreme Court held that racially restrictive housing covenants were unconstitutional in *Shelley v. Kraemer*,[36] the FHA continued to insure developments with racially restrictive covenants that called for violators to pay damages that could exceed home values themselves.[37]

Conservative financial estimates of redressing the harms of slavery reach into the hundreds of billions of dollars, with some estimates topping trillions. One method uses capital-theory tools and historical data on slave populations and prices to arrive at a labor-based "unpaid Black equity" figure for work performed during

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28. Wolff, *Wealth Trends*, *supra* note 24, at 142. The average bequest for white inheritors was $115,000 compared with $32,000 for Black inheritors. *Id.*

29. Darity, *Racial Wealth Inequality*, *supra* note 25, at 81.

30. Olivia Paschal & Madeleine Carlisle, *Read Ta-Nehisi Coates's Testimony on Reparations*, ATLANTIC, (June 19, 2019), https://www.theatlantic.com/politics/archive/2019/06/ta-nehisi-coates-testimony-house-reparations-hr-40/592042/ (providing the transcript of Ta-Nehisi Coates's testimony at a House hearing for H.R. 40, a bill that would establish a commission to study reparations); *see also* BROOKS, *supra* note 21, at 36 ("Thirty years after the cheating stopped [segregation] . . . , the racialized distribution of . . . power, wealth, and privilege continues to limit opportunities for black Americans.").

31. Darity, *Racial Wealth Inequality*, *supra* note 25, at 78.

32. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/ [hereinafter Coates, *Case for Reparations*].

33. *Id.*

34. RICHARD ROTHSTEIN, THE COLOR OF LAW 10 (2017).

35. Coates, *Case for Reparations*, *supra* note 32.

36. Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that judicial enforcement of restrictive agreements denied equal protection of the law).

37. ROTHSTEIN, *supra* note 34, at 90.

1790–1860 of between $448 and $995 billion, dependent on interest rates used.[38] Another method starts with General Sherman's Special Field Order No. 15 distribution of 40 acres per family at $10 per acre in 1865 and arrives at a present value of $2.6 trillion by multiplying $400 by four million former enslaved people and applying compounding interest and inflation.[39] Another calculation starts with 40 acres, but this method uses the current average price of that agricultural land to determine that the value of the farmland and buildings would amount to about $123,000 per allotment or $486 billion total for the four million enslaved people from the 1860 census.[40]

Reparations estimates rely on the value of the land promised to the freed enslaved people because the 40 acres represented both back payment for slavery and a promise of the federal government's commitment to land redistribution.[41] Land transactions are altogether different than other contracts because land lasts forever.[42] Rights to realty are created as perpetual interests via fee simple transfers that span generations.[43] The loss of this land was more than theft from freed enslaved people; it robbed future generations as well.[44]

II. REPARATIONS AS A MEANS TO REDRESS HARMS

Reparations from governments as a remedy for their injustice to large groups took form after World War II when the Federal Republic of Germany redressed harms to Jews for the Holocaust.[45] Redress of such atrocious government

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38. Robert S. Browne, *The Economic Basis for Reparations to Black America*, *in* REDRESS FOR HISTORICAL INJUSTICES IN THE UNITED STATES: ON REPARATIONS FOR SLAVERY, JIM CROW, AND THEIR LEGACIES 238, *supra* note 14, at 243.

39. 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.

40. *Id.*

41. *See* Robin D. G. Kelley, *"A Day of Reckoning": Dreams of Reparations*, *in* REDRESS FOR HISTORICAL INJUSTICES IN THE UNITED STATES: ON REPARATIONS FOR SLAVERY, JIM CROW, AND THEIR LEGACIES 207, *supra* note 14, at 207; Kerr-Ritchie, *supra* note 14, at 228.

42. Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1528 (2007).

43. *Id.*

44. Ironically, even if the former enslaved people had managed to acquire and maintain the homesteads following the Reconstruction period, discriminatory lending policies from the newly formed Department of Agriculture would have likely stripped them of their land in the decades that followed. *See* Pigford v. Glickman, 185 F.R.D. 82, 85, 87 (1999) (describing discriminatory practices by county commissioners for the Department of Agriculture that caused the rapid decline from 925,000 Black American farmers owning more than 16 million acres of land to 18,000 farmers owning less than 3 million acres of land).

45. BROOKS, *supra* note 21, at xv. The first chancellor, Konrad Adenauer, spoke for the Federal Republic of Germany and its people: "In our name, unspeakable crimes have been committed and demand compensation and restitution, both moral and material, for the persons and properties of the Jews who have been so seriously harmed." *See* Browne, *supra* note 38, at 240. The indemnification agreement between Germany and Israel was near $821 million, with certain commodities and services made available by Germany to Israel. *Id.*

actions against innocent people may be in the form of monetary payment or social programs, apology, or both.[46] A second example of such reparations occurred in the United States when Congress created the Indian Claims Commission in 1946, which had jurisdiction to hear and resolve claims resulting from unfair takings and other treaty breaches between the United States and Native nations and tribes.[47] A third example was the Civil Liberties Act of 1988, which recognized that interned Japanese Americans and relocated Aleuts had suffered damages from unjust action by the United States during World War II and allocated $20,000 and $12,000 per person respectively in compensation.[48] Finally, though it did not offer monetary compensation, a 2001 government study authorized by Congress demonstrated that Italian Americans suffered similar mistreatment as Japanese Americans under the Roosevelt Administration.[49]

As well as expressing regret, congressional action authorized legal remedies. The act creating the Indian Claims Commission provided recourse for:

> (1) claims in law or equity arising under the Constitution, laws and treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including tort; (3) contracts unenforceable through fraud, duress, unconscionable consideration, and mutual or unilateral mistake; and (4) claims arising from takings by the United States.[50]

The Act also removed the statute of limitations as a defense for the United States, though later legislation imposed a statute of limitations and curtailed causes of action.[51] The Civil Liberties Act acknowledged Aleuts had no remedy for the injustices they suffered, except through an act of Congress.[52] This acknowledgement highlights a key requirement for reparations against the United States: waiver of sovereign immunity.[53] Besides a waiver of sovereign immunity, there needs to be a

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46. BROOKS, *supra* note 21, at xiv. President Ford apologized to Japanese Americans and Aleuts, and President Reagan and Congress provided monetary and nonmonetary reparations for the forcible removal and internment of Japanese Americans and Aleuts during World War II. *Id.* at xiii. President Clinton apologized to Native Hawaiians one hundred years after the United States overthrew their sovereign nation. *Id.* at xii.

47. Browne, *supra* note 38, at 240–41 (referring to the Act of August 13, 1946, Ch. 959, H.R. 4497, Public Law).

48. Civil Liberties Act of 1988, 50 U.S.C. §§ 4211–4220 (2018).

49. BROOKS, *supra* note 21, at xiii.

50. Indian Claims Commission Act, ch. 959, 60 Stat. 1050 (1946), https://www.loc.gov/law/help/statutes-at-large/79th-congress/session-2/c79s2ch959.pdf.

51. *Id.* Later legislation barred claims existing before August 13, 1946 but not presented to the Commission within five years of the Act, moved claims from the Indian Claim Commission to the United States Court of Federal Claims, and removed causes of action for torts, unenforceable contracts, and takings. 25 U.S.C. § 70k (1976) (omitted from current Code because Commission terminated on Sept. 30, 1978); *see also* 28 U.S.C. § 1505 (2018) (amended 1992).

52. Civil Liberties Act of 1988, 50 U.S.C. §§ 4211–20 (2018).

53. Cato v. United States, 70 F.3d 1103, 1107 (9th Cir. 1995); *see also* F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994) (citing cases describing limits of sovereign immunity waivers).

cognizable cause of action and standing before a claim may be considered on the merits.[54] Furthermore, the claim must be within the statute of limitations.[55]

A. Requirements for Legally Enforceable Reparations Remedies

An act of Congress is required to sue the United States because the United States must explicitly and unequivocally waive its sovereign immunity, and the terms of a specific waiver define the bounds of a court's jurisdiction to hear claims.[56] For example, the Civil Rights Act waives sovereign immunity applied to individual federal officers, and the Federal Tort Claims Act ("FTCA") waives sovereign immunity for certain tort claims filed within the statute of limitations.[57] Or, as in the Civil Liberties Act of 1988, Congress may bypass the issue of liability versus immunity and simply specify remedial restitution for racial groups harmed by past government action.[58]

Even with a statutory waiver of immunity, a complaint filed against the United States for damages due to enslavement and subsequent discrimination may fail for lacking a cognizable cause of action or party standing to assert the claim.[59] In *Cato v. United States*, the Ninth Circuit Court of Appeals was sympathetic to the parties' desire for redress of past injustice; however, the court held the plaintiffs both lacked standing and failed to assert a cause of action because they could not sue the United States under the FTCA for alleged violations of the Thirteenth Amendment.[60] The court found that: (1) the plaintiffs had not alleged concrete, personal injuries beyond generalized, class-based grievances required for standing; and (2) the United States had not rendered itself liable under the FTCA for constitutional tort claims.[61]

The plaintiffs in *Cato* failed to meet the standing requirements from *Allen v. Wright* because the alleged harms of "forced, ancestral indoctrination into a foreign society; kidnapping of ancestors from Africa; forced labor; breakup of families; removal of traditional values; deprivations of freedom; and imposition of oppression, intimidation, miseducation and lack of information about various aspects of their indigenous character" were generalized class-based grievances

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54. *In re* African-American Slave Descendants Litig., 471 F.3d 754, 758 (7th Cir. 2006).

55. Alexander v. Oklahoma, 382 F.3d 1206, 1220 (10th Cir. 2004).

56. *Cato*, 70 F.3d at 1107; *see also Meyer*, 510 U.S. at 475 (citing cases describing limits of sovereign immunity waivers).

57. *See* 42 U.S.C. § 1981(a) (2018); 28 U.S.C. §§ 1346, 2674 (2018).

58. 50 U.S.C. § 4201 (2018).

59. *Cato*, 70 F.3d at 1105–06, 1111.

60. *Id.* at 1106, 1109, 1111. Judge Armstrong of the district court noted:

> Discrimination and bigotry of any type is intolerable, and the enslavement of Africans by this Country is inexcusable. This Court, however, is unable to identify any legally cognizable basis upon which plaintiff's claims may proceed against the United States. While plaintiff may be justified in seeking redress for past and present injustices, it is not within the jurisdiction of this Court to grant the requested relief. The legislature, rather than the judiciary, is the appropriate forum for plaintiff's grievances.

Id. at 1105.

61. *Id.* at 1109, 1111.

rather than concrete personal injuries fairly traceable to the government conduct.[62] Thus, the plaintiffs lacked standing to assert the claim in federal court.[63] Similarly, the Supreme Court held that plaintiffs who did not live in districts in which their personal votes were diluted and rendered ineffective by district gerrymandering—even racial gerrymandering—did not satisfy the particularized, personal injury required for Article III standing.[64]

Even if the *Cato* plaintiffs had satisfied the standing requirement, they still lacked a cognizable cause of action. In *F.D.I.C. v. Meyer*, the Supreme Court determined that a cause of action from a federal constitutional violation arose from federal rather than state law, and the FTCA treated the United States as "a private person" in accordance with state law for a tort claim.[65] Thus, tort claims from a deprivation of a federal constitutional right were not "cognizable" under 28 U.S.C. § 1346(b).[66] Moreover, the Eleventh Amendment bars a party from suing a state for monetary damages in a federal court for a federal law violation, unless Congress properly authorizes the action under its remedial powers of § 5 of the Fourteenth Amendment.[67]

These dual requirements of standing and a legally cognizable cause of action apply equally to claims against private parties in federal court.[68] Both requirements were lacking for plaintiffs attempting to sue private parties that provided services or otherwise profited from business with slave owners.[69] In *In re African-American Slave Descendants Litigation*, the plaintiffs sought disgorgement of profits that the defendants obtained in dealing with slave owners and asserted tort claims and federal civil rights violations under 42 U.S.C. § 1982.[70] The Seventh Circuit Court of Appeals described the federal claims as frivolous and concluded that the plaintiffs both lacked constitutional and prudential standing, and failed to state a claim upon which relief could be granted—plus, the statute of limitations for the remaining claims had passed.[71] By definition, a statute of limitations bars claims to prevent a wrong against an ancestor from being passed to a descendant; otherwise a statute of limitations would have little effect.[72]

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62. *Id.* at 1106, 1109; *see also* Allen v. Wright, 468 U.S. 737, 738 (1984) ("Such injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct, and respondents do not allege a stigmatic injury suffered as a direct result of having personally been denied equal treatment.").

63. *Id.* at 1109.

64. Gill v. Whitford, 138 S. Ct. 1916, 1930 (2018). To satisfy the three-part test for Article III standing, a plaintiff must: (1) suffer an injury in fact; (2) that is fairly traceable to the defendant's alleged conduct; and (3) that a favorable judicial decision is likely to redress. *Id.* at 1929.

65. F.D.I.C. v. Meyer, 510 U.S. 471, 477–78 (1994).

66. *Id.* at 478.

67. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 363–65 (2001).

68. *In re* African-American Slave Descendants Litig., 471 F.3d 754, 757–59 (7th Cir. 2006).

69. *Id.* at 759.

70. *Id.* at 757.

71. *Id.* at 757–58, 763.

72. *Id.* at 759.

Failure to redress the victims of the Tulsa Race Riot of 1921 illustrates the painful consequences of statutes of limitations.[73] On May 31, 1921, and the following day, a white mob armed with machine guns opened fire on Black American residents of Greenwood, Oklahoma, after Black residents had sought to protect a young man from being lynched.[74] Black residents fired back at the mob in an effort to defend their community.[75] The Governor called the Oklahoma National Guard to restore order, and the guardsmen joined the white mob to disarm Black residents and burn virtually every building within 42 square blocks, killing up to 300 people and leaving thousands homeless.[76] In 1997, the Oklahoma state legislature commissioned a study of the Riot and four years later issued a final report refuting that the Riot was caused by the residents of Greenwood.[77] Instead, the escalation of the conflict and burning of the town was initiated by agents of the government.[78] In February 2003, Riot survivors and descendants of survivors filed suit against city and state actors for monetary damages and injunctive and declaratory relief on civil rights claims under 28 U.S.C. §§ 1981, 1983, and 1985; constitutional violations of the Fourteenth Amendment and equal protection; and state law claims of negligence and promissory estoppel.[79] These claims were time-barred under both an accrual analysis and equitable tolling principles.[80] The plaintiffs argued that they could not access courts to redress the wrongs of the Riot because the facts only came to light in 2001, the year the report was released.[81] The court found that the plaintiffs were aware of the facts through lawsuits and publications that followed the Riot and, while the courts denied any meaningful access to the plaintiffs for recovery of property damage during the several decades after the Riot,[82] the plaintiffs could have brought the claims in the 1960s or in the time that followed.[83] Though equitable tolling applied during the time period when the plaintiffs lacked access to the courts, the statute of limitations began to run when the plaintiffs knew or had reason to know of the existence and cause of the injury.[84]

Despite the remedial nature of reparations, courts do not construe reparations statutes broadly. For example, citizens of non-Japanese ancestry could not assert claims for restitution under the Civil Liberties Act because the plaintiffs

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73. Alexander v. Oklahoma, 382 F.3d 1206, 1220 (10th Cir. 2004) ("The Tulsa Race Riot represents a tragic chapter in our collective history. While we have found no legal avenue exists through which Plaintiffs can bring their claims, we take no great comfort in that conclusion. As the Supreme Court has recognized, '[i]t goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable.'").

74. *Id.* at 1211–12.

75. *Id.* at 1212.

76. *Id.* at 1211–12.

77. *Id.* at 1212.

78. *Id.*

79. *Id.*

80. *Id.* at 1211.

81. *Id.* at 1212.

82. *Id.* at 1219.

83. *Id.* at 1213.

84. *Id.* at 1215, 1219.

did not fit within "any category of individuals explicitly afforded relief under the Act."[85] Likewise, although a German American had Article III standing because he was interned by the U.S. government like the children of Japanese Americans, the court rejected his claim for reparations under the Civil Liberties Act on the merits.[86] Congress's decision to compensate Japanese but not German Americans survived the "most exacting equal protection review."[87] Because a plaintiff was not of Japanese ancestry, the denial of compensation was appropriate because the plaintiff was ineligible under the statute.[88] The racial classification of the Act complied with constitutional equal protection because it was an example of a "remedial" race-conscious measure aimed at specific governmental actions as opposed to discrimination in general.[89] In fact, the Office of Redress Administration properly denied payments if injuries were not related to any evacuation, internment, or relocation program specified by the Act.[90]

In the late 1990s, plaintiffs also attempted to circumvent obstacles in federal court by recovering reparations through tax refunds.[91] This tactic was short-lived and reversed.[92]

Remedying vestiges of slavery is possible under federal law when Congress provides express statutory authority for such remedies and parties' claims fit within the statutory guidelines. Though not explicitly reparations for slavery, U.S. Department of Agriculture ("USDA") regulations did establish a process to investigate civil rights complaints.[93] Consequently, Black American farmers experiencing racially discriminatory lending practices from USDA programs successfully sued for damages under the Fifth Amendment, the Administrative Procedure Act, Title VI of the Civil Rights Act of 1964, and the Equal Credit Opportunity Act[94] when the system was dysfunctional for over a decade as complaints were thrown in the trash or ignored.[95] The D.C. Circuit affirmed the consent decree from the settlement that provided for either $50,000 cash payment

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85. Obadele v. United States, 52 Fed. Cl. 432, 434 (2002).

86. Jacobs v. Barr, 959 F.2d 313, 314 (D.C. Cir. 1992).

87. *Id.*

88. *Obadele*, 52 Fed. Cl. at 435. Although the plaintiffs were ineligible under the Civil Liberties Act, the court acknowledged their primary grievance: Congress's failure to enact similar legislation for African Americans. *Id.* at 436.

89. *Id.* at 443.

90. *Id.*

91. Wilkins v. Comm'r, 120 T.C. 109, 110 (2003); *see also* Taylor v. United States, 57 Fed. Cl. 264, 264–65 (2003). James and Katherine Wilkins claimed an $80,000 refund on their 1998 federal income tax return for "black taxes" or so-called slavery reparations. *Wilkins*, 120 T.C. at 110. They used Forms 2439 to identify a tax paid on their behalf in the amount of $80,000. *Id.* They entered the amount on Form 1040 and received a total tax refund of $81,312. *Id.* In 2000, the Wilkinses received a letter from the IRS stating that there is no provision for a refundable tax credit for the payment of slavery reparations. *Id.*

92. *Id.* at 113. Although the Wilkinses argued for equitable estoppel, they failed to meet the elements. *Id.*

93. Pigford v. Glickman, 185 F.R.D. 82, 88 (D.D.C. 1999).

94. Pigford v. Glickman, 206 F.3d 1212, 1215 (D.C. Cir. 2000).

95. *Pigford*, 185 F.R.D. at 88.

and loan forgiveness or one-day trials on a case-by-case basis with uncapped recovery.[96] The total award was estimated to be $2 billion in debt relief and payments.[97] This case does not concern reparations, but it does show conditions under which a party may successfully recover damages against the U.S. government.

III. OTHER VEHICLES OUTSIDE STATUTORY PRESCRIPTIONS FOR REPARATIONS

Congress enacted the Civil Rights Acts of 1964 and 1968 to prevent future loss of fair access to public places, housing, employment, and education from segregation and racial discrimination.[98] Congress has yet to pass legislation compensating victims for violence to Black communities,[99] lynchings,[100] and discriminatory housing practices from the New Deal through the Civil Rights era.[101] In the absence of constitutional and statutory authority, victims of harms have sought remedies through other legal vehicles. For various reasons, these vehicles failed to result in reparations.

A. A Stalled Vehicle: Common Law Torts

Tort law is an appealing choice to remedy harms because of its ability to apportion moral culpability.[102] Yet problems of identity, attenuation, and statutes of limitations cause tort claims to stall as a vehicle for reparations.

Litigation is the "primary tool to ensure people pay damages to those they harm,"[103] yet as noted in Part II, claims can fail for a lack of standing. The problem of standing is overcome by filing a common-law tort claim in state court or, as an

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96. *Pigford*, 206 F.3d at 1215.

97. *Id.* at 1212.

98. 42 U.S.C. § 2000a (2018); 42 U.S.C. § 3601 (2018) (policy of United States to provide fair housing).

99. *See* Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 96 (2004) [hereinafter Brophy, *Tort Law Analogy*] (noting that state legislation may provide relief, such as an Illinois statute providing a cause of action for compensation from mob violence, although a federal statute for recovery from race-motivated riots was lacking).

100. Despite nearly unanimous passage in the House, Senator Rand Paul blocked approval of the latest attempt to make lynching a federal crime. Jacey Fortin, *Congress Moves to Make Lynching a Federal Crime After 120 Years of Failure*, N.Y. TIMES (Feb. 28, 2020), https://www.nytimes.com/2020/02/26/us/politics/anti-lynching-bill.html; Allison Pecorin, *Emotional Senate Debate as Rand Paul Blocks Bill to Make Lynching a Federal Crime*, ABC NEWS (June 4, 2020), https://abcnews.go.com/Politics/lynching-federal-crime-us-sen-rand-paul-stands/story?id=71056869.

101. ROTHSTEIN, *supra* note 34, at 19–20. New Deal housing construction projects and public works both followed existing segregation in communities and established segregated communities. *Id.* "[T]he federal government [had] in effect been planting the seeds of Jim Crow practices throughout the region [California] under the guise of 'respecting local attitudes.'" *Id.* at 37.

102. Brophy, *Tort Law Analogy*, *supra* note 99, at 86.

103. Kaimipono David Wenger, *"Too Big to Remedy?" Rethinking Mass Restitution for Slavery and Jim Crow*, 44 LOY. L.A. L. REV. 177, 193 (2010) [hereinafter Wenger, *Too Big to Remedy*].

alternative, filing a tort complaint in federal court under the Federal Tort Claims Act for injuries arising after January 1, 1945.[104]

Unfortunately, three generations of reparations scholarship have failed to frame harms to Black Americans as a recoverable tort.[105] Tort lawsuits by a group of descendants against a group of beneficiaries for generational harms are difficult,[106] and tort claims for racial discrimination suffer from a lack of causality, specific damages, and timeliness.[107] Supreme Court cases from the 1980s and 1990s established that there could be no remedy without a close connection between the individualized harm and the relief sought; generalized societal racial discrimination was not enough.[108]

One explanation for this close connection between victim and wrongdoer is a strong tradition in the United States for ethical individualism in which individuals are not blameworthy for acts out of their control.[109] Just compensation requires an "identity" relationship in which the wrongdoer is the "payer" and the victim is the "claimant," though a claimant can sell a valid tort claim to a buyer and this buyer maintains rights in the claimant group.[110] Unfortunately, positive law never recognized initial claims for slavery so there is no mechanism to "pass down" rights and obligations for victims and wrongdoers.[111] Yet this narrow view ignores a long national history of federal, state, and local governments compensating groups for past harms outside of the strict "wrongdoer–victim" relationship.[112] Legal

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104. *See* 28 U.S.C. § 1346 (2018).

105. Brophy, *Tort Law Analogy*, *supra* note 99, at 84. The first generation in the 1980s introduced the idea of reparations, though it lacked a legal framework. *Id.* The passage of the Civil Liberties Act of 1988 demonstrated the possibility of racial healing through reparations for the second generation, but no reparations were awarded for clear harms, as shown in *Alexander v. Oklahoma*, 382 F.3d 1206, 1220 (10th Cir. 2004), for the Tulsa Race Riot. *Id.* Opponents of the third generation of reparations began to take arguments more seriously; arguments shifted to shortcomings in the statute of limitations, plaintiff class members, identification of defendants, and policy issues. *Id.*

106. Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 502–03 (2003) [hereinafter Brophy, *Conceptual Problems in Reparations*]. "Individual lawsuits are simply not well-suited to deal with claims by a group against descendants of a group of beneficiaries." *Id.* at 517.

107. *See* Ori Herstein, *Historic Injustice, Group Membership and Harm to Individuals: Defending Claims for Historic Justice from the Non-Identity Problem*, 25 HARV. BLACKLETTER L. J. 229, 231–33 (2009).

108. Brophy, *Tort Law Analogy*, *supra* note 99, at 87–88.

109. Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 699 (2003); *see also* HOLMES, *Torts: Trespass and Negligence*, *in* THE COMMON LAW 77, *supra* note 1, 94 ("The general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune.").

110. Posner & Vermeule, *supra* note 109, at 699.

111. *Id.*

112. *See* Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 820–22 (2006) [hereinafter Brophy, *Reconsidering Reparations*]. Table 2 lists reparations beginning in 1725 with payments to families of women falsely convicted of witchcraft and continuing through 1999 with payments to Black farmers for racially discriminatory denial of credit. *Id.*

liberalism cannot escape its roots in claims of individuals against other individuals, so it may be unable to address the scope of racial inequality.[113]

Similarly, although tort claims often quantify complex, intangible qualities like loss of life and pain and suffering,[114] determining the value of group harms is arguably problematic. The problem is one of speculation as to what outcomes would have been possible but for systemic barriers imposed by societal discrimination.[115] Yet even speculative concerns are appropriate for determining a rightful measure of compensation that considers how things would have gone for the plaintiff if not for the defendant's actions.[116]

The most difficult hurdle to overcome for reparation tort claims, though, is timeliness.[117] A lawsuit that satisfied all other elements of a tort claim for state-sponsored destruction of a Black community still failed because the statute of limitations had run.[118] After the 1921 Tulsa Race Riot destroyed 42 square blocks, victims filed over 100 lawsuits seeking redress for property and other losses but not a single one recovered any damages.[119] When surviving victims and descendants of victims attempted to recover damages after Oklahoma government entities acknowledged state action contributed to the harm, the court found that the extraordinary circumstances after the Riot that prevented recovery had dissipated by the 1960s and that the plaintiffs could have brought their claims at that time.[120]

Encouraging timely filing of lawsuits serves two purposes: first, evidence relating to the cause of action is fresh for more accurate trials; and second, parties bring closure to past disputes earlier "so that everyone can get on with the business of life."[121] Unfortunately, for victims of the Riot, evidence of the role state actors played in the Riot did not exist until many years after the statute of limitations for the tort claims had run.[122]

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113. *See* Brophy, *Tort Law Analogy*, *supra* note 99, at 116.

114. Posner, *supra* note 109, at 700.

115. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989) ("It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities.").

116. *See* Leo Katz, *What to Compensate? Some Surprisingly Unappreciated Reasons Why the Problem Is So Hard*, 40 SAN DIEGO L. REV. 1345, 1345–46 (2003).

117. *See* Richard A. Epstein, *The Case Against Black Reparations*, 84 B.U. L. REV. 1177, 1184 (2004). The statute of limitations for individual causes of action arising from slavery could be tolled while a slave was a nonperson and unable to bring suit. *Id.* However, Jim Crow segregation does not toll the statute of limitations because victims had the possibility of bringing suit, even if the climate of the court made such a suit impossible to win. *Id.*

118. Alexander v. Oklahoma, 382 F.3d 1206, 1220 (10th Cir. 2004) ("[S]tatutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims." (quoting United States v. Kubrick, 444 U.S. 111, 125 (1979)).

119. *Id.* at 1212, 1218.

120. *Id.* at 1213.

121. Epstein, *supra* note 117, at 1183.

122. *Alexander*, 382 F.3d at 1212.

Victims of German slave labor encountered a similar time-barred dismissal from the statute of limitations.[123] A plaintiff brought lawsuits against Ford Werke, A.G., a German motor manufacturer active during the Nazi regime, and its parent organization, Ford Motor Company, for forcing her and thousands of other persons like her to work in factories under inhumane conditions during World War II without compensation.[124] The Alien Torts Claim Act, 28 U.S.C. § 1350, granted the district court subject-matter jurisdiction over her claim under customary international law because the plaintiff was an alien suing for a tort committed in violation of international law.[125] Although Congress did not specify a statute of limitations in the Alien Torts Claim Act, the court determined that the statute of limitations for submitting a claim had passed given the terms of the treaties and reparations agreements between nations following the end of the war.[126]

Aside from the difficulties that arise within tort law, social norms outside the courtroom may influence decisions about reparations as remedies. Over 90% of white Americans are opposed to reparations to Black Americans, though most support remedial programs like affirmative action.[127] Here again, liberal democratic emphasis on individualism and self-reliance creates a political culture that resists social aid programs like welfare, tolerates greater disparities of wealth, and reveres private property above all.[128] Thus, slavery reparations are unwelcome because they

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123. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 469 (D.N.J. 1999).

124. *Id.* at 431.

125. *Id.* at 438–39.

126. *See id.* at 462–63. The Paris Reparations Treaty contemplated that nonrepatriable victims of German action could bring claims in the future, but the plaintiff never alleged that she was a nonrepatriable victim under the terms of the Treaty. *Id.* at 450–51. Because the Treaty did not allow for individual claims against the German government and agencies outside nonrepatriable victims, the Treaty precluded her individual claim. *Id.* at 456–57, 460. Even if the later London Debt Agreement recognized her claim, individual claims could only be pursued through government negotiations. *Id.* at 465. Last, "neither the Paris Reparations Treaty nor the London Debt Agreement prevented [the plaintiff] from bringing forced-labor claims against Ford, a U.S. corporation, under the [Alien Tort Claims Act], a U.S. statute," once German courts had set the effective date for all forced-labor claims during World War II. *Id.* at 467.

127. Lee A. Harris, *Reparations as a Dirty Word: The Norm Against Slavery Reparations*, 33 U. MEMPHIS L. REV. 409, 410 n.9 (2003).

128. *Id.* at 416–18 ("[In] no other country in the world is the love of property keener or more alert than in the United States, and nowhere else does the majority display less inclination toward doctrines which in any way threaten the way property is owned." (quoting Alexis de Tocqueville)). Classic American literature decries the influence of society and extolls the virtues of rugged individualism and self-reliance. *See, e.g.*, RALPH WALDO EMERSON, *Self-Reliance, in* ESSAYS OF RALPH WALDO EMERSON, 15, 18 (1841) ("[Y]our miscellaneous popular charities; the education at college of fools; the building of meeting-houses to the vain end to which many now stand; alms to sots, and the thousand-fold Relief Societies; though I confess with shame I sometimes succumb and give the dollar, it is a wicked dollar, which by and by I shall have the manhood to withhold."); HENRY DAVID THOREAU, *Walden, in* WALDEN & OTHER WRITINGS 3 (1937) (espousing the benefits of living in solitude through the work of one's own hands). Furthermore, selfishness and lack of empathy were seen as great virtues. *See, e.g.*, AYN RAND, THE FOUNTAINHEAD 636 (1943) (describing how

contradict the egalitarian belief that equal opportunity exists for all through hard work and self-reliance when in fact equal opportunity has never existed for Black Americans.[129]

These social norms matter because reparations will not succeed without public support. Using tort litigation as a first-line strategy for slave redress narrows the discussion from reckoning with a long-time harm to monetary arguments for specific actors that are often driven by short-term interests that sacrifice efforts towards genuine redress and reconciliation.[130] Framing reparations as a tort limits recovery to monetary compensation and likely fails to develop a more complete, coherent historical record on slavery and its impact on contemporary society.[131]

B. A Stuck Vehicle: Uncompensated "Taking" Under the U.S. Constitution

Few legal theories invoke the Takings Clause of the Fifth Amendment[132] as a cause of action for reparations because slavery was legal, and the only application was to compensate slave-owners for the loss of enslaved people.[133] But unlike a personal injury in torts, a government "taking" concerns property rights,[134] which are highly regarded[135] yet weakly protected against government action.[136] The

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altruism and living for others destroys men's souls); AYN RAND, ATLAS SHRUGGED 939 (1957) (positing that love without moral judgment will "bring your soul to the state of the dump heap that welcomes anything on equal terms").

129. Harris, *supra* note 127, at 420–21.

130. BROOKS, *supra* note 21, at 138–39.

131. *Id.* at 139.

132. U.S. CONST. amend. V.

133. *See* Stephan Stohler, *Slavery and Just Compensation in American Constitutionalism*, 44 L. & SOC. INQUIRY 102, 103 (2019).

134. Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 195 (2003) [hereinafter Wenger, *Slavery as Takings Violation*].

135. *See* Roger Pilon, *Property Rights and the Constitution*, *in* CATO HANDBOOK FOR POLICY MAKERS, https://www.cato.org/cato-handbook-policymakers/cato-handbook-policy-makers-8th-edition-2017/property-rights-constitution ("Property is the foundation of every right we have, including the right to be free. Every right claim, after all, is a claim to some thing — either a defensive claim to keep what one is holding or an offensive claim to something someone else is holding. John Locke, the philosophical father of the American Revolution and the inspiration for Thomas Jefferson when he drafted the Declaration of Independence, stated the issue simply: 'Lives, Liberties, and Estates, which I call by the general Name, Property.'"); Christina Sandefur, *The Property Ownership Fairness Act: Protecting Private Property Rights*, GOLDWATER INST. (Feb. 9, 2016), https://goldwaterinstitute.org/article/the-property-ownership-fairness-act-protecting-private-property-rights/ (noting that the right of property ownership is one of the most essential human rights).

136. Ilya Somin, *America's Weak Property Rights Are Harming Those Most in Need*, ATLANTIC (Mar. 24, 2020), https://www.theatlantic.com/ideas/archive/2020/03/weak-property-rights/608476/ (stating that courts often allow governments to violate property rights with little or no judicial scrutiny, such as when law enforcement seizes assets from those not charged with a crime, onerous zoning laws block housing construction, or private property is transferred to private developers, displacing thousands of poor residents). Both the Cato Institute article and Goldwater Institute article cite *Kelo v. New London* as evidence of disregard for private property rights in government regulatory takings. Pilon, *supra* note 135; Sandefur, *supra* note 135.

courts' narrow application of the clause all but guarantees that reparations as a Takings Clause violation fails because self-ownership rights of life and liberty[137] are not "property" within the meaning of the amendment.[138] In short, "justice and fairness" require payment for economic injuries caused by public action.[139]

In modern times, the Court has interpreted the Fifth Amendment Takings Clause as a means to prevent a smaller subset of the population from bearing burdens that, "in all fairness and justice, should be borne by the public as a whole."[140] Slavery burdened a subset of the population to transform the southern states into a dominant force in the cotton market (which was one of the world's largest traded commodities markets),[141] create some of the first and longest railroads in the nation,[142] and fund the federal government via taxes,[143] but enslaved people received nothing but cruelty.[144] Slavery was abolished and land was distributed or promised to the freed people, but the distributed land was then taken without compensation.[145]

Recently, the Supreme Court held that a constitutional violation occurred at the time of the taking, regardless of whether a later payment remedied the violation.[146] Chief Justice Roberts likened the situation of delayed payment for a taking without compensation to a bank robber who returns the "loot"—the robber might give it back, but "he still robbed the bank."[147] Likewise, someone whose property had been taken by a local government had a claim in federal court under §1983 for the constitutional violation, regardless of state court action.[148]

Despite this remedial language, courts are unlikely to consider this land theft as a government taking. Property seized pursuant to criminal laws or subjected to in rem forfeiture proceedings are not "takings" for which the owner is entitled to

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137. Wenger, *Slavery as Takings Violation*, *supra* note 134, at 199. The Framers were influenced by John Locke, who espoused that every man has a property interest in his own person and a man's property includes his "Life, Liberty, and Estate." *Id.* The primary purpose of the government was to protect this fundamental interest in property. *Id.* at 200. A slave may be in possession of his body, but the government had taken all other "sticks" from his bundle. *Id.* at 218.

138. Hohri v. United States, 586 F. Supp. 769, 783 (D.D.C. 1984) ("The Supreme Court has defined property for taking purposes as 'the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it.'" (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945)).

139. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978).

140. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also Penn Cent. Transp. Co.*, 438 U.S. at 124 (noting that economic injuries caused by public action and for public benefit should be compensated by the government rather than "remain disproportionally concentrated on a few persons").

141. EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM at xxiii (2016).

142. *Slavery and Southern Railroads*, RAILROADS AND THE MAKING OF MODERN AMERICA, http://railroads.unl.edu/topics/slavery.php (last visited Jan. 19, 2020).

143. Wenger, *Slavery as Takings Violation*, *supra* note 134, at 239.

144. *See* BAPTIST, *supra* note 141, at xxi.

145. *See supra* Part I.

146. Knick v. Twp. of Scott, 139 S. Ct. 2162, 2172 (2019).

147. *Id.*

148. *Id.*

compensation because government seizures under its police power are not for "public use" within the meaning of the Fifth Amendment.[149] Granted, use of police power outside these channels requires an imminent peril, such as an advancing fire, for which action might result in saving the lives and property of many.[150] Absent imminent peril, government action to confiscate cameras, videos, vehicles, bank account assets, crops, and business property from interned Japanese Americans during World War II was improper as a government "taking" of property.[151]

Government police power supported slavery. Slavery has its origin in a legitimate use of force, even as "every man has a natural right to the fruits of his own labour."[152] At the time, nations recognized that war conferred the right of the "victor" to enslave the "vanquished."[153] This practice had continued since antiquity, and therefore it could not be repugnant to natural law.[154] It may have been that "by the law of nature all men are free,"[155] but Black people, enslaved or free, were treated as though excluded from this natural law due to presumed inferiority.

> [T]hey were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.[156]

Enslaved people were not people with rights; they were property for which their owners had rights to exclude.[157] Therefore, it is not surprising that before the Civil War, compensation clauses in the U.S. and state constitutions were more likely devised and used to compensate slave owners for loss of enslaved people—a loss of property—than formerly enslaved people for loss of freedom.[158]

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149. Acadia Tech. Inc. v. United States, 458 F.3d 1327, 1331–32 (Fed. Cir. 2006).

150. Hohri v. United States, 586 F. Supp. 769, 784 (D.D.C. 1984).

151. *Id.* at 783–84. Unfortunately, a failure to file a claim within the statute of limitations required dismissal of the takings claim. *Id.* at 786.

152. The Antelope, 23 U.S. 66, 120–21 (1825).

153. *Id.* at 120.

154. *Id.* at 120–21.

155. *Id.* at 73.

156. Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

157. Wenger, *Slavery as Takings Violation*, *supra* note 134, at 212 (distinguishing in personam rights under peonage or indentured servitude from in rem rights implied by slavery, which were enforceable against anyone, not just the parties in a servitude agreement).

158. Stohler, *supra* note 133, at 103. When proslavery delegates held firm control of the legislature, compensation clauses were discouraged because these clauses implied that regulation or facilitated takings were allowed, contrary to the desires of slaveholders; however, when proslavery delegates did not hold firm control of a legislature, compensation clauses for at least fair market value, often reaching prohibitive value, were adopted to protect the interests of slaveholders. *Id.* These considerations drove the adoption of compensation clauses as much or more than debates about internal improvements. *See* Lea S. Vandervelde, *Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 444 (1989) (noting that "some members of Congress argued . . . that freeing slaves from their masters would violate

Following emancipation, there was no compensation for former enslaved people, though not from a lack of effort.[159] Had the federal government committed to the promise of granting former enslaved people real property rights,[160] former enslaved people and their descendants might have been positioned differently for later government action; for example, abrogation of these rights would have been unconstitutional, and a regulatory scheme to deprive property interests for a public use such as consolidation of title would have been a government "taking" that required compensation.[161] Unfortunately, even if compensation had been made in the form of land entitlements, these would have likely been stripped without reference to any government "takings."[162]

C. A Broken Vehicle: Unjust Enrichment and Restitution in Equity

Although unjust enrichment and restitution are not burdened by statutes of limitations, courts still require unattenuated links between parties and acts. Also, the sheer magnitude and reach of a claim in equity may overwhelm the courts' willingness or ability to find a remedy. The vehicle is willing but breaks through strain.

The statute of limitations is an affirmative defense for common law tort claims asserted in a court of law, but it is not a defense for a claim in equity.[163] A party that takes intangible property like labor but does not pay for it is said to be "unjustly enriched," and the party providing the labor technically asserts a damages claim in a court of law as a quasi-contract or quantum meruit claim.[164] The tactical decision to assert equity claims of unjust enrichment in both Holocaust litigation and reparations evades defenses like the statute of limitations and assumption of risk, but care must be taken because often state law will apply a contract statute of

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the Constitution's [T]akings [C]lause"). In the pre-war era, lawmakers and abolitionists understood that enslaved people as property could not be taken from slaveholders without compensation, however immoral the institution of slavery. Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 28 (2000).

159. Wenger, *Slavery as Takings Violation*, *supra* note 134, at 193 n. 4 (listing numerous actions taken).

160. *Id.* at 241–42.

161. Hodel v. Irving, 481 U.S. 704, 716 (1987) ("[T]he regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs. In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times."). The Court acknowledged that the government had a legitimate interest in consolidating extreme fractionation of certain lands to promote use, *id.* at 712, but the government could not abrogate both descent and devise of property interests, *id.* at 716, even if such interest was 2% or less. *Id.* at 704.

162. For example, General Sherman issued Special Field Order 15 that designated land along the South Carolina coast to be distributed among freed people, and approximately 40,000 freed people settled on this seized land. Kelley, *supra* note 41, at 207. Congress passed a bill creating the Freedmen's Bureau, which President Johnson promptly vetoed. *Id.* Nearly all of the land provided to freed people was returned to Confederate plantation owners. *Id.*

163. Anthony J. Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y.U. ANN. SURV. AM. L. 651, 652–53 (2003).

164. *Id.* at 654–55.

limitations for damages of the quasi-contract or quantum meruit claim asserted in courts.[165]

Litigation in American courts generated over $8 billion in settlements for distribution to Holocaust victims.[166] The four primary claims in lawsuits filed by Holocaust survivors and descendants featured exploitative behavior by private entities acting in concert with government policy: (1) Swiss banks had never returned deposits by Holocaust victims for large sums on the eve of the Holocaust; (2) Austrian and German banks had knowingly profited from Nazi programs which forced non-Nazi business and property owners to sell at a fraction of market value; (3) German and Italian insurance companies had failed to honor life and property insurance policies issued to Holocaust victims; and (4) German industry had profited from use of slave labor.[167] The common thread throughout the claims was that nongovernmental entities were unjustly enriched by taking advantage of actions and policies by Nazi Germany and shifted victims' assets to their own capital accounts.[168] The plaintiffs sought recovery of the value of the misappropriated assets as restitution, though technically only the second and fourth claims were for unjust enrichment; the first claim was a classic bailment/constructive trust, and the third was a contracts claim.[169]

Unfortunately, the success of the Holocaust litigation is unlikely to translate to reparations because Holocaust victims are either direct survivors or first-generation descendants asserting specific losses not blurred by generations, and the litigation was as much about politics as about law.[170] Additionally, the United States did not outlaw the slave trade until 1808 nor slavery itself until 1863, so the wealth transfer from enslaved people to slave owners was not unlawful domestically nor internationally.[171] Nevertheless, following the Holocaust litigation, American descendants of enslaved people sued U.S. insurance companies that profited from doing business with slave owners, but predictably the court found a "fatal disconnect between the victims and the plaintiffs."[172] The statute of limitations prevented a wrong to the ancestor from passing as a legal claim to the descendants.[173]

The time to apply equitable distribution was the period following the end of slavery, and the failure of Reconstruction left a legacy of loss with no adequate measures for former enslaved people to gain freedom for economic opportunity.[174] Decades of Jim Crow segregation resulted in voter suppression, slave-like convict-

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165. *Id.* at 651–55.

166. Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615, 615 (2003).

167. *Id.* at 617.

168. *Id.*

169. *Id.* at 618.

170. *Id.* at 619, 621. There was a powerful legal theory, but fear of political sanctions drove the result. *Id.* at 619 ("Law provided the roadmap for the proceedings, but did not necessarily provide the fuel.").

171. *See id.* at 620.

172. *In re* African-American Slave Descendants Litig., 471 F.3d 754, 759 (7th Cir. 2006).

173. *See id.*

174. Brophy, *Conceptual Problems in Reparations*, *supra* note 106, at 498.

labor practices, cultural theft, educational inequity, lynchings, and other violations.[175] The sheer magnitude of harms resulting from this legacy makes meaningful reparations unlikely.[176]

D. Stuck in First Gear: Broad Remedies in General

There are some harms that may be described as too big to remedy, or stated another way, courts have consciously limited the legal consequences of wrongs to a controllable degree in the interest of public policy.[177] Absent contractual privity, courts fix the "orbit of duty," guided by principles of proximate cause, to limit liability consistent with direct causal links between harms and remedies.[178] A danger of this approach is that the more persons who suffer an injury through gross negligence, the less responsibility is imposed upon the party or parties causing the harms.[179] Courts avoid subjecting actors to limitless liability because of high economic cost, so courts are cautious in imposing a duty of care on actors to an indeterminate class of persons.[180] Other societal costs, such as a victim's lack of recourse, are less compelling to courts, even when confronted with clear, violent, preventable injury.[181]

The question of whether a legal remedy is possible is one of discretion, not power. Courts have the power to remedy wide-scale, rippling harms when they so choose.[182] Vietnam veterans exposed to Agent Orange wanted a jury "once-and-for-

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175. Wenger, *Too Big to Remedy*, *supra* note 103, at 181.

176. Brophy, *Conceptual Problems in Reparations*, *supra* note 106, at 500.

177. Wenger, *Too Big to Remedy*, *supra* note 103, at 208–09; *see also, e.g.*, Strauss v. Belle Realty Co., 482 N.E.2d 34, 36, 38 (N.Y. 1985) (finding that an "orbit of duty based on public policy" did not extend to a plaintiff injured during a power outage caused by a power company's negligence).

178. *Strauss*, 482 N.E.2d at 36. The power company's gross negligence caused several million residents in New York City to be without power for 25 hours, and one resident who fell down darkened stairs while trying to get water during this period sued the power company for negligence. *Id.* at 35. The court limited the scope of the power company's liability by determining the company owed no duty for the type of harm suffered by the apartment tenant. *Id.* at 38.

179. *Id.* at 40 (Meyer, J., dissenting).

180. *See* Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1060–61 (N.Y. 2001).

181. Waters v. N.Y.C. Hous. Auth., 505 N.E.2d 922, 923–25 (N.Y. 1987). The owner of an urban building with defective locks, a broken security system, and a history of crime was not liable on a negligence claim because he owed no duty to a 16-year-old girl who was accosted at knifepoint, taken to the roof, and sexually assaulted. *Id.* Why? The girl was not his tenant. *Id.*

182. *In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 746–47 (E.D.N.Y. 1984). The court noted that no single litigation could resolve all the plaintiffs' burdens, *id.* at 740, and the legislative and executive branches were likely more capable of shaping larger remedies and emotional compensation, *id.* at 747, but the court would approve the settlement reached following nationwide hearings. *Id.*

> In listening to hundreds of witnesses around the country and reading the poignant letters of many veterans, their wives and parents, a repeated refrain makes it clear that more than money is at stake. The veterans feel

all" to establish the connection between the chemical exposure and the physical, mental, and emotional problems from which many suffer even though, as a class, they were unable to satisfy traditional tort requirements of causation between individual plaintiffs and defendants.[183] The court was also willing to simplify the problem posed by the statute of limitations for more than 150 different subclasses of servicepersons, spouses, and children distributed throughout the states and foreign countries.[184]

One explanation for why the tort system of injury–remedy fails for certain types of harms is that those in power have not faced these harms, so the law they create has a narrow definition of injury that benefits the dominant group.[185] A limited exposure to diverse backgrounds and ways of thinking hampers leaders of a nation of many peoples.[186] Racial or ethnic origin is but an element of a broader array of characteristics constituting "diversity," in which states have a compelling interest.[187] This presupposes that a broad array of human experiences enhances a system of corrective justice and that corrective justice is vital to the rule of law.[188]

This may not be the case. Thinking that a firm commitment to the rule of law will save a society from injustice is disingenuous. The rule of law itself is a fluid concept subject to multiple interpretations. For those whose basic rights are not threatened, procedural protections may be sufficient for satisfactory results. Laws should be easily understood by the public, applied equally, and distinct from arbitrary action of those in power.[189] Unfortunately, although slavery and other forms of oppression violate notions of decency, they may well comply with law as a system of positive rules.[190] For example, slavery, the law of capture, and superiority of the conqueror in early American history were consistent with a strong

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> that out of love of country they went to its aid and fought bravely in a brutal war. In return, they believe, they were sprayed with chemicals that insidiously are destroying them.

Id. at 746.

183. *Id.* at 747–48.

184. *See id.* at 800, 816.

185. Wenger, *Too Big to Remedy*, *supra* note 103, at 208.

186. Grutter v. Bollinger, 539 U.S. 306, 324 (2003).

187. *Id.* at 325 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978)).

188. *See* Wenger, *Too Big to Remedy*, *supra* note 103, at 196 ("[O]ne might reasonably expect a system of corrective justice under the rule of law to have some remedy in place for a set of egregious wrongs like slavery.").

189. Kaimipono David Wenger, *Reparations Within the Rule of Law*, 29 T. JEFFERSON L. REV. 231, 233 (2007) [hereinafter Wenger, *Rule of Law*] (describing how these three prongs represent a Diciean view of law from the English jurist A.V. Dicey).

190. *Id.* at 234.

rule of law,[191] and America was not unique in this thinking.[192] Yet, even during the time of legal American slavery, there was consciousness that conquest and subordination could be problematic to a democratic society.[193]

This coexistence of the rule of law and slavery led some to argue that the law cannot rely only on positive rules but must also reflect "inner morality"—though even moralistic law has described slavery and oppression as "moral" outcomes.[194] Only a rule of law that emphasizes political rights and civil liberties for all people, with methods of accountability and means to constrain abuses of state power, would not tolerate slavery.[195] Within this view of law, reparations are the logical result of applying corrective justice to people harmed by slavery and follow-on segregation.[196]

So, what is the prevalent view of law? There is no simple answer. But when it comes to matters of race, the Supreme Court has adopted an anti-discrimination approach in which remedial measures apply narrowly in a forward-looking manner rather than backward-looking to remedy the past harms of racism.[197] This approach

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191. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. 543, 570 (1823) (describing how discovery and conquest were proprietary rights of civilized nations (European) on the American continent because the Indians (native tribes) did not follow recognized property laws).

192. The mechanisms of coercion that underpin the traffic and exploitation of people extend far back in history to Indian and African slavery adopted by colonial powers. ANDRES RESENDEZ, THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA 319 (2016).

> Modern incarnations of involuntary servitude and human trafficking are hardly by-products of economic dislocations or the growing inequality of the contemporary world. Such nefarious endeavors have existed for centuries as a substitute for formal slavery and have expanded in times of war, revolution, lack of state control, and globalization defined in a broader sense—starting with Portugal's exploration of western Africa and the Admiral's discovery of the New World, as opposed to just the latest twist on this process over the past thirty years.

Id. at 319–20.

193. *See Johnson*, 21 U.S. at 589–90 (noting that conquest required both that the conquered lose the "painful sense of being separated from their ancient connexions" and the conqueror refrain from wantonly oppressing the conquered or else poor public opinion would threaten the conqueror's reputation and power).

194. Wenger, *Rule of Law*, *supra* note 189, at 235–36. The rule of law set forth by Lon Fuller acknowledges that even a moralistic rule of law can be damaged by a "deterioration in legality, such as in Germany under Hitler." LON L. FULLER, THE MORALITY OF LAW 42–43 (1969); *see also* Dred Scott v. Sandford, 60 U.S. 393, 393–94 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (describing how clauses in the Constitution treat those of African descent as "persons whom it was morally lawful to deal in as articles of property and to hold as slaves," despite a change in public opinion which took place after adoption of the Constitution).

195. *See, e.g.*, Wenger, *Rule of Law*, *supra* note 189, at 237 (describing the Rule of Law as defined by political theorist Guillermo O'Donnell).

196. *Id.* at 240.

197. Robert Westley, *Reparations and Symbiosis: Reclaiming the Remedial Focus*, 71 UMKC L. REV. 419, 419 (2002).

is described as antidiscrimination because it is promulgated in the interests of fairness, but it rarely addresses the underlying social forces that create the inequity and continuing discriminatory harms.[198] The restrictions of this approach appear even for remedies authorized by the legislature, as discussed in the next section.

IV. CONSTITUTIONAL LIMITATIONS ON REPARATIONS AS LEGISLATIVE REMEDIES

Courts often declare they are unable to provide requested remedies because the legislature is the proper body to correct harms wrought by slavery, segregation, and continuing discrimination.[199] Indeed, sections within all of the Reconstruction amendments explicitly authorize Congress to enforce their provisions.[200] Why, then, has forging a statutory remedy been so difficult?

Following ratification of the Reconstruction amendments, the Supreme Court adjudicated another 100 years of segregation and racial discrimination cases, starting with the *Slaughter-House Cases* in 1873.[201] The Court in the 1883 *Civil Rights Cases* noted in dicta that the Thirteenth Amendment granted power to Congress to pass laws necessary and proper for abolishing all "badges and incidents of slavery" but construed the actual enforcement powers far more narrowly.[202] For example, the Court held that Congress did not have the enforcement power to enact the public accommodations provision of the Civil Rights Act of 1875 because discrimination in public accommodations had nothing to do with slavery and was outside the scope of the Thirteenth Amendment.[203] It took the Civil Rights movement and passage of the Civil Rights Act of 1964 for the Court to acknowledge that Congress had both the power and authority to determine "badges and incidents of slavery" and translate their abolishment into effective legislation.[204]

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198. *See id.* at 420.

199. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 112–13 (1995) (O'Connor, J., concurring) (noting that the judicial intervention for racial imbalance is limited to constitutional violations but that Congress has discretion to determine legislation needed to secure the guaranties of the Fourteenth Amendment); Cato v. United States, 70 F.3d 1103, 1105 (9th Cir. 1995) (quoting District Court Judge Armstrong as stating that "[t]he legislature, rather than the judiciary, is the appropriate forum for plaintiff's grievances").

200. U.S. CONST. amends. XIII–XV.

201. Slaughter-House Cases, 83 U.S. 36, 74 (1873) (holding that federal and state citizenship are distinct and the privileges and immunities clause only applied to citizens of the United States, meaning that the clause was not available to a citizen of a state for a state law that abridged a state citizen's privilege and immunities).

202. United States v. Cannon, 750 F.3d 492, 498 (5th Cir. 2014) (quoting The Civil Rights Cases, 109 U.S. 3, 20 (1883)).

203. *Id.*; *see also* Hodges v. United States, 203 U.S. 1, 14–16 (1906) ("True, the 13th Amendment grants certain specified and additional power to Congress, but any congressional legislation directed against individual action which was not warranted before the 13th Amendment must find authority in it.").

204. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–41 (1968). Some badges of slavery were current:

> The true curse of slavery is not what it did to the black man, but what it has done to the white man. For the existence of the institution produced

Even so, legislation cannot guarantee remedies. Although the Court recognizes that § 5 of the Fourteenth Amendment is "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment" equal protection under the law,[205] the Court maintains that all legislation using racial classification—remedial as well as discriminatory—is subject to strict scrutiny because the basic principle of the Fifth and Fourteenth Amendments protect persons, not groups.[206] Justice Stevens called the reasoning flawed:[207]

> The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor . . . . The Court's explanation for treating dissimilar race-based decisions as though they were equally objectionable is a supposed inability to differentiate between "invidious" and "benign" discrimination. But the term "affirmative action" is common and well understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad.[208]

Justice Thomas countered that remedial racial preferences contain racial paternalism whose consequences "can be as poisonous and pernicious as any other form of discrimination."[209]

What fails strict scrutiny depends on the prevailing Justices' position on remedial measures. For example, Justice Scalia allowed that "[i]ndividuals who have been wronged by unlawful racial discrimination should be made whole" but refused the pursuit of racial preferences, even for admirable motives, because that kind of thinking was at the root of racial prejudice and hatred.[210] Justice Thomas also disapproved of the racial preference in a program awarding government contracts because "the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution."[211] In contrast, Justice Stevens emphasized practical steps needed to overcome hurdles to penetration within the contracting market and how race-

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> the notion that the white man was of superior character, intelligence, and morality. The blacks were little more than livestock—to be fed and fattened for the economic benefits they could bestow through their labors, and to be subjected to authority, often with cruelty, to make clear who was master and who slave.

Id. at 445.

205. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).

206. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

207. *Id.* at 245 (Stevens, J., dissenting).

208. *Id.* (citation omitted).

209. *Id.* at 241 (Thomas, J., concurring).

210. *Id.* at 239 (Scalia, J., concurring).

211. *Id.* at 240 (Thomas, J., concurring).

conscious "set-asides" aid minority subcontractors.[212] The tension thus lies between those who favor race-neutral measures aimed at specific, documented discrimination and those who think more affirmative race-conscious steps like set-asides are necessary to redress discrimination. Opinions by Justices Scalia and Thomas are indicative of the Court's antidiscrimination race-neutral approach emphasizing equality.[213]

Emphasis of formal equality among categories[214] is not without appeal: "Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law."[215] Justice Thomas rebuked the courts for presuming anything predominantly Black must be inferior.[216] Yet in practical terms, race-neutral measures have limited remedial effect: ending racial discrimination against whites is as much a priority as ending racial discrimination against nonwhites.[217] In a society that condemns anti-Black or anti-minority attitudes, a race-neutral approach may be acceptable.[218] The question, then, is to what extent does American society condemn these attitudes and act to ensure these attitudes are not inherent within American institutions.[219]

Throughout challenges to race-conscious remedial measures, the Court has wavered in how it polices congressional action largely concerned with equality pertaining to persons. In *Metro Broadcasting, Inc. v. FCC*, the Court showed deference to Congress, a "co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment."[220] Congress "need not make specific findings of discrimination to

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212. *Id.* at 261–62 (Stevens, J., dissenting) ("Indeed, minority subcontractors may face more obstacles than direct, intentional racial prejudice: They may face particular barriers simply because they are more likely to be new in the business and less likely to know others in the business. . . . This program, then, if in part a remedy for past discrimination, is most importantly a forward-looking response to practical problems faced by minority subcontractors.").

213. *See* Westley, *supra* note 197, at 419.

214. *Id.* at 420.

215. *Adarand*, 515 U.S. at 240 (Thomas, J., concurring).

216. Missouri v. Jenkins, 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

217. Westley, *supra* note 197, at 420.

218. Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 5 (2002).

219. Bias on account of race, religion, and place of origin continues within American society and politics. *See* Ingrid Anderson, *What History Reveals About Surges in Anti-Semitism and Anti-Immigrant Sentiments*, PBS (Oct. 29, 2018), https://www.pbs.org/newshour/nation/what-history-reveals-about-surges-in-anti-semitism-and-anti-immigrant-sentiments; Joseph De Avila, *Hateful Propaganda from White Supremacists Spreads*, WALL ST. J. (Mar. 5, 2019), https://www.wsj.com/articles/spread-of-hateful-propaganda-by-white-supremacists-climbs-11551783601; Dov Grosgal & Kevin M. Kruse, *How the Republican Majority Emerged: Fifty Years After the Republican Party Hit Upon a Winning Formula, President Trump Is Putting It at Risk*, ATLANTIC (Aug. 6, 2019), https://www.theatlantic.com/ideas/archive/2019/08/emerging-republican-majority/595504/ ("Capitalizing on the white southern backlash against civil rights was central to this [Southern] strategy.").

220. Metro Broad., Inc. v. F.C.C., 497 U.S. 547, 563 (1990) (quoting Fullilove v. Klutznick, 448 U.S. 448, 472 (1980)).

engage in race-conscious relief."[221] Nevertheless, the use of intermediate scrutiny for benign race-conscious measures by Congress had detractors.[222] In *Adarand Contractors, Inc. v. Pena*, strict scrutiny ultimately prevailed, even when the challenged statute explicitly defined group membership remediation.[223]

Courts apply strict scrutiny to distinguish between unconstitutional discrimination and "narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination."[224] They also no longer defer to Congress. For example, the Court determined that providing minority role models for minority students to alleviate the effects of societal discrimination was not a compelling interest for the government to use race in hiring or layoffs of public-school teachers,[225] though opinions differ about the value of role models.[226]

Adarand Constructors, Inc. is an interesting case study considering equality because it critiqued the racial component of a preferential program.[227] That case concerned a Department of Transportation appropriations measure requiring at least 10% of appropriated funds be expended consistent with the Small Business Association 8(a) program, which preferred socially and economically disadvantaged groups.[228] That program had been the primary method of the federal government to channel contracts to these disadvantaged groups.[229] The primary beneficiaries were to be minorities, but other Americans suffering from social and economic

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221. *Id.* at 565 (quoting Justice O'Connor from City of Richmond v. J.A. Croson Co., 488 U.S. 469, 489 (1989)).

222. *Id.* at 602 (O'Connor, J., dissenting). Justices O'Connor, Scalia, and Kennedy, and Chief Justice Rehnquist emphasized that the government should allocate benefits and burdens among individuals without social science assumptions for how a race or ethnicity may think or act. *Id.* The means selected must be narrowly drawn for advancing a compelling government interest, remedial or not. *Id.* at 608. The Court of Appeals panel majority found the FCC policy unconstitutional because the program was "not narrowly tailored to remedy past discrimination or to promote programming diversity." *Id.* at 562–63 (quoting Shurberg Broad. of Hartford, Inc. v. F.C.C., 876 F.2d 902, 902–03 (D.C. Cir. 1989).

223. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 206 (1995). The Fifth and Fourteenth Amendments protect individuals, not groups, and group classification should be irrelevant in government action on race, *id.* at 227, though the Small Business Act "defines 'socially disadvantaged individuals' as 'those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.'" *Id.* at 206.

224. Missouri v. Jenkins, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring).

225. *Adarand Constructors*, 515 U.S. at 220 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274, 276 (1986)).

226. Others would disagree that lack of role models is insufficient evidence for action and remedy. *See, e.g.*, Rebecca Brand, *'If She Can't See It, She Can't Be It': Why Media Representation Matters*, GUARDIAN (Nov. 12, 2013), https://www.theguardian.com/women-in-leadership/2013/nov/12/media-representation-matters; Kim Everson, *The Importance of Diverse Role Models*, FORBES (Sept. 26, 2019), https://www.forbes.com/sites/forbescommunicationscouncil/2019/09/26/the-importance-of-diverse-role-models/#1d91012e2582.

227. *See Adarand Constructors,* 515 U.S. 200.

228. *Id.* at 205–06, 208.

229. 124 CONG. REC. 34,097 (1978).

disadvantage could apply if they could demonstrate cultural bias.[230] Adarand Constructors, Inc., a construction company, submitted the low bid but lost the federal contract to a construction company that, unlike Adarand, was certified as a small business controlled by "socially and economically disadvantaged individuals."[231] The company did not challenge the program but instead argued against the race-based presumptions in identifying "socially and economically disadvantaged" individuals.[232]

On one hand, that challenge ignored Congress's rationale to create the program: Congress used documented data to justify legislation to remedy racial discrimination in small business,[233] and documented bias surfaced in *City of Richmond v. J.A. Croson Co.* as well.[234] On the other hand, Adarand was not challenging the program itself, only the "use of race-based presumptions in identifying such individuals."[235] Concerned about the dangers of broad, group classifications and harmful stereotypes,[236] the Court questioned whether a person who was a racial minority should automatically qualify as a "socially and economically disadvantaged" individual.[237] The Court did not think so and remanded the case to the lower court to consider the question under strict scrutiny.[238] Furthermore, the Court sent a message that all racial classifications would be subject to the same treatment:

> "[A] free people whose institutions are founded upon the doctrine of equality" should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.[239]

Strict scrutiny for race-conscious remedial measures shifts the burden back to the government to convincingly demonstrate specific discrimination and a tailored remedy. This shift could have the benefit of requiring more well-researched

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230. *Id.*
231. *Adarand Constructors*, 515 U.S. at 205.
232. *Id.* at 204.
233. Fullilove v. Klutznick, 448 U.S. 448, 465 (1980) (noting that the House Subcommittee on SBA Oversight and Minority Enterprise observed that minority persons comprised about 16% of the national population but only 382,000 businesses out of 13 million (3%) were minority owned—of gross receipts, only 0.65% was realized by minority business concerns).
234. City of Richmond v. J.A. Corson Co., 488 U.S. 469, 479–80 (1989) (explaining that although the general population of Richmond was 50% Black, only 0.67% of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983).
235. *Adarand Constructors*, 515 U.S. at 204.
236. *Id.* at 226–27.
237. *Id.* at 205.
238. *Id.* at 238–39.
239. *Id.* at 227.

and articulate legislation, but it could also defeat good ideas that lack the political clout and monetary backing to survive judicial scrutiny.

Affirmative action is another race-conscious remedy viewed with great judicial skepticism. Justice Powell's concurring opinion in *Regents of University of California v. Bakke*[240] became the generally accepted account of when race-based affirmative action in higher education admissions might be permitted.[241] An admissions policy that selected "some specified percentage of a particular group merely because of its race or ethnic origin" was facially invalid because "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake," which "the Constitution forbids."[242] Powell also rejected helping groups that were victimized by societal discrimination because this imposed disadvantages upon people who might bear no responsibility for the harms.[243] Last, Justice Powell rejected the notion that minority medical students would be more interested and likely to practice in minority communities to improve health-care services than nonminority students.[244] The only justification for a race-conscious program Justice Powell found compelling was diversity.[245]

Powell's diversity rationale for race-conscious admissions policies was appealing to many because it emphasized characteristics like applicants' academic ability along with "talents, experiences, and potential 'to contribute to the learning of those around them'" rather than racial group classifications.[246] In short, it also benefitted nonminority communities.[247] The presence of a critical mass of minority students might dispel racial stereotypes and reveal there is "no minority viewpoint."[248] These outcomes could not be accomplished with "only token numbers of minority students."[249]

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240. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 269 (1978).

241. Grutter v. Bollinger, 539 U.S. 306, 322–23 (2003) (describing the history and use of *Bakke*, 438 U.S. at 269–70).

242. *Bakke*, 438 U.S. at 307.

243. *Id.* at 310.

244. *Id.* at 310–11.

245. *Id.* at 315 ("It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.").

246. *Grutter*, 539 U.S. at 315.

247. *Id.* at 330–31. Diversity benefits major American businesses like General Motors and 3M because the skills needed in a global workplace "can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* at 330. Likewise, leaders of the U.S. military stated the need for a racially diverse officer corps to fulfill the military's principle role in national security. *Id.* at 331. Because the military must be selective in admissions officer training and education, it follows that other selective institutions must remain "both diverse and selective." *Id.*

248. *Id.* at 319–20.

249. *Id.* at 333.

Like other race-conscious programs, policies aimed at improving student body diversity had their detractors.[250] According to some, achieving critical mass for diversity was, in actual operation, unconstitutional racial balancing.[251] Admissions data showed very unequal numbers of students from various minority groups as sufficient to reach a "critical mass."[252] These variations made the notion of critical mass highly suspect because the admissions data had the appearance of merely producing student bodies that matched available race and ethnic demographics.[253]

Despite these concerns, race-conscious admissions in higher education may pass strict scrutiny as long as the means were not defined in terms of specified percentages or other forms of racial balancing.[254] "The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."[255] In *Grutter v. Bollinger*, the Court approved of the demonstrated individualized approach towards evaluating candidates for admission to the University of Michigan Law School.[256] The law school's "highly individualized, holistic review" for each applicant satisfied the paramount importance placed on individualized consideration as articulated in *Bakke*.[257]

Although race-conscious remedial programs like affirmative action are subject to skepticism and scrutiny under the Fourteenth Amendment, criminalizing racially motivated violence under the Thirteenth Amendment is not.[258] Section 249(a)(1) of the Shepard-Byrd Act applied to hate crimes motivated by religion, national origin, race, or color.[259] It provided that:

> Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion,

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250. *See id.* at 378 (Rehnquist, C.J., dissenting).

251. *Id.* at 379.

252. *Id.* at 381. The Director of Admissions for the law school testified that "critical mass" meant meaningful numbers or meaningful representation such that minority students were encouraged to participate in classroom and not feel isolated. *Id.* at 318 (majority opinion).

253. *Id.* at 381 (Rehnquist, C.J., dissenting) ("In order for this pattern of admission to be consistent with the Law School's explanation of 'critical mass,' one would have to believe that the objectives of 'critical mass' offered by respondents are achieved with only half the number of Hispanics and one-sixth the number of Native Americans as compared to African–Americans. But respondents offer no race-specific reasons for such disparities. Instead, they simply emphasize the importance of achieving 'critical mass,' without any explanation of why that concept is applied differently among the three underrepresented minority groups.").

254. Fisher v. Univ. of Texas at Austin, 570 U.S. 297, 311 (2013).

255. *Id.* at 312.

256. *Grutter*, 539 U.S. at 337.

257. *Id.*

258. United States v. Cannon, 750 F.3d 492, 497 (5th Cir. 2014).

259. *Id.*

> or national origin of any person—(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.[260]

For this section, Congress asserted authority under § 2 of the Thirteenth Amendment to eliminate racially motivated violence that was a badge or incident of slavery.[261] The Supreme Court held that the scope of Congress's authority to create remedial legislation under the Thirteenth Amendment extended beyond elimination of the literal structures of slavery to include "badges" and "incidents" of slavery that Congress could rationally determine.[262] The *Cannon* Court concluded that racially motivated violence was essential to enslavement and widely used following the Civil War in the attempt to return Black Americans to a subordinate state; therefore, Congress was rational in determining that racially motivated violence was a badge or incident of slavery.[263]

Exploring the use of the Thirteenth Amendment for further protections of civil liberties offers promising possibilities,[264] but the details are beyond the scope of this Note.

V. A NEW VEHICLE FOR REPARATIONS

Those who live with inequality are likely to have a more cynical perspective of race-neutral measures justified in the name of equality.[265] All men may be created equal, and it is a fine idea to assert that race-neutral measures result in all people treated equally under the law,[266] but the experience of nonwhite Americans with the law is more likely to be distorted by vastly disparate distributions of wealth and power.[267] For reparations to be meaningful, they should

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260. 18 U.S.C. § 249(a)(1) (2018).

261. *Cannon*, 750 F.3d at 501–02 (quoting United States v. Hatch, 722 F.3d 1193, 1206 (10th Cir. 2013)); *see also* United States v. Metcalf, 881 F.3d 641, 645 (8th Cir. 2018).

262. *Cannon*, 750 F.3d at 499 (citing Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968)).

263. *Id.* at 502.

264. Alexander Tsesis, *Furthering American Freedom: Civil Rights & The Thirteenth Amendment*, 45 B.C. L. REV. 307, 307 (2004).

265. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987); FREDERICK DOUGLASS, *What to the Slave is the Fourth of July?*, *in* THE PORTABLE FREDERICK DOUGLASS 207–08 (1852) (describing how the celebration of the Fourth of July was a sham: "your denunciations of tyrants, . . . your shouts of liberty and equality, . . . are, to him, mere bombast, fraud, deception, impiety, and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages").

266. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).

267. Matsuda, *supra* note 265, at 327–28 ("Frederick Douglass realized this truth about law before Oliver Wendell Holmes ever picked up a pen."); *see also* TEJU COLE, *Black Body*, *in* KNOWN AND STRANGE THINGS: ESSAYS 16 (2016) ("The news of the day (old news, but raw as a fresh wound) is that black American life is disposable from the point of view of policing, sentencing, economic policy, and countless terrifying forms of disregard. There is a vivid performance of innocence, but there's no actual innocence left. The moral ledger remains so far in the negative that we can't even get started on the question of reparations.");

acknowledge that unchecked, destructive power has been wrongfully directed at Americans for their skin color, and monetary compensations are not enough.[268]

For those displaced or cast as the "other" in a dominant group, loss of identity often results in psychological trauma and social dysfunction.[269] Reparations in the context of reconciliation and "making it right" present an opportunity to improve relations between racial groups,[270] though reaching agreement on what is right is problematic given different perspectives.[271] Additionally, reparations in the form of monetary compensation may be inadequate for loss of land, language, or religion vital to a group of people.[272]

Brophy, *Conceptual Problems in Reparations*, *supra* note 106, at 498 (explaining that former enslaved people left without economic independence and land ownership following Reconstruction faced a difficult fate, but even worse, they were forced in long term labor contracts with harsh "black codes" and subjected to state-mandated segregation in housing, public accommodations, and education).

268. BROOKS, *supra* note 21, at 141–42. "Human bondage and government sanctioned segregation . . . were exceptional acts of human degradation. . . . [T]hrowing money or programs in the direction of blacks without [remorse and] an apology is unacceptable . . . ." *Id.* at 142.

269. Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1659 (2000) (explaining that "English-only" movements advance cultural uniformity in America based on the primacy of Anglo culture at the expense of nonwhites through stereotypes used to justify discriminatory action, and this cultural imperialism demanding cultural assimilation has "devastating consequences" for members of minority cultures).

270. *Id.* at 1667–68 ("For many groups, the idea of intercultural reconciliation involves both the values essential to reconstruction (for example, the notions of apology and forgiveness) and the need for reparation as a way to 'make things right.'"). Work by Professor Eric Yamamoto supported the idea that interracial justice can be redemptive for all parties but is hard earned. *Id.* at 1658–59.

271. *Id.* at 1617. Many American citizens wonder how other groups of citizens, like Mexican Americans or Native Americans, can make claims to resources which were allocated in a different political era. *Id.* Their presumption is that *all* American citizens benefitted from the nineteenth-century expansion, economic growth, and consequent U.S. leadership among Western industrial nations. *Id.* Sadly, that presumption is not supported by data. Lisa J. Dettling, Joanne W. Hsu, Lindsay Jacobs, Kevin B. Moore & Jeffrey P. Thompson, *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. (Sept. 27, 2017), https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.htm (finding that Black and Hispanic families have 15–20% median or mean net worth of white families in 2016 dollars); Rakesh Kochhar & Anthony Cilluffo, *How Wealth Inequality Has Changed in the U.S. Since the Great Recession, by Race, Ethnicity and Income*, PEW RES. CTR. (Nov. 1, 2017), https://www.pewresearch.org/fact-tank/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/ (showing the median net worth of white families was three to five times higher than Black or Hispanic families in 2016).

272. Tsosie, *supra* note 269, at 1668 ("The idea of reparations also involves recognition of particular group rights to enjoy their distinctive cultural context. Thus, for example, Mexican American claimants argue for recognition of language rights, and Native

The courts recognize individual equal protection under the law,[273] but when the law legitimizes conquest, thus reinforcing disenfranchisement of the "other," equal protection does not exist.[274] True, a goal of gathering diverse groups of people is to reduce negative stereotypes about minority groups,[275] but affirmative action only in the name of diversity cannot be relied upon to acknowledge and redress past wrongs.[276] It may be that affirmative action in the pursuit of diversity is the only remedial measure granted to Black Americans, but it misses the mark of reparations.[277]

Roy L. Brooks argues that redress, including monetary compensation, without a clear, formal apology from the government fails to commemorate the memory of the enslaved people and the pride and dignity of people sacrificed to create American prosperity.[278] His atonement model focuses on apology and rehabilitation in the form of a slavery museum and an atonement trust fund.[279] Slavery was an embodiment of indifference to the life, liberty, and well-being of human beings in pursuit of personal gain, and the American public should be reminded of slavery's evils.[280] The trust fund would be treated like the inheritance long denied to Black Americans through intentional discrimination, financed by the federal government, and administered by Black Americans.[281]

Unfortunately for this model of reparations, the likelihood is small that a racially based trust fund would pass strict scrutiny unless it was a statutory remedy

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American claimants argue for recognition of their rights to practice their religion at certain sacred sites.").

273. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

274. *See* Johnson v. M'Intosh, 21 U.S. 543, 573 (1823). The principle of discovery gave title, which might be consummated by possession, to European governments. *Id.* "The title by conquest is acquired and maintained by force." *Id.* at 589. It was hoped that the conquered would "mingle" with "old members of society" until the "distinction between them is gradually lost." *Id.* When the conquered inhabitants are "blended" with the conquerors, then public sentiment ensured that "new subjects should be governed as equitably as the old." *Id.* at 589–90.

275. Grutter v. Bollinger, 539 U.S. 306, 330 (2003). The Court may want to consider the value of diversity within its own ranks. *Id.* at 332 (noting that a handful of highly selective law schools accounted for "nearly 200 of the more than 600 United States District Court judges").

276. *Id.* at 321. Attainment of a racially diverse class was not a remedy for past discrimination. *Id.* Major U.S. companies and the U.S. military benefitted by selecting highly qualified and racially diverse candidates. *Id.* at 331–32.

277. BROOKS, *supra* note 21, at 141 (stating that racial reconciliation is necessary because the federal government committed a racial atrocity for which it has never apologized; in consequence, the government has little credibility on racial matters).

278. *Id.* at 142.

279. *Id.* at 157.

280. *Id.* at 158.

281. *Id.* at 159.

that was both highly individualized[282] and supported by evidence.[283] One suggestion for a highly individualized method to qualify for reparations was to show at least one ancestor harmed by slavery and self-identification as African American on legal documents in the past ten years, but tracing genealogy back to the slavery era is difficult.[284] Even if slave ancestry could be shown, the passage of time and attenuation of direct harm from slavery itself is likely to raise questions as to whether the reparations remedy has been narrowly tailored to the harm of slavery.[285]

Yet, a blocked avenue for monetary compensation cannot negate the urgent need for reparations.[286] Courts can give voice to people harmed by the government.[287] Redress and perhaps even limited apology are possible.[288] Commissions by the legislature to study past wrongful acts may not result in successful lawsuits,[289] but much like Brook's "Clarification of the Historical Record" concerning slavery and the Civil War,[290] they will provide new narratives that are less distorted by the power dynamics of the past. In fact, according to Ta-Nehisi Coates, the hardest part of reparations may not be the money; a deep reconsideration of our nation's autobiography as the "oldest enlightened republic and pioneer of the free world" might force us to see beyond the myth we tell ourselves and the world and accept a humbler but more complete story.[291]

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282. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (noting the importance of persons not groups); Grutter v. Bollinger, 539 U.S. 306, 337 (2003) (Individualized consideration is of paramount importance.).

283. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 486 (1989) (finding that a set-aside lacking concrete supporting evidence of discrimination by a government actor was not narrowly tailored).

284. Cohen, *supra* note 39.

285. Not only do set-asides and quotas fail to be narrowly tailored to accomplish a remedial purpose, *Croson*, 488 U.S. at 486, but harms do not pass to descendants. *In re* African-American Slave Descendants Litig., 471 F.3d 754, 759 (7th Cir. 2006). Also, use of social science as evidence of continuing harm through wealth disparity by race may not be viewed favorably. Missouri v. Jenkins, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) (discounting an approach relying on "questionable social science" instead of constitutional principle).

286. COATES, EIGHT YEARS IN POWER, *supra* note 9, at 206 ("Something more than moral pressure calls America to reparations. We cannot escape our history.").

287. *In re* Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 747 (E.D.N.Y. 1984) ("Vietnam veterans and their families desperately want this suit to demonstrate how they have been mistreated by the country they love. They want it to give them the respect they have earned. They want it to protect the public against future harm by the government and chemical companies.").

288. Pigford v. Glickman, 185 F.R.D. 82, 85 (D.D.C. 1999) ("These events were the culmination of a string of broken promises that had been made to African American farmers for well over a century. It is difficult to resist the impulse to try to undo all the broken promises and years of discrimination that have led to the precipitous decline in the number of African American farmers in the United States.").

289. *See* Alexander v. Oklahoma, 382 F.3d 1206, 1212, 1220 (10th Cir. 2004).

290. BROOKS, *supra* note 21, at 148 (describing the cost of accepting and adopting the Southern version of Civil War history that trivialized slavery as the price the country paid for reconciliation).

291. COATES, EIGHT YEARS IN POWER, *supra* note 9, at 159.

Reparations are not the responsibility of the victims because making amends is the obligation of one who did wrong and desires a change.

One relatively inexpensive way to make amends is to bring H.R. 40, the bill forming a commission to study reparations, to the floor of the House and pass it. For 25 years, Congressman John Conyers Jr. introduced this bill to call for a congressional study of slavery and its lingering effects.[292] Congressman Conyers passed away in 2019, and Congresswoman Sheila Jackson Lee became the new sponsor of the bill that has yet to reach the floor of the House.[293]

Another inexpensive way to make amends is to apologize. White Americans today are not personally responsible for slavery and most are not likely to support slavery,[294] so an apology might seem fruitless. Prime Minister Howard of Australia did not want white Australians to personally apologize for the forced relocation and assimilation of Aboriginal children between 1850 and 1967 because he did not want an exercise of shame or guilt.[295] Instead, he supported an apology coming from Parliament that acknowledged that past atrocities were committed in the name of the Australian people.[296] A sincere apology offers the hope of forgiveness and reconciliation.[297] Even for world leaders, an authentic, timely apology can be valuable.[298] An apology can shift the dynamics of power and fortune, which is perhaps why those with power are either reluctant to use it or overuse it in an egocentric way to skirt controversy.[299]

An apology alone is also likely to fall short of true redemption.[300] To move beyond rhetoric and debates over monetary compensation to individuals, Brooks suggests rehabilitative reparations that are directed towards the larger community.[301] Slavery museums could do much to change the narrative of our nation's history or at least recognize the painful, involuntary contribution made by millions of people to create the United States we know today.[302]

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292. *Id.* at 178.

293. H.R. 40, 116th Cong. (2019).

294. There are exceptions. In a recent conversation on race, the Atlanta megachurch pastor Louie Giglio said, "We understand the curse that was slavery, white people do, and we say that was bad. But we miss the blessing of slavery, that it actually built up the framework for the world that white people live in." Sarah Pulliam Bailey, *Atlanta Megachurch Pastor Louie Giglio Sets Off Firestorm by Calling Slavery a 'Blessing' to Whites*, WASH. POST (June 16, 2020), https://www.washingtonpost.com/religion/2020/06/16/atlanta-megachurch-pastor-louie-giglio-sets-off-firestorm-after-calling-slavery-white-blessing/.

295. BROOKS, *supra* note 21, at 153.

296. *Id.*

297. *Id.* at 147.

298. Barbara Kellerman, *When Should a Leader Apologize—and When Not?*, HARV. BUS. REV. (Apr. 2006), https://hbr.org/2006/04/when-should-a-leader-apologize-and-when-not.

299. Megan Garber, *Sorry, Not Sorry*, ATLANTIC (Dec. 2019), https://www.theatlantic.com/magazine/archive/2019/12/sorry-no-apologies/600742/.

300. BROOKS, *supra* note 21, at 155.

301. *Id.* at 156.

302. *Id.* at 157–59.

Last, equal protection under the Fourteenth Amendment is not the only avenue for race-conscious legislation; Congress has constitutional authority to distribute monies to remedy racial and economic discrimination through the Commerce Clause and § 2 of the Thirteenth Amendment as well.[303]

CONCLUSION

Black Americans have been intentionally harmed throughout the nation's history, but courts have limited redress, largely because Congress was granted the power to enact corrective changes. Legislative action remains the best avenue to pursue reparations, but race-conscious remedial measures using racial group classifications are not likely to survive strict scrutiny by the Supreme Court. The Court is unlikely to find a compelling interest or a narrowly tailored remedy in these measures because the Court is unwilling to apply racial group classifications within the equal protection framework of the Fourteenth Amendment that applies to persons. Instead, reparations in other forms, such as rehabilitating the public through education, are more likely to pass judicial scrutiny. Moral rights may not be legal rights, but there is room for positive action.

303. R.I. Chapter, Associated Gen. Contractors of America, Inc. v. Kreps, 450 F. Supp. 338, 346–47 (D.R.I. 1978).