LAW AS REPARATIONS

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WALTER: Don't cry, Mama. Understand. That white man is going to walk in that door able to write checks for more money than we ever had. It's important to him and I'm going to help him . . . .

MAMA: Son—I come from five generations of people who was slaves and sharecroppers—but ain't nobody in my family never let nobody pay 'em no money that was a way of telling us we wasn't fit to walk the earth . . . .

—Lorraine Hansberry, A Raisin in the Sun[1]

And I know the money don't really make me whole . . . .

—Noname[2]

This Article contends that we should understand law as a powerful force for reparations, considering legal, philosophical, and critical theorists in addition to legal analysis of historical case studies. The creation of group-specific legal rights and remedies, which allow individuals to exercise greater power and agency in shaping their lives, are a form of reparations that may be preferable to most of the proposals currently discussed (which rely largely upon financial or in-kind assistance). Part I introduces the concepts of reparations and reconciliation. Part II explores recent attempts to use Charles Mills' Racial Contract framework as a justification for reparations. The Article asserts that a proper reading of Mills requires making Black Americans more than mere beneficiaries of a "restored" social contract and must make them contract makers. Part III explores what it means to be a contract maker, looking at the work of Mills, James Baldwin, and principles of contract law. Part IV posits that law and legal rights are a powerful form of reparations because they

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1 Lorraine Hansberry, A Raisin in the Sun act 3 (Vintage Books 1st ed. 1994) (1959).

2 Noname, *Yesterday*, on Telephone (self-released 2016).

uniquely help recipients become contract makers in society. It considers how the original intent of the Thirteenth and Fourteenth Amendments was reparative but has since become co-opted by color-blind, "reverse-racism" arguments. These amendments are contrasted with federal and state-level laws in Hawai'i that explicitly provide unique rights and benefits to Native Hawaiians (with mixed success). Drawing from the author's experience working in civil rights in Hawai'i, the Article contends that the presence of targeted reparative laws has empowered Native Hawaiians with the tools to control their fate in a way that one-time payments could not.

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Introduction

How ought people and governments respond to the history of terrible harms committed against racial minorities? The literature on racial justice for Black Americans has grappled with this question, engaging with the history of harm done to Black Americans, the persistent effects of White supremacy, and considering which reforms are appropriate given historical and ongoing harms. This Article interprets reparations as something more than lump-sum payments, positing instead a system of reshaping socio-political understanding through the empowerment of oppressed groups. As reparations movements have begun to re-emerge, especially at the local level,[3] questions about the modality and efficacy of reparations have emerged from proponents and critics alike. This Article contends that we should understand law as a powerful force for reparations. The creation of group-specific legal rights and remedies, which allow individuals to exercise greater power and agency in shaping their lives, are a form of reparations that may be preferable to most of the proposals currently discussed, which rely largely upon financial or in-kind assistance.[4]

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[3] States like California and New York, cities like Evanston, Illinois; Amherst, Massachusetts; Boston, Massachusetts; Providence, Rhode Island; Asheville, North Carolina; Iowa City, Iowa; San Francisco, California; and Palm Springs, California, and private actors like Georgetown University, Brown University, and the Jesuit Order have all recently initiated reparations programs. *See* Rachel L. Swarns, The 272: The Families Who Were Enslaved and Sold to Build the American Catholic Church 216–30 (2023); Grace Ashford & Luis Ferré-Sadurní, *New York to Consider Reparations for Descendants of Enslaved People*, N.Y. Times (Dec. 19, 2023), https://www.nytimes.com/2023/12/19/nyregion/reparations-new-york-slavery.html [https://perma.cc/5D7A-TUCQ]; Char Adams, *Evanston Is the First U.S. City to Issue Slavery Reparations. Experts Say It's a Noble Start*, NBC News (Mar. 26, 2021), https://www.nbcnews.com/news/nbcblk/evanston-s-reparations-plan-noble-start-complicated-process-experts-say-n1262096 [https://perma.cc/KBQ5-B2U2]; Wesley Days & Ryan Trowbridge, *Slave-Related Reparations Could Soon Be Distributed in Amherst*, W. Mass. News (Sep. 4, 2024), https://www.westernmassnews.com/2024/09/04/slave-related-reparations-could-soon-be-distributed-amherst/ [https://perma.cc/2EMN-Y6Q4]; Res. No. 20-128, City of Asheville (2020), https://drive.google.com/file/d/171cMxxq7D5suSZQSA_DAVmvdQXEGPT7E/view [https://perma.cc/DFT2-A8YE]; Report of the Providence Municipal Reparations Commission (Aug. 2022), https://www.providenceri.gov/wp-content/uploads/2022/08/ReparationsRecommendationsReport_FINAL.pdf [https://perma.cc/7TRX-W6TM] [hereinafter Providence Report]; Eric He, *Palm Springs Strikes Tentative $27M Deal on Landmark Reparations Settlement*, Politico (Nov. 13, 2024), https://www.politico.com/news/2024/11/13/palm-springs-reparations-settlement-00189504 [https://perma.cc/M2XA-EG5K].

[4] *See, e.g.*, Swarns, *supra* note 3, at 216–30; Providence Report, *supra* note 3.

Part I introduces the concepts of reparations and reconciliation. Part II explores recent attempts to use Charles Mills' Racial Contract framework as a justification for reparations. In response to these attempts, the Article asserts that a proper reading of Mills requires making Black Americans more than mere beneficiaries of a "restored" social contract and instead making them contract makers. Part III explores what it means to be a contract maker, looking at the work of Mills, James Baldwin, and principles of contract law itself. Part IV posits that law and legal rights are a powerful form of reparations because they uniquely help recipients become contract makers in society. It considers how the original intent of the Thirteenth and Fourteenth Amendments was reparative, part of a broader project of Reconstruction, but has now become co-opted by color-blind or "reverse-racism" arguments. These amendments are contrasted with federal and state-level laws in Hawai'i that explicitly provide unique rights and benefits to Native Hawaiians (with mixed success). Drawing from the author's experience working toward civil rights advancement in Hawai'i, the Article contends that the presence of targeted reparative laws has empowered Native Hawaiians with the tools to control their fate in a way that one-time payments could not. Bolstered by these examples, law as reparations becomes a possible response to the Racial Contract.

Law is, in part, a way to shape our social interactions and institutions, and to right wrongs.[5] It is also a structure that successive generations build upon: the laws we create and give effect to now will have some ability to extend our present commitments into the future.[6] Given the gravity of chattel slavery and its ongoing ramifications, reparations are fundamental to understanding and changing *who* our legal system values and *what function* law can play in recognizing harms and experiences of minorities. Understanding reparations is a matter of urgency. If the reparations question goes unaddressed, unresolved questions of racial justice will continue to haunt this country, and structures of inequality will remain

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5 *See, e.g.*, STEPHEN A. SMITH, RIGHTS, WRONGS, AND INJUSTICES: THE STRUCTURE OF REMEDIAL LAW 7 (2019); Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1299 (2014) ("Property institutions not only regulate the complexity of human interaction, but also *shape the character of those interactions*. Property is not only about the allocation of scarce resources, the management of complex information, or the coordination of land use among competing users; it is about our *way of life*.").

6 *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986).

untransformed. Reparations are a chance to investigate the underpinnings of this country's history and to make changes so that legal systems of racial oppression are remedied—to the extent possible—and never allowed to replicate themselves.

Thus, reparations matter to the law. This Article will argue that law should likewise be important to reparations. Proponents of reparations have employed a variety of arguments, most prominently that descendants of slaves are owed redress for the harms done to their ancestors.[7] This Article contends that reparations through the passage of law and through legal tools to empower Black Americans will enable the dual goals of reparations and reconciliation, and have the transformative potential that other forms of redress may not have. By shaping our institutions and our social relations, both in the present and in the future, through legal precedent, implementing reparative laws ties our society and its institutions to the mast of racial justice when the siren song of the space traders comes calling.[8]

I
Setting the Table: Reparations and Reconciliation

The definition of reparations that this Article uses is backward-looking. Broadly, reparations as a term is meant to apply to situations where there is 1) an injury to individuals, 2) from the wrongful actions of another, 3) such that redress of some sort is owed to the injured.[9] For African Americans, it is taken to be an attempt to discover the historical injuries of slavery and White supremacy and provide some form of redress for these harms. The specific formulations of reparations that this Article responds to are primarily those of Howard McGary and Des Jagmohan.[10] Their view suggests that there are historical debts of injustice owed to Black Americans because of the suffering of Black Americans under legal forms of discrimination

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7 *See, e.g.*, Bernard R. Boxill, *A Lockean Argument for Black Reparations*, 7 J. Ethics 63, 69–70 (2003).

8 *See* Homer, The Odyssey 12.1–240 (Alexander Pope trans., Ingram, Cooke, and Co. 1853); Derrick Bell, *The Space Traders*, *in* Faces at the Bottom of the Well: The Permanence of Racism 158 (1992) (telling a story where an alien species arrives on Earth and offers the United States staggering gold, technological advancements, and limitless clean energy, asking in return, for all of the African American population; the United States agrees).

9 Boxill, *supra* note 7, at 65; Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 Colum. L. Rev. 689, 691 (2003).

10 *See* Howard McGary, *Reconciliation and Reparations*, 41 Metaphil. 546 (2010); Desmond Jagmohan, *Reparations Without Reconciliation*, in Nomos, 65 Am. Soc'y for Pol. & Legal Phil. 140, 141 (2023).

such as slavery and Jim Crow. Unjust legal and systematic harm to individuals, most notably the forced theft of labor of enslaved individuals, creates a right of reparation that these individuals may rightfully pass to their descendants.

A. What Reparations Are Not

Calls for reparations for slavery have rarely been about restoring the exact value of the labor and suffering that enslaved people suffered.[11] The very first promises of reparations were for forty acres and a mule to freed slaves, made and left unfulfilled by Union General William T. Sherman.[12] The earliest mass movement for reparations—started in 1897 by former slave Callie House and Reverend Isaiah Dickerson—called for pensions for former slaves.[13] The movement unsuccessfully attempted to sue the U.S. government to pay reparations using the proceeds it had gained from seizing and selling Southern cotton at the end of the Civil War.[14] This cotton had been picked by enslaved people.[15] The lawsuit failed,[16] but it is notable that these early calls for reparations were not precise estimates of the cost of the harm suffered by slaves. In fact, they were likely vast underestimations of the terrible physical and psychological toll of enslavement and the tremendous profits made by White Southerners using enslaved labor.[17]

Arguments for reparations have instead always been about providing some compensation for the harms of slavery—and later, Jim Crow—and arguing that such compensation is the right of these individuals. As was the case with other reparation initiatives (e.g., from the U.S. government to Japanese

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11 *See* Caleb Harrison, *Supersession, Reparations, and Restitution*, 19 J. ETHICS & SOC. PHIL. 148, 154–55 (2021). In this way, reparations are different from those traditional at law, such as restitution and compensation.

12 Adjoa Aiyetoro & Adrienne D. Davis, *Historic and Modern Social Movements for Reparations: The National Coalition for Reparations in America (N'COBRA) and Its Antecedents*, WASH. U. WOMEN, GENDER & SEXUALITY STUD. RSCH., May 2010, at 7 n.22.

13 *Id.* at 10.

14 *Id.* at 14.

15 *Id.*

16 *Id.*

17 *See id.* at 14 (describing House and Dickerson's request for $68 million with recent estimated costs of reparations totaling as high as $10–12 trillion); Tala Hadavi, *Support for a Program to Pay Reparations to Descendants of Slaves Is Gaining Momentum, but Could Come with a $12 Trillion Price Tag*, CNBC (Aug. 12, 2020), https://www.cnbc.com/2020/08/12/slavery-reparations-cost-us-government-10-to-12-trillion.html [https://perma.cc/UVP5-MEUY].

Americans and from Germany to Israel),[18] most proponents of reparations for slavery know that the exact harm suffered by Black individuals is incredibly high and perhaps unable to be calculated as a monetary value.[19] Instead, they believe they are owed redress that can help them move forward from the specific harms done to them.

B. Reconciliation as an Aim of Reparations

The reconciliation literature is concerned with the psychological harms created by grave injustices motivated by racism and emphasizes the need for transformation and repair between racial groups.[20] Howard McGary describes reconciliation as "an important vehicle for maintaining healthy moral, social, and political relationships."[21] He comes to this definition using the Oxford dictionary definition for reconciliation:

1. Restore friendly relations between.
2. Make or show to be compatible.
3. Make (someone) accept (a disagreeable thing).[22]

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18 *See, e.g.*, JOHN TATEISHI, REDRESS: THE INSIDE STORY OF THE SUCCESSFUL CAMPAIGN FOR JAPANESE AMERICAN REPARATIONS 77 (2020). Tateishi, an architect of the movement for Japanese American redress, described his disappointment with the amount of redress sought and ultimately paid to individuals who had been interned during World War II. *Id.* ("I favored $50,000, even though, even as a symbolic figure, it was hardly adequate to make up for the abrogation of our constitutional rights, for having to live with the brand of being traitors to this country, for three years' imprisonment and the loss of freedom. Marutani joined in that view. Ultimately, we agreed on $25,000. Whatever amount we chose would by its very nature be a compromise, I knew that, but I still regretted that I hadn't pushed harder for $50,000.").

19 *See* ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 142, 146–48 (2004) ("Redressing slavery and Jim Crow should be about honor, not alms. It should be about black pride and dignity, and, last but not least, it should be about commemorating and memorializing the slaves. These heroic men, women, and children were denied freedom so that all Americans might live in the freest and most prosperous nation humankind has ever known . . . Reparations are essential to atonement, because they make apologies believable."); Adrian Vermeule, *Reparations as Rough Justice*, in NOMOS, 51 TRANSITIONAL JUSTICE 151, 151 (2012) ("I want to suggest that there is a widely shared intuition or complex of intuitions underpinning the persistent demand for compensatory reparations programs. This intuition has been called *rough justice*. It would be self-defeating to attempt a precise definition of rough justice, but here is a working approximation: rough justice is the intuition that sometimes it is permissible, even mandatory, to enact a scheme of compensatory reparations that is indefensible according to *any* first-best criterion of justice." (emphasis in original)).

20 *See* Janna Thompson, *Historical Injustice and Reparation: Justifying Claims of Descendants*, 112 ETHICS 114, 119 (2001); *see also* CATHERINE LU, JUSTICE AND RECONCILIATION IN WORLD POLITICS 76, 90–91 (2017).

21 McGary, *supra* note 10, at 548.

22 *Id.*

McGary also draws on Audrey Chapman's work, which defines reconciliation as requiring "the transformation of relationships among former antagonists. The goal is to enable them to achieve sufficient accommodation and trust to be able to live together peacefully and cooperate and collaborate with one another."[23] McGary likens this goal to Margaret Walker's definition of moral repair: "restoring or creating trust and hope in a shared sense of value and community."[24]

Reconciliation, then, is a process by which individuals learn to live together with healthy moral, social, and political relationships that enable some degree of trust in the possibility of shared community. This view of reconciliation does not assign guilt to White individuals, nor does it place responsibility for paying reparations to individuals. Instead, it simply acknowledges that harm has occurred and has created a breach between Black and White Americans. Like reparations, carefully defining reconciliation is also important. Often the means of achieving reconciliation are incorrectly assumed to be bundled with reconciliation itself.[25] For this reason, reconciliation is often set aside by reparations scholars as overly hopeful or placing too much emphasis on forgiveness.[26] Some of the most prominent attempts at reconciliation have called for methods that forego compensation to victims or strongly de-prioritize them.[27] While these approaches have emphasized forgiveness or amnesty for past harms, more meaningful reconciliation might be achieved through the revelation of harsh truth and through providing redress, even if controversial.

This Article assumes that reparations and reconciliation need not be two separate things, nor should they be. There are ways to provide redress for the past that also build toward the future. It is necessary for the United States to fully accept its disagreeable history and legacy of slavery, and to build healthier relations between citizens of different races. By applying the concept of the Racial Contract, the issues of both racial

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23 *Id.* at 549 (quoting AUDREY R. CHAPMAN, *Approaches to Studying Reconciliation*, *in* ASSESSING THE IMPACT OF TRANSITIONAL JUSTICE: CHALLENGES FOR EMPIRICAL RESEARCH 143 (Hugo van der Merwe, Victoria Baxter & Audrey R. Chapman eds., 2009)).

24 *Id.* at 556 (quoting MARGARET URBAN WALKER, MORAL REPAIR: RECONSTRUCTING MORAL RELATIONS AFTER WRONGDOING 28 (1st ed. 2006)).

25 *Id.* at 547 ("Some people attempt to expand the concept of reparation to do too much. In certain cases, providing reparations to the victims of wrongdoing may allow the parties to reconcile their differences, but such reconciliation is the consequence of reparations, not the meaning of reparations or justification for them.").

26 *See* Jagmohan, *supra* note 10, at 141.

27 *See, e.g.*, CHARLES GRISWOLD, FORGIVENESS 61–62 (2007).

reconciliation and reparations become unified. The broken race relations that are created by the Racial Contract and the resulting exploitation are inseparable. Thinking more expansively about what reparations could be, and what form they take, can achieve a dual purpose of providing overdue reparations while also making headway on reconciliation.

II
Rejecting Reparations as Remedy to the Racial Contract

Charles Mills, in *The Racial Contract*, proposed that society has been structured such that race is used as a fundamental justification for some individuals to dehumanize and exploit others.[28] Critiquing the European social contract tradition in philosophy, Mills argues that the Racial Contract is a better way of understanding the history of domination of and harm against Black people.[29] He argues that social contract theory is largely an exercise in deriving principles from assumptions that are purposely blind to colonialism and racism, or actually justify such prejudices.[30] Philosophers seeking to structure from first principles bring the racism and exploitation of their time into their reasoning. Mills argues that "racism . . . is *itself* a political system, a particular power structure of formal or informal rule, socioeconomic privilege, and norms for the differential distribution of material wealth and opportunities, benefits and burdens, rights and duties."[31] Social contract theories largely ignore the extent to which racism infiltrates reality and underlies key assumptions about who can participate in the formation of society. Whether in formal documents—like the Doctrine of Discovery or charters for slave ships—or in the everyday exploitation of Black and Indigenous people, Mills believes the foundational social contract is an agreement to exploit some for the benefit of others.[32]

The Racial Contract defines and advances the goals of racism as a political system, and "White supremacy is the unnamed political system that has made the modern world what

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28 *See* Charles W. Mills, The Racial Contract 11 (1997).

29 *Id.* at 16–17 ("[T]he color-coded morality of the Racial Contract restricts the possession of this natural freedom and equality to white men. . . . [T]hese subpersons . . . are biologically destined never to penetrate the normative rights ceiling established for them below white persons.").

30 *See id.* at 17–19.

31 *Id.* at 3.

32 *Id.* at 24.

it is today."[33] Mills is an important voice in reparations discussions, because he identifies not only historical harm to Black individuals but also the harm of the Racial Contract ideology. These are not abstract harms. Mills is clear that, especially considering chattel slavery, "the economic dimension of the Racial Contract is the *most* salient, foreground rather than background, since the Racial Contract is calculatedly aimed at economic exploitation."[34]

Social contract theories are mythical, but they provide telling insight into how our political, social, and economic systems came to be.[35] Mills' descriptions of the Racial Contract, how the Western world intentionally dehumanized and exploited people of color for economic gain, hew closely to reality. The Racial Contract is a compelling concept because it explains the motivation behind the horrific institutions of racism. Namely, the exploitation and profit by turning Black individuals into "others" not worthy of being party to contract.[36] It is also helpful in explaining how the mindset of the Racial Contract can endure and transform, even when formal racial discrimination is outlawed. Not only did the Racial Contract exploit, but it also dehumanized through the use of racial categories and stereotypes about capacity that still linger.

A recent article by Martha M. Ertman makes use of Mills' conception of the Racial Contract to make the case for racial reparations to Black Americans.[37] Ertman identifies the tremendous historical and present racial wealth gap as evidence of exploitation due to the workings of the Racial Contract.[38] She then argues "[f]or law to come into line with its foundational assumption of equal treatment, it must acknowledge breaches of that social contract and award remedies to those harmed by the breach."[39] Reparations, for Ertman, is an attempt to make disadvantaged individuals whole by curing the existing

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33 *Id.* at xxix.

34 *Id.* at 32.

35 *See generally* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Charles Frankel ed., Hafner Publ'g Co. 1947) (1762).

36 The wrongfully taken property has also created greater barriers for Black Americans to obtain property, a right which some argue is important to discovering and affirming the self. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–61 (1982).

37 *See* Martha M. Ertman, *Reparations for Racial Wealth Disparities as Remedy for Social Contract Breach*, 85 L. & CONTEMP. PROBS. 213, 239–41 (2022).

38 *Id.* at 236, 252.

39 *Id.* at 232.

social contract with financial payment.[40] Ertman's arguments align with the work of scholars like Desmond Jagmohan and Howard McGary, who argue that reparations should primarily be understood as repayment for past harm and unburdened by considerations of racial reconciliation or efficacy.[41] In this, Mills and Ertman are in agreement.[42] Mills notes many of these differences in opportunities and the accumulation of wealth that has been *artificially* created by de jure and de facto racially discriminatory practices.[43] Ertman's article provides a useful update to Mills' already formidable collection of evidence of the Racial Contract.

This Article agrees with Ertman that the Racial Contract illustration is validated by the disparate oppression of Black Americans and other minority groups.[44] However, Ertman fundamentally misreads Mills and the Racial Contract. She writes: "philosopher Charles Mills would modify or reform the social contract to make it live up to its liberal promise of equal treatment of all. A central element of Mills' salvage operation would be a backward-looking program of reparations and other anti-racist reforms."[45] To Ertman, the social contract has suffered a breach and simply requires a remedy, although such a remedy may itself be complicated.

This is striking, because Mills is clear that the social contract, if any such compact exists, *is* the Racial Contract.[46] Mills' work suggests that the proper response to the Racial Contract is not to provide remedy for breach, but to tear up the contract itself. Mills writes that the Racial Contract asserts a basic inequality "in the capacity of different human groups to know the world and to detect natural law. Subpersons are deemed cognitively inferior, lacking in the essential rationality that would

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40 *See id.* at 234.

41 *See* Jagmohan, *supra* note 10, at 141; McGary, *supra* note 10, at 548.

42 *See* Ertman, *supra* note 37, at 234; CHARLES W. MILLS, BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE 135 (1998) ("From slavery, federal land grants, and the homesteading of the West through differential access to education, job opportunities, white markets, union membership, and equal wages and promotion chances to ghettoization, restrictive covenants, redlining, white flight, and differential allocation of resources to schools and neighborhoods, whites have historically been materially advantaged over nonwhites, particularly blacks.").

43 *See* MILLS, *supra* note 42, at 54, 76.

44 *See* Ertman, *supra* note 37, at 240, 252. Mills himself is clear that the idea of a Racial Contract (like other social contract theories) is a fabrication, although an illustrative one. *See* MILLS, *supra* note 42, at xiv.

45 Ertman, *supra* note 37, at 239.

46 *See* MILLS, *supra* note 28, at 3–4.

make them fully human."[47] The Racial Contract is not something that can be easily remedied, and instead must be replaced by an arrangement that values the equality and humanity of all people.[48] However, Ertman explicitly seeks to modify or reform the Racial Contract and thus runs the risk of perpetuating the Racial Contract by not uprooting it completely.[49]

A. Case Study: South Africa

What does seeking remedy to a bad contract, rather than complete replacement, look like in practice? Here, the balance between the desire for reconciliation and the need for reparation comes into play once more. Some proponents of reconciliation seek to patch up the Racial Contract through reconciliation-oriented measures, without carefully considering if these policies are adequately addressing and correcting harm. Scholars like Margaret Walker, Roy Brooks, and Desmond Tutu have touted South Africa as a model of reconciliation.[50] They assert that the South African Truth and Reconciliation Commission (TRC) was justified in granting amnesty to perpetrators of apartheid who participated in public confessions, rather than seeking punishment for these crimes.[51] Brooks believes that this amnesty was fundamental to racial reconciliation and democracy for the country.[52] The focus was on moving past the apartheid regime, without the country falling apart. While the Commission focused on public confession and discovery of fact, it did recommend a total of $360 million in reparations to victims of extreme crimes like rape or mutilation.[53]

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47 *Id.* at 59.

48 *Id.* at 75 ("Whereas before it was denied that nonwhites were equal persons, it is now pretended that nonwhites are equal abstract persons who can be fully included in the polity merely by extending the scope of the moral operator, without any fundamental change in the arrangements that have resulted from the previous system of explicit de jure racial privilege."); *see also id.* at 133 ("As long as this studied ignorance persists, the Racial Contract will only be rewritten, rather than being torn up altogether, and justice will continue to be restricted to 'just us.'").

49 For a similarly optimistic view, see generally JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011).

50 *See* WALKER, *supra* note 24, at 14–15; BROOKS, *supra* note 19, at 146–48; *see generally* DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS (1999).

51 WALKER, *supra* note 24, at 14–15; BROOKS, *supra* note 19, at 146–48; TUTU, *supra* note 50, at 50–51.

52 *See* BROOKS, *supra* note 19, at 146–48; *see also* Roy L. Brooks, *Framing Redress Discourse*, in NOMOS, 65 AM. SOC'Y FOR POL. & LEGAL PHIL. 79, 111 (2023).

53 *See* Ginger Thompson, *South Africa to Pay $3,900 to Each Family of Apartheid Victims*, N.Y. TIMES (Apr. 16, 2003), https://www.nytimes.com/2003/

However, the Commission lacked the power to do more than make recommendations. Payments totaling only $85 million were paid after intense political pressure following the conclusion of the TRC.[54]

Some have noted that the TRC, while popular to outside observers, may not have satisfied Black South Africans or helped them recover from the economic, social, and political damage of apartheid.[55] The choice to focus on reconciliation-as-forgiveness, rather than focusing on redress, has produced mixed results at best. The payments made were deemed insufficient in quantity and scope, as no compensation was made for the harms of apartheid policies outside of direct violence.[56] By some measures, Black–White inequality in South Africa is worse than it was during apartheid.[57] For example, housing segregation remains troublingly high, due in part to Black South Africans' lack of economic resources and to White flight into the suburbs.[58] The TRC process has also failed to prevent violence. In July 2021, more than 330 people died in political rioting.[59] Through the lens of the Racial Contract, the TRC process sought to keep the existing social contract from fraying further rather than embrace what might have emerged if it was altogether abandoned. As recent events show, this method does not lead to either reparations or a sense of true reconciliation.

The example of South Africa is a warning against half measures. The Racial Contract has deep roots and will continue to pose problems for racial reconciliation and justice unless completely addressed. For Black Americans, it is not enough to be the beneficiaries of contractual remedy. Instead, a proper remedy must include making Black Americans full parties to

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04/16/world/south-africa-to-pay-3900-to-each-family-of-apartheid-victims.html [https://perma.cc/NJD8-G2ZV].

54 *Id.*

55 Adrian Guelke, *Truth for Amnesty? The Truth and Reconciliation Commission and Human Rights Abuses in South Africa*, 10 Irish Stud. Int'l Affs. 21, 23–24, 29 (1999).

56 *See* Thompson, *supra* note 53.

57 Consider, for example, that seventy percent of private-sector management leadership in South Africa is White. Robin Wright, *Mandela's Dream for South Africa Is in Ruins*, New Yorker (July 28, 2021), https://www.newyorker.com/news/daily-comment/mandelas-dream-for-south-africa-is-in-ruins [https://perma.cc/5TKP-V24R].

58 Justice Malala, *Why Are South African Cities Still So Segregated 25 Years After Apartheid?*, The Guardian (Oct. 21, 2019), https://www.theguardian.com/cities/2019/oct/21/why-are-south-african-cities-still-segregated-after-apartheid [https://perma.cc/WH8B-VGDT].

59 Wright, *supra* note 57.

a new contract. There is no room for this in the Racial Contract, which necessarily treats Black Americans (and others) as subhuman. Without individuals to exploit, the Racial Contract cannot function.

B. The Need for Novation

The Racial Contract demands a novation, a replacement of an old contract with a new one. A novation commonly involves bringing in new parties, which may be fitting given that the Racial Contract viewed minorities not as parties but as the object of contract. A new societal agreement must involve introducing the previously oppressed as *equal* parties who consent to it. Merely being admitted as an equal member to the old, Racial Contract (or even a revised version of it) might lead to some improvements for the oppressed, but it does not treat them as equal members and creators of society. Without a new social contract, progress for the oppressed will be asymptotic, approaching equality but never able to reach it. Instead, Black Americans and other historically marginalized groups must have real powers in negotiating and formulating the terms of society for true progress toward racial justice and equality to be possible. Three examples illustrate the need for novation and how merely changing individuals into parties to the social contract without giving them the ability to equally participate in restructuring it falls short.

1. *Cherokee Freedmen*

Melinda C. Miller provides an economic analysis of outcomes for Black Americans who had been enslaved by the Cherokee Nation, finding that former Cherokee slaves were similar to other Southern freedmen in economic status before the Civil War but had significantly more positive wealth outcomes after Emancipation.[60] Among other outcomes, she finds that Cherokee Freedmen were more likely to have physical and human capital, such as owning fruit trees and being literate.[61] Miller proposes that these improved outcomes stem from the fact that Cherokee Freedmen were given land as a form of reparations, while other free Black individuals were not.[62] An 1866 treaty

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60 Melinda C. Miller, *"The Righteous and Reasonable Ambition to Become a Landholder": Land and Racial Inequality in the Postbellum South*, 102 REV. ECON. & STAT. 381, 387–89, 392 (2020).

61 *Id.* at 391–92.

62 *Id.* at 392–93.

between the U.S. government and the Cherokee Nation—who had fought and lost with the Confederacy—provided Freedmen citizenship in the Nation, the ability to claim Cherokee land, federal assistance for farming, and federal protection over property rights.[63] While the provision of material resources led to positive economic outcomes for these newly freed Black individuals, it did not lead to their equal acceptance or agency within the Cherokee Nation. Decades later, resentment still lingered among some Cherokee individuals, clearly revealing a social division between the descendants of Freedmen and non-Black Cherokee Nation citizens.[64] In 2007, the Cherokee Nation amended their constitution to only allow citizenship rights (such as holding political office) to those who are Cherokee "by blood."[65] As a result, descendants of Black Freedmen who had been owned by Cherokee citizens could be stripped of their citizenship, a change that was supported by more than seventy-five percent of Cherokee citizens at the time.[66] One editor, protesting these changes, argued that this "made [Black Cherokee] second-class citizens."[67] These changes were only reversed by the Cherokee Supreme Court in 2021, following a 2017 ruling by a U.S. District Court that the removal of citizenship from descendants of Cherokee Freedmen violated the 1866 treaty that guaranteed tribal citizenship.[68]

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63 *Id.* at 383.

64 *Id.* at 385 ("In 1906, another Senate committee visited the Cherokee Nation. Resistance to freedmen citizenship remained. One Cherokee woman declared, 'We were forced to take them [the freedmen] in as citizens after the war of the rebellion . . . we do not think it was right to force all these negroes onto us as a punishment.' A lawyer from the Cherokee Nation observed, 'There is a very strong prejudice between the Indian blood of the Cherokee Nation and the freedmen.' A judge succinctly summarized a popular opinion on the Cherokee freedmen's access to land: 'There was just as much justice in it as there would have been if the Government had compelled the slave owners of Texas and Arkansas and Mississippi and Louisiana to have divided their lands with the negroes.'" (quoting KENT CARTER, THE DAWES COMMISSION AND THE ALLOTMENT OF THE FIVE CIVILIZED TRIBES, 1893–1914, at 106 (1999)) (alteration in original)).

65 Mary Louise Kelly & Farah Eltohamy, *Cherokee Nation Strikes Down Language That Limits Citizenship Rights "By Blood,"* NPR (Feb. 25, 2021), https://www.npr.org/2021/02/25/971084455/cherokee-nation-strikes-down-language-that-limits-citizenship-rights-by-blood [https://perma.cc/X9ET-KAFT].

66 Alex Kellogg, *Cherokee Nation Faces Scrutiny for Expelling Blacks*, NPR (Sep. 19, 2011), https://www.npr.org/2011/09/19/140594124/u-s-government-opposes-cherokee-nations-decision [https://perma.cc/A69Q-R2L7].

67 Kelly & Eltohamy, *supra* note 65.

68 *Id.*; *see also* Cherokee Nation v. Nash, 267 F. Supp. 3d 86, 127 (D.D.C. 2017) ("If native Cherokees have any right to citizenship at all, then qualifying freedmen have a coextensive right to that same citizenship under Article 9 of the 1866 Treaty. . . . [T]he freedmen's right to citizenship does not exist solely under the Cherokee Nation Constitution and therefore cannot be extinguished solely by

Economic reparations without becoming equal citizens meant that, even over a century later, Cherokee Freedmen could have their political rights and social belonging within the Cherokee Nation threatened and (temporarily) stripped from them.

The reparations granted to Cherokee Freedmen demonstrate the problem with Ertman's notion of the Racial Contract. Miller's work acknowledges that the racial gap in Cherokee–Black society was smaller than the racial gap between White and Black people in the Jim Crow South, but emphasizes the gap's persistence despite the (forced) reparations of land from Cherokee Nation.[69] Additionally, while it is meaningful that the outcomes of Freedmen who received land from the Cherokee were better than those freedmen who did not, neither group achieved equal outcomes to White Americans. Indeed, some scholars have argued that the mere provision of land would have been insufficient, even if given to all formerly enslaved individuals, because of the largely unchanged social and political racism in the post-Emancipation South.[70] Black recipients of Cherokee land were also not given the full force of citizenship in the Cherokee Nation. They were not allowed to become political, social, or economic equals in Cherokee society. This example demonstrates that effective reparations must be more than economic boon without true societal equality.

2. *Gender and Emancipation*

Historian Amy Dru Stanley observes parallel dynamics for freed Black women after the Civil War.[71] Formerly enslaved Black men, out of a desire to live out and prove their emancipation, often replicated the patriarchal gender norms that had been present among their former enslavers and in White society.[72] Because Emancipation did not fundamentally rethink

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amending that Constitution."); Kat Chow, *Judge Rules That Cherokee Freedmen Have Right to Tribal Citizenship*, NPR (Aug. 31, 2017), https://www.npr.org/sections/thetwo-way/2017/08/31/547705829/judge-rules-that-cherokee-freedmen-have-right-to-tribal-citizenship [https://perma.cc/C6QB-57JQ].

69 Miller, *supra* note 60, at 390.

70 *See, e.g.*, Roger L. Ransom, *Reconstructing Reconstruction: Options and Limitations to Federal Policies on Land Distribution in 1866–67*, 51 CIV. WAR HIST. 364, 368–69, 374 (2005). *See generally* ROBERT HIGGS, COMPETITION AND COERCION: BLACKS IN THE AMERICAN ECONOMY 1865–1914 (1977); ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY (2007).

71 *See* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 33 (1998).

72 *Id.* at 49 ("Many freedmen therefore understood the right to have a wife at their own disposal as a bequest of emancipation. As they saw it, freedom deeded

how society should be ordered to reduce inequality, being a freedman meant gaining partial access to the patriarchal gender relations that White men enjoyed. Admitting Black individuals into the existing social contract was certainly beneficial because participation meant freedom from being an object of contract. At the same time, however, it also meant admission into the unchanged patriarchal norms that objectified women as property. In one speech, an abolitionist feminist reported that formerly enslaved women had declared, "[y]ou give us a nominal freedom, but you leave us under the heel of our husbands, who are tyrants almost equal to our masters."[73] Improving the terms of the Racial Contract by abolishing slavery and admitting the formerly enslaved (at least partially) into some of the rights previously enjoyed only by White individuals failed to reduce gender inequality for Black and White women alike.[74]

3. *Gender and Equality*

Catharine MacKinnon observes that the attempts to achieve equality for women in the mid- to late twentieth century did so by imposing supposedly gender-neutral legal standards that were, in actuality, standards that favored men.[75] While women had some of the protections that men had, their new legal rights were based off of mirroring that of men.[76] MacKinnon notes that this preserved the dominant status of men in society, despite the presence of formal equality before the law.[77] To MacKinnon, attempts to be race- or gender-blind further entrench the legal, social, and political powers of already dominant groups. For

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them property in her person and labor; in stating exclusive claim to her, they declared themselves slaves no more.").

73 *Id.* at 50.

74 *See* CAROLE PATEMAN, THE SEXUAL CONTRACT 229–30 (1988).

75 Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, *in* FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 81, 83–84 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

76 *Id.* at 84 ("Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex.").

77 *Id.* at 85 ("Why should you have to be the same as a man to get what a man gets simply because he is one? Why does maleness provide an original entitlement, not questioned on the basis of *its* gender . . . .").

instance, she notes that policy attempts to benefit marginalized groups who remain oppressed even after formal equality is established are challenged as discriminatory despite the clear need for them.[78] Instead, she emphasizes the importance of creating new standards in which women have "equal power in social life"[79] and are part of actively shaping what society looks like.[80]

C. What Now?

Given the problems of the Racial Contract, what are we to do? Ertman's interpretation of Mills mistakenly locates a solution within his critique of the Racial Contract. Ertman posits that "[b]y revealing traditional social contract analysis as a 'White male fairyland,' complete with 'wishing-makes-it-so idealizing,' Mill [sic] creates a roadmap to overcome this 'willed obliviousness' and extend genuine equality of opportunity to all."[81] On the contrary, a close study of Mills' work reveals that he does not leave such a roadmap. Mills writes at length about the problems of the Racial Contract—and suggests potential areas for change—but never sets out the terms of a replacement contract. While Ertman does not engage with Mills in a detailed manner, her work does provide inspiration to consider what it could look like to completely replace the Racial Contract. Ertman's misunderstanding of Mills is inconsequential compared to the very serious problems she raises of racial inequality in health care, wealth, homeownership, and more. This Article argues that what is most important to dismantling the Racial Contract is that Black Americans—and all those subjugated under the Racial Contract—become *contract makers*. Reparations ought to go beyond providing remedy to Black Americans under the terms of a bad contract,

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78 *Id.* at 89 ("If differentiation is discrimination, affirmative action, and any legal change in social inequality, is discrimination—but the existing social differentiations which constitute the inequality are not? This is only to say that, in the view that equates differentiation with discrimination, changing an unequal status quo is discrimination, but allowing it to exist is not.").

79 *Id.* at 91.

80 *Id.* at 90 ("The moment when one's particular qualities become part of the standard by which humanity is measured is a millennial moment.").

81 Ertman, *supra* note 37, at 240 (quoting Charles W. Mills, *Intersecting Contracts*, *in* CONTRACT & DOMINATION 165, 199 (Carole Pateman & Charles W. Mills eds., 2007)).

they must allow the oppressed the ability to radically alter or replace the contract itself.[82]

III
What Does It Mean to Be a Contract Maker?

> *Any real change implies the breakup of the world as one has always known it, the loss of all that gave one an identity, the end of safety.*
>
> —James Baldwin[83]

This Part considers what it means to be a party to contract by taking a deeper look at the work of Mills and his ideological fellows in Carole Pateman and James Baldwin. In considering their work, this Part establishes three basic principles for designing reparations policies that empower Black Americans to be contract makers. Then, the Article turns to contract law principles to further understand the basic norms that must be present between equal parties in a contract. By considering what makes a contract exploitative and unconscionable, this Part develops an understanding of what a new social contract should aspire to.

A. A Conceptual Look at the Contract Maker

A review of Mills' work provides some guidance as to what it means to be a true contract maker, someone who is valued equally in society and recognized as such in politics and law. Mills sets forth that "[r]eparative racial justice as a matter of non-ideal theory, then, can be approached within the framework of repairing a 'contract of breach' . . . [in] at least six dimensions: juridico-political, economic, cultural, somatic, cognitive-evaluative, and ontological."[84] However, he does not provide direct elaboration upon what progress in these six dimensions means, or how these different categories should be considered in relation to one another. In another work, Mills and Carole Pateman go a bit further, proclaiming that "one of the main aims of the

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82 To reference Tocqueville, it is important that "everyone . . . look[s] upon the law as his own work." Alexis de Tocqueville, Democracy in America and Two Essays on America 18 (Gerald E. Bevan trans., Isaac Kramnick ed., Penguin Classics 2003). This is impossible under the terms of the Racial Contract.

83 James Baldwin, Nobody Knows My Name: More Notes of a Native Son 117 (1961).

84 Charles W. Mills, *Contract of Breach: Repairing the Racial Contract*, *in* Contract & Domination 106, 118 (Carole Pateman & Charles W. Mills eds., 2007).

normative contract will be the elimination of these structures of exploitation—unequal chances for the poor and working class, sexual exploitation, differential White advantage and corresponding wealth—that the individualist perspective of mainstream contract theory tends to obfuscate."[85] It is clear that a just social contract will not leave individuals to be exploited within institutions and structures that are oppressive. Protections, powers, and responsibilities also ought to be extended at the group level, and not just the individual. The contract that Mills and Pateman aspire to is incompatible with a simple financial reparations program. Such a program would provide cash payment to individuals, but would do little to eliminate exploitative market systems, biases, and race-based wealth gaps that exist.[86] In such a scenario, it is not hard to imagine reparations becoming a catalyst for further exploitation, with reparations checks ending up back in the pockets of exploitative institutions.

What Mills, and others, *do* make clear is that substantial effort is required to provide previously subjugated and dehumanized people recognition as equals. Mills writes: "[t]earing up the Racial Contract will demand a project of national reconstruction, the allocation of whose burdens will need to recognize the problems tens of millions of poor, working-class, and unemployed White Americans are facing also."[87] This project asks for a great deal from individuals to be seen as fellow contract makers, rather than subhuman.[88] Correspondingly, it seems that resources and assistance are necessary and fair to empowering Black Americans to demand equal respect, dignity, and power from others. The assertion of equality certainly

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85 Charles W. Mills, *The Domination Contract*, *in* CONTRACT & DOMINATION 79, 99 (Carole Pateman & Charles W. Mills eds., 2007) (citation omitted). *See also* PATEMAN, *supra* note 74.

86 *See* Doug Irving, *What Would It Take to Close America's Black-White Wealth Gap?*, RAND (May 9, 2023), https://www.rand.org/pubs/articles/2023/what-would-it-take-to-close-americas-black-white-wealth-gap.html [https://perma.cc/JYN5-SXVU].

87 Woojin Lim, *"The Racial Contract": Interview with Philosopher Charles W. Mills*, HARV. POL. REV. (Oct. 29, 2020), https://harvardpolitics.com/interview-with-charles-w-mills/ [https://perma.cc/L8BA-QRDB].

88 CHARLES W. MILLS, *Dark Ontologies: Blacks, Jews, and White Supremacy*, *in* BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE 67, 87 (1998) ("But in the racial polity, where historically servility is precisely what has been expected and required of subpersons, their demands for equal respect from the population of official persons will be actively resisted, and their duty to themselves of self-esteem will be much harder to fulfill. Personhood, respect, and self-respect thus have to be fought for by nonwhites in a way that they do not for whites or for abstract individuals in the race-free polity of an ideal Kantianism.").

might be furthered by material resources, like cash payment, but it also requires more than that. Demanding one's dignity requires the power to enforce equal treatment, especially in situations where money cannot buy it.

Mills makes explicit mention of James Baldwin when explaining some of the fundamental barriers to Black Americans being perceived as equals, as people who are worthy and capable of being equal members of society rather than exploited by it.[89] Baldwin believed that White and Black Americans needed to accurately see one another in order to embrace their common humanity and move forward from their dark, shared past. He is hopeful, writing that:

> If we—and now I mean the relatively conscious whites and the relatively conscious blacks, who must, like lovers, insist on, or create, the consciousness of the others—do not falter in our duty now, we may be able, handful that we are, to end the racial nightmare, and achieve our country, and change the history of the world.[90]

Although he harbored uncertainties,[91] Baldwin did believe it possible and necessary to achieve racial reconciliation where the humanity of both Black and White Americans could be recognized and flourish. Baldwin did not insinuate that all Americans hold racial animus, but rather that they are inculcated in a worldview originally created to justify slavery. It was imperative to Baldwin that Black and White Americans develop the ability to understand one another through an "active awareness and acceptance of the ways that [racial] circumstances shape an individual's life and the attempt to make those circumstances articulate to bring about change."[92] Scholars of Baldwin like

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89 MILLS, *supra* note 28, at 97 ("James Baldwin argues that white supremacy 'forced [White] Americans into rationalizations so fantastic that they approached the pathological,' generating a tortured ignorance so structured that one cannot raise certain issues with whites." (quoting James Baldwin, *Stranger in the Village*, *in* JAMES BALDWIN: COLLECTED ESSAYS 117, 127 (Toni Morrison ed., 9th ed. 1998))).

90 JAMES BALDWIN, THE FIRE NEXT TIME 105 (1963).

91 *See* James Baldwin, *Letter from a Region in My Mind*, NEW YORKER (Nov. 10, 1962), https://www.newyorker.com/magazine/1962/11/17/letter-from-a-region-in-my-mind [https://perma.cc/97CN-G74A] ("Do I really want to be integrated into a burning house? White Americans find it as difficult as white people elsewhere do to divest themselves of the notion that they are in possession of some intrinsic value that black people need, or want. . . . The only thing white people have that black people need, or should want, is power.").

92 Lawrie Balfour, *"A Most Disagreeable Mirror": Race Consciousness as Double Consciousness*, *in* A POLITICAL COMPANION TO JAMES BALDWIN 1, 21 (Susan J. McWilliams ed., 2017).

David Jenkins and Lawrie Balfour refer to this as race consciousness or recognition.[93] Cash reparations achieve one piece of this puzzle by acknowledging that a harm has been done. However, they fall short in failing to ensure that Black Americans themselves are recognized and acknowledged as human.

We might call a failure to achieve recognition, even if economic or social progress is made, misrecognition. Baldwin describes the consequences of misrecognition vividly:

> In our image of the Negro breathes the past we deny, not dead but living yet and powerful, the beast in our jungle of statistics. It is this which defeats us, which continues to defeat us, which lends to interracial cocktail parties their rattling, genteel, nervously smiling air: in any drawing room at such a gathering the beast may spring, filling the air with flying things and an unenlightened wailing . . . . Wherever the Negro face appears a tension is created, the tension of a silence filled with things unutterable.[94]

Baldwin believes that a meaningful accounting of racial slavery and American democracy is needed to create recognition, even at great cost.[95] To be a contract maker in society, you must be recognized as an equal and not just a beneficiary. To be recognized as an equal, you must be seen and understood. Individuals who are valued equally by the social contract and play an equal role in creating, shaping, and freely acquiescing to it are free of the unutterable tension that Baldwin describes.

The experience of the formerly dehumanized must be told, and their unique position in society must have corresponding recognition in social, legal, economic, and political spheres. Baldwin explains what vanquishing the "beast" of misrecognition might achieve: "[t]o tell his story is to begin to liberate us from his image and it is, for the first time, to clothe this phantom with flesh and blood, to deepen, by our understanding of him and his relationship to us, our understanding of ourselves and of all men."[96] He also argues that it may be necessary to use significant measures to achieve this kind of reconciliation

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93 *Id.*; David Jenkins, *James Baldwin and Recognition*, 8 AM. POL. THOUGHT 82, 83 (2019).

94 JAMES BALDWIN, *Many Thousands Gone*, *in* JAMES BALDWIN: COLLECTED ESSAYS 19, 22 (Toni Morrison ed., 9th ed. 1998).

95 Balfour expands, writing that "[t]o avoid dealing with the historical dehumanization of black Americans is thus to allow the beast to roam in white imaginations and the fear of the chaos brought on by true racial equality to rage unchecked." Balfour, *supra* note 92, at 29.

96 BALDWIN, *supra* note 94, at 34.

and that "[o]ur good will, from which we yet expect such power to transform us, is thin, passionless, strident."[97]

To be full contract makers, then, Black Americans need to be seen as such. Perception and recognition are difficult because they do not depend on one's bank account alone. However, it is crucial to combat misrecognition in order to both correct for the material and psychological wrongs done to Black Americans *and* to achieve a sense of reconciliation. One way to do so, supported by reparations proponents, is by giving Black Americans the resources (which they have historically been deprived of) to be *seen* as full persons. Baldwin is unflinching in arguing that change demands strong measures and creativity about what types of resources are needed. He writes that "there is simply no possibility of a real change in the Negro's situation without the most radical and far-reaching changes in the American political and social structure."[98] Even landmark legal decisions may be insufficient if they are unenforced or do not lead to policies that force bad actors to recognize the humanity of the oppressed.[99]

Baldwin argues that the failure of White Americans to see Black Americans and their history of injustice accurately also creates alienation from themselves. He calls this phenomenon White innocence.[100] Shattering White innocence is key to enabling White people to understand themselves. Political theorist Mark Brown, himself a White man, expounds upon this:

> White people are innocent because they act like children, people who have grown without growing up. They refuse to face the pervasiveness of white supremacy, pretending that it exists only in the distant past or the demonized American South . . . White innocence is the ideology that both denies and enables white supremacy.[101]

Of course, White innocence is not something maintained by all White Americans. However, it is certainly still present,

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97 *Id.*

98 Baldwin, *supra* note 91.

99 Baldwin is skeptical of the attitudes of White Americans toward the *Brown v. Board* decision that outlawed school segregation, noting in *The Fire Next Time* that "White Americans have contented themselves with gestures that are now described as 'tokenism.' . . . [T]hey suppose, in spite of the mountain of evidence that has since accumulated to the contrary, that this was proof of a change of heart . . . ." BALDWIN, *supra* note 90, at 86.

100 *See* Mark B. Brown, *James Baldwin and the Politics of White Identity*, 20 CONTEMP. POL. THEORY 1, 7 (2021).

101 *Id.*

visible in the "All Lives Matter" counter-protests to the "Black Lives Matter" movement or in the insistence that we live in a color-blind society.[102] It is also present in the notion that a one-time payment is sufficient to make Black Americans whole, or that equality has already essentially been achieved.[103]

Together, the works of Mills, Pateman, and Baldwin give us a good understanding of what a replacement social contract ought to achieve. All three are clear that the Racial Contract must be replaced with a social arrangement that is fundamentally different in how it values all people equally. When thinking about how reparations might be used to help recipients become true contract makers, three principles emerge:

I. Reparations proposals should not fall victim to opponents who call for color-blind proposals to generally address wealth inequality.[104]

Race-neutral policies can certainly co-exist with reparations, but combating epistemologies of ignorance is critical to overturning the Racial Contract. To avoid the problems of misrecognition and White innocence that Baldwin identifies, there must be policies that specifically foster recognition of Black Americans. Looking at issues of racial inequality, bias, and

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102 George Yancy & Judith Butler, *What's Wrong with "All Lives Matter"?*, in THE STONE, N.Y. TIMES (Jan. 12, 2015), https://opinionator.blogs.nytimes.com/2015/01/12/whats-wrong-with-all-lives-matter/ [https://perma.cc/HZ9E-NKLX]; Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2225–26 (2023) [hereinafter *SFFA*] (Sotomayor, J., dissenting) ("Today, this Court stands in the way and rolls back decades of precedent and momentous progress. It holds that race can no longer be used in a limited way in college admissions to achieve such critical benefits. In so holding, the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter.").

103 *See, e.g.*, Charles Krauthammer, *Essay: Reparations for Black Americans*, TIME (Dec. 31, 1990), https://time.com/archive/6716829/essay-reparations-for-black-americans/ [https://perma.cc/24BT-N8Z8] (defending and defining reparations as a singular opportunity to wash America's hands of the legacy of slavery); John McWhorter, *Why I Don't Want Reparations for Slavery*, L.A. TIMES (July 15, 2001), https://www.latimes.com/archives/la-xpm-2001-jul-15-op-22579-story.html [https://perma.cc/RV9N-YQE7] ("Fewer than one in four black families now lives below the poverty line, and the black underclass is, at most, one out of five. This is what the civil rights revolution helped make possible. Yet today, numerous black officials proclaim that the overriding situation for blacks is one of penury, dismissal and spiritual desperation. Under this analysis, the blood of slavery remains on the hands of mainstream America until it allocates a large sum of money to 'repair' the damage done to our race over four centuries.").

104 Jennifer M. Page, *Reparations for White Supremacy? Charles W. Mills and Reparative vs. Distributive Justice After the Structural Turn*, 55 J. SOC. PHIL. 709, 714 (2022) ("When income is redistributed under the banner of reparative rather than distributive justice, this powerfully recognizes past and ongoing injustice as the reason why society owes something to Black people.").

discrimination straight on is incredibly important to reforging a social contract that values all people equally. Even if economic inequality was somehow eliminated, great harm could persist if racialized attitudes and treatment continued in legal, social, and political spheres. There is also no guarantee that, in market economies, exploitation would not continue. While economic opportunity might look equal at Time 0, individual and system choices might produce racial wealth gaps, denial of opportunity, and poor treatment over time. This is because color-blind economic proposals do little to eliminate or protect against racialized attitudes.[105]

For example, a 2022 reparations plan in Providence, Rhode Island, was framed as racial reparations but distributed in a race-neutral manner in order to comply with federal guidelines.[106] Ironically, in order to comply with federal civil rights laws intended to benefit Black Americans—like the Civil Rights Act of 1964[107]—Providence felt it could not implement a reparations policy that meaningfully impacted Black Americans.[108] Also, funds were not distributed to individuals, but rather to organizations and communities, which were not necessarily required to advance Black American issues as a condition of funding.[109] This policy was criticized by reparations proponents and opponents alike. One activist noted that "[i]t's not reparations. What this policy is, it is city funds from COVID-19 to

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105 JOHN RAWLS, A THEORY OF JUSTICE 266 (rev. ed. 1999) ("Social and economic inequalities are to be arranged so that they are . . . to the greatest benefit of the least advantaged . . . ."). Rawls defines these social and economic inequalities primarily based upon income. *Id.* at 267. His Difference Principle, one of the most popular race-neutral distributive justice philosophies, does not provide for means of racial reconciliation or acknowledge the continued impact of de jure and de facto discrimination. *See id.* at 252–53. Rawls is forward-looking to a fault, not realizing that past harm will continue into the future if not addressed. For example, should economic benefits be provided to a bankrupt former Confederate general who has suddenly lost most of his wealth because of Emancipation? It is not clear that this individual, despite being perhaps the least advantaged by a post-Emancipation society, ought to receive any benefit.

106 *See* Gabriella Abdul-Hakim et al., *Providence Establishes Reparations Program to Praise and Criticism*, ABC NEWS (Jan. 31, 2023), https://abcnews.go.com/US/providence-establishes-reparations-program-praise-criticism/story?id=96662287 [https://perma.cc/PBB3-5LVV].

107 *See* Civil Rights Act of 1964, 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

108 *See id.*

109 *See* Steph Machado, *Here's How Providence Is Spending Its Reparations Money*, BOS. GLOBE (Aug. 14, 2024), https://www.bostonglobe.com/2024/08/14/metro/providence-rhode-island-reparations-money/ [https://perma.cc/3BQ6-LH78].

fund an anti-poverty program. That's not what reparations is. Reparations is the work to repair the harm that has been done to Black people in this country."[110] Further, the limited funds and the application process do not fulfill the core tenet of reparations, which is that reparations are owed based on past harm and not on how well one will use payment received.

Failing to directly acknowledge the deep harm that was done (and continues to be done) to minority groups will only perpetuate the Racial Contract. To be successful, reparations must dedicate specific effort, resources, and powers to clearly addressing the country's legacy of slavery. Broad redistributive economic policies might help some Black (and White) individuals, and can be useful, but are insufficient to correct for the dehumanization of the Racial Contract.

II. Reparations policies cannot become yet another way for existing structures of domination to survive while paying lip service to progress.

Those working toward racial justice should be wary of framing one-time financial payments as "reparations," allowing opponents to claim that problems of race are resolved, once and for all.[111] It is seductively simple to view racial harm as a breach to an ordinarily acceptable social contract. The solution, then, is just to pay for damages to the breach. A one-time payment, as in real contract cases, would be considered sufficient to make parties whole. But in the case of the Racial Contract, a one-time payment does little to change the status of exploited people from the object of contract to being recognized as parties to contract. Indeed, for this reason, some Japanese Americans protested the reparations checks given by the U.S. government for the Japanese internment that occurred during World War II.[112] For some, these reparations were an insufficient substitute for the grave violations done to them by the U.S. government and a poorly disguised attempt to frame Japanese Americans as a "model minority" willing to easily forgive the government.[113] Reparations proposals must aim to

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110 Abdul-Hakim et al., *supra* note 106.

111 *See, e.g.*, Krauthammer, *supra* note 103.

112 *See* Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV. 385, 425 (1998) ("Asian Pacific Americans are at a crossroads in terms of where they will stand in the coming era of race relations; they will either be used to solidify control of white supremacy or stand as a force against it. In the justice that was rendered by national redress for incarceration lies the danger that its price will be ideological co-optation.").

113 *See id.* at 390–91.

fundamentally shift relations between groups of people toward equality, and must have lasting power behind them.

Relatedly, reparations should not be understood or formulated as paternalistic. Reparations policies must be structured so as not to be seen as a handout to Black Americans. Doing so perpetuates the idea of a fundamental inequality between White and Black people that is so central to the Racial Contract. It makes Black Americans the object of pity at best, rather than equals who deserve repair when harm is done to them. Mills emphasizes the importance of actions being carried out under the appropriate description: "If I give you twenty dollars because I am feeling sorry for you, it is not the same as if I give you twenty dollars to repay the money I borrowed from you last month," he writes.[114] It is necessary to guard against a paternalistic approach that sees reparations as a cash handout to the needy rather than something that is owed for past harm. As considered in Part IV of this Article, legal rights and responsibilities may be a reparations option that avoids this issue.

III. Adding "favorable terms" to a broken and bad status quo is insufficient.

Reparations proposals should be so bold as to set the groundwork for societal transformation. An unconscionable contract that is made slightly less unconscionable through financial payouts is still unconscionable. Concepts from contract law, explored in the following section, can help elucidate the harms of the Racial Contract and what a true novation requires.

B. Contract Law Concepts

Concepts from contract law also provide guidance on what it means to be a respected party to a contract rather than a beneficiary or exploited third party.[115] Here, the Article considers the concept of unconscionability, looking specifically at 1) equality of bargaining power, 2) ability to reject unfavorable terms, and 3) duress.[116] Without these protections, some parties to contract

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114 Charles W. Mills, *Race and Global Justice*, *in* EMPIRE, RACE AND GLOBAL JUSTICE 94, 117 (Duncan Bell ed., 2019).

115 For an interesting consideration of tort law applications to the question of reparations, see generally Marc Loth, *How Does Tort Law Deal with Historical Injustice?: On Slavery Reparations, Post-Colonial Redress, and the Legitimations of Tort Law*, 11 J. EUR. TORT L. 181 (2020).

116 *See generally* Richard J. Hunter, Jr., *Unconscionability Revisited: A Comparative Approach*, 68 N.D. L. REV. 145 (1992); Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773 (2020).

will be subject to the threat of domination by others. To replace the Racial Contract means respecting not only the basic humanity and equality of the oppressed or exploited, but also letting them participate freely in the act of replacement. Some have argued that these protections were attempted during the Reconstruction Era but failed due to political and judicial workings.[117] In addition, examples abound of racial discrimination leading to unjust contracts.[118] To understand what it means to be respected as an equal in the social contract, it is worth understanding what guardrails contract law has instituted. Although in practice discrimination and bias still threaten to make certain contracting behavior immoral but not deemed illegal, the ideals in the law itself are of some use as a guide.

At the outset, it is worth noting that contract law has often failed racial minorities.[119] The standard for what makes a contract unconscionable, for example, is often fairly narrow and judges make basic assumptions about parties to a contract that do not account for the realities of subordination and inequalities.[120] In a 1969 case, *Contract Buyers League*, the court found that a valid complaint might exist that a contract for residential property was racially discriminatory in violation of the Civil Rights Act of 1866,[121] but also determined that the contract in question was not unconscionable.[122] Exploitation of unequal

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117 *See, e.g.*, BALKIN, *supra* note 49, at 47–48; John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 451–57 (2001); Alexander Tsesis, *Enforcement of the Reconstruction Amendments*, 78 WASH. & LEE L. REV. 849, 880–81, 921 (2021).

118 *See* Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 924–25 (1997); *see also* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 475–76 (1923); Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 836, 842 (1983).

119 Sabine Tsuruda, *Race, Unconscionability, and Contractual Equality*, 60 HARV. C.R.-C.L. L. REV. 159, 162 (2025).

120 *Id.* at 173 ("Under the ideal of classical contractual equality, people are equals in virtue of possessing the ability to advance their ends and interests in the contracting process, and in being treated as having such an ability, but not necessarily in virtue of being able to exercise that ability equally. Some individuals may be more or less persuasive, or have wealth, opportunity, social status, or other resources or characteristics that give them a relative bargaining advantage. As the unconscionability doctrine makes clear, the common law of contracts typically leaves such sources of bargaining power inequalities intact, taking individuals and markets as it finds them.").

121 Civil Rights Act of 1866, 42 U.S.C. § 1982 ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").

122 Contract Buyers League v. F & F Inv., 300 F. Supp. 210, 227–28 (N.D. Ill. 1969) ("But while the discriminatory exploitation of a system of *de facto* segregation

education and experience and the fact that artificial housing shortages for Black individuals may have pressured plaintiffs to accept a bad contract were insufficient grounds for a claim of unconscionability.[123] So, contract law is far from perfect in thinking about a fair, just, and equal society. However, the abstract principles may be helpful, if applied fairly and understanding the context of racial subordination, to understanding how parties to the social contract ought to be treated.

To be considered an equal contract maker, the terms and environment of contracting cannot be unconscionable. The development of the unconscionability doctrine recognizes that not all transactions are made between individuals with equal information, power, or freedom to transact.[124] It permits a court to refuse to enforce a contract on the ground that it is exploitative,[125] "unreasonably favorable" to one of the parties,[126] or otherwise extremely unfair.[127] The Uniform Commercial Code § 2-302(1) allows:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.[128]

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is unlawful under the Civil Rights Act, the artificial shortage of housing for negroes does not constitute an appropriate foundation for application of the principle of unconscionability.").

123 *Id.* Discrimination in the housing market remains an issue in the present. *See* Debra Kamin, *Discrimination Seeps into Every Aspect of Home Buying for Black Americans*, N.Y. TIMES (Nov. 29, 2022), https://www.nytimes.com/2022/11/29/realestate/black-homeowner-mortgage-racism.html [https://perma.cc/R8MC-H5EU].

124 Jones v. Star Credit Corp., 298 N.Y.S.2d 264, 266 (N.Y. Sup. Ct. 1969) ("The law is beginning to fight back against those who once took advantage of the poor and illiterate without risk of either exposure or interference.").

125 *See, e.g.*, Kelker v. Geneva-Roth Ventures, Inc., 303 P.3d 777, 782 (Mont. 2013) (explaining that "exploitation of the weaker party's vulnerability or lack of sophistication" is a common "element[]" of unconscionability).

126 RESTATEMENT (SECOND) OF CONTS. § 208 cmt. d (AM. L. INST. 1981) ("[A] gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.").

127 *See, e.g.*, U.C.C. § 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 2022) (explaining that the unconscionability doctrine is intended to prevent "unfair surprise").

128 U.C.C. § 2-302(1).

However, courts vary in exactly how they define unconscionability. An English court defined an unconscionable contract as one which "no man in his senses and not under delusion would make on the one hand and as no honest and fair man would accept on the other."[129] A more recent court defined it similarly as one "so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms."[130] Other definitions have also focused upon an intent to deceive or oppress by one party against a much less informed or weaker party.[131] The intuitions captured here are important because unconscionability is not formulaic in how it is interpreted or applied—as the racially discriminatory contract in *Contract Buyers League* demonstrates.

Another purpose of unconscionability, as codified, is the prevention of oppression and unfair surprise.[132] A serious disparity in ability to understand the bargaining process or contract terms by one party might render a contract unconscionable because the disadvantaged party could not have contemplated the result. Some courts have sought to turn this into a test, requiring a showing (1) that "a gross disparity existed in the division of assets and (2) [that the evidence shows] overreaching or oppressive influences."[133] A contract might also become unconscionable if no consent was given, or the terms of the contract or a gap in bargaining power is such that meaningful consent could not have been given.[134] While the mere presence of differences in bargaining power may not be

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129 Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (Ch. 1750).

130 Gillman v. Chase Manhattan Bank, 534 N.E.2d 824, 828 (N.Y. 1988).

131 3 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 928 (Spencer W. Symons ed., 5th ed. 1941) ("When the accompanying incidents are inequitable and show bad faith, such as concealments, misrepresentations, undue influence, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other, these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative.").

132 U.C.C. § 2-302 cmt. 1 ("The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power." (citing Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948))).

133 Galloway v. Galloway, 622 S.E.2d 267, 271 (Va. Ct. App. 2005).

134 Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) ("But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.").

sufficient to render a contract unconscionable, a contract may be found unconscionable if the difference is stark enough that there is an absence of meaningful choice by the disadvantaged party, to the benefit of the more resourced party.[135]

What would it mean to make guarantees against unconscionability in the social contract? From the brief snapshot above, contracts must not be oppressively unfair to one party at the expense of another. They must also not take place in circumstances where one party has significantly more power over the other, either in ability to obfuscate bad contract terms or to force the other party to accept terms no matter how detrimental. In other words, it would be nothing less than to give the power to reject any version of the Racial Contract of exploitation. This means going beyond blanket assumptions that the playing field is equal for everyone and that the free-market principles that underpin much of contract law allow all parties equal freedom.[136] It also means thinking carefully about when parties are contracting, considering both the possibility that individuals have unique (possibly eccentric) valuations of goods and that these individuals may have no other options to choose from, artificially influencing what they are willing to part with in the bargaining process.

Current reparations proposals are troubling because they do not address some of the key parts of the Racial Contract that make it unconscionable. For example, a key element of any contract is consent by the parties.[137] The enactment of contract without consent can also be described as duress, and a form of unconscionability. As Cohen warns, "[t]he extreme form of such duress, the highwayman's pistol, still leaves us with the freedom to accept the terms offered or else take the consequences. But such a choice is surely the very opposite of what

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135 *Id.* ("Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.").

136 Tsuruda, *supra* note 119, at 164 ("How would the unconscionability doctrine change if racially discriminatory contracts were paradigmatically unconscionable? The unconscionability doctrine would abandon its classical emphasis on party decision-making abilities and its assumption that market norms are fair. Instead, the doctrine would ask whether contract enforcement is consistent with treating the parties as equals—not just with respect to their capacities for choice, but with respect to their basic interests and inalienable rights.").

137 *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 296–99 (1986); Nancy S. Kim, *Relative Consent and Contract Law*, 18 NEV. L.J. 165, 178–79 (2017).

men value as freedom."[138] Reparation proposals are currently being formulated and, in some cases, enacted without the consent of many Black Americans, even over their disagreement.

In March of 2021, the Evanston City Council voted to pay $10 million in reparations to eligible Black residents over ten years.[139] To qualify, a resident must have lived in Evanston between 1919 and 1969 and suffered housing discrimination due to city ordinances, policies, or practices (or be a direct descendant of such a person).[140] In phase one, only sixteen Black families received $25,000 for home repairs and down payments on property.[141] A Northwestern study found that seventy percent of White respondents viewed the reparations program as "good public policy" for the City of Evanston.[142] This is meaningful, as "previous surveys nationwide have never recorded more than 20 percent support among White Americans for reparations."[143] In comparison, sixty-four percent of Black respondents, sixty-one percent of Latino respondents, and sixty-two percent of Asian respondents expressed support for the program.[144] But many members of the Black community were skeptical about these "reparations," concerned that these payments would benefit few people and were merely symbolic.[145]

It is concerning to pass a reparations proposal, allegedly for Black Americans, that many in the Black community disapprove of. In passing Evanston's proposal, it appears that only the consent of Evanston's city council really mattered.

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138 Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 569 (1933).

139 Adams, *supra* note 3.

140 *Id.*

141 *Id.*

142 Stephanie Kulke, *Overwhelming Support for Evanston Reparations Program, Survey Finds*, NW. WEINBERG COLL. ARTS & SCI. NEWS CTR. (Oct. 30, 2023), https://news.weinberg.northwestern.edu/2023/10/30/overwhelming-support-for-evanston-reparations-program-survey-finds/ [https://perma.cc/8UF3-JGE4].

143 *Id.*

144 *Id.*

145 Adams, *supra* note 3 (noting that Evanston Alderman Cicely Fleming called the program "a housing plan dressed up as reparations" and said that "true reparations" would require greater control by the people compared to city leaders). Fleming was the lone council member who voted against the legislation. Dahleen Glanton, *Column: Evanston's Reparations Plan Is More Symbol than Substance*, CHI. TRIB. (Mar. 25, 2021), https://www.chicagotribune.com/2021/03/25/column-evanstons-reparations-plan-is-more-symbol-than-substance/ [https://perma.cc/8C5J-DGWN]. Chicago Tribune columnist Dahleen Glanton also described the resolution as "mostly a symbolic gesture with little of the substance the reparations movement hoped for," adding that "African Americans won't get a dime in their pockets." *Id.* One college student said bluntly that "[g]iving $400,000 to 16 Black people in a town of 12,000 Black residents is not reparation." Adams, *supra* note 3.

The housing grant program offered no choice to Black Americans other than to accept or deny. While perhaps not duress in the vein of the highwayman analogy, this is still surely a failure to obtain mutual assent between the parties who really matter—namely, Evanston and its Black residents—about what remedy ought to be.[146]

To avoid continuing the coercive practices of the Racial Contract, a new social contract must also restore equal bargaining power to parties. Reparations proposals that focus on financial compensation or in-kind grants, such as housing, are unlikely to achieve this. These types of payments are certainly helpful, but they do not undo or address the centuries of exploitation that have occurred. Once the money is gone, the systems of exploitation will remain.[147] Financial compensation will be a *relief* but not a remedy. Something more powerful is needed to address how the Racial Contract has created systems of inequality. While the restoration of property is important, so is the restoration of bargaining power. This is one reason why providing laws as a form of reparations is an attractive alternative to current reparations proposals.

Equal bargaining power is important to preserving the ability to reject unfavorable terms in the social contract. Being able to put a foot down and say, emphatically, "no!" is important leverage to protect parties from accepting rotten contract terms. The Racial Contract imposed deleterious harms upon Black individuals and communities without the ability to challenge it. It is important that reparations proposals do not impose supposed benefits without Black Americans being able to bargain for what they actually want and need. A fair social contract must be one that can be contested, modified, and freely chosen. A reparations framework must include some flexibility to challenge exploitation and discrimination, and to reject the status quo in order to bargain for something better.

The Racial Contract is clearly unconscionable. From the get-go, the enslaved people who were brought to the United States had no say in their inhumane treatment. Those emancipated

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146 *See* RESTATEMENT (SECOND) OF CONTS. § 17(1) (AM. L. INST. 1981) (explaining that, in general, "the formation of a contract requires a bargain in which there is a manifestation of mutual assent").

147 *See* Danielle Kie Hart, *Contract Law & Racial Inequality: A Primer*, 95 ST. JOHN'S L. REV. 449, 456 (2021) ("*[A]ll* uses of unequal bargaining power, proper *and* improper, thereby become entrenched and protected by the contract law system with far-reaching consequences for contracting parties and the contract law system as a whole.").

had very little say in what rights and protections they were to be given.[148] Even today, the ramifications of formal and informal discrimination remain: redlining and denial of mortgages, discriminatory hiring, and entire Black neighborhoods razed for highway infrastructure have continued to be weaponized against Black Americans well after Emancipation.[149] A replacement contract must be created such that the aggrieved can feel satisfied that they have been given a seat at the table and can bargain, as equals, for the society that they wish to live in. There must be protection that these negotiations have been reasonable, even if they don't get everything they want. Law does this. Legal rights and protections can enable individuals to challenge unfair processes and discriminatory outcomes. They can be used to elevate voices by creating assurances that speaking out will not be punished and can allow for allocation of resources to account for past harms. Exercise of legal power can also be creative and generate new choices and possibilities. Because law is more durable and flexible than one-time financial payments, it is also a better candidate for reducing unequal power between parties over time.

IV
Law as Reparations

This Part argues that *law itself* is the form of reparations that best positions recipients to become contract makers and thus address the harms created by the Racial Contract. Most current reparations proposals being considered or adopted involve one-time payments or housing grants to directly impacted Black Americans or their descendants. While these policies are certainly beneficial to some degree, they fall short. The problems posed by the Racial Contract—and the task of replacing it—require complex solutions that are empowering without being paternalistic and that can be flexible to accommodate changing conditions and circumstances. To repair not only the

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148 *Id.* at 455 ("Consider, again, the white plantation owner and the newly-freed slave the day after the Emancipation Proclamation was issued. The plantation owner owned the land, buildings, equipment, and farm animals on the plantation; the freedman owned only himself. Unless the freedman had another source of income, which he would not, he would need to sell his labor to earn money for, among other things, food and a place to live. Not so for the plantation owner whose property would enable him to sustain himself, at least for a while.").

149 Deborah N. Archer, *"White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction*, 73 Vand. L. Rev. 1259, 1307, 1311 (2020); Richard Rothstein, The Color of Law: A Forgotten History of How Our Government Segregated America 239 (2017).

tremendous economic harm that slavery and racial discrimination caused and continue to cause but also the psychological dehumanization of Black Americans, more is needed. Providing unique and new legal rights to oppressed groups, in addition to or in lieu of financial payment, empowers groups to advocate for themselves and to be part of determining what remedy should be. Law is perhaps less satisfying than a one-time payment, or housing grant, or apology. However, it may be the only form of reparations that moves beyond symbolic action into the work of both reparation and reconciliation.

The United States has previously provided laws specifically designed to act a bit like reparations. Consider the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution.[150] Legislative history strongly establishes that these "Reconstruction Amendments" and other contemporary proposals were intended to ensure political equality for freed slaves following the Civil War.[151] However, while these laws may have originally been primarily meant to benefit Black Americans, they have since been weakened or re-interpreted. Without laws that are made specifically for the benefit of harmed groups, tailored to their needs, there is a risk that these groups face legal invisibility. Namely, laws that historically oppressed groups *should* be able to avail themselves of have now been used against them, because the laws lack specificity.

For instance, the Supreme Court has recently interpreted the Fourteenth Amendment to support "reverse-racism" claims of White plaintiffs, in contradiction with the original purpose of the amendment.[152] Notably, the Court has also interpreted the Fourteenth Amendment to overturn the practice of affirmative action for colleges intending to benefit historically marginalized groups like Black Americans.[153] The Court in its reasoning included previous precedent and selective legislative history surrounding the Fourteenth Amendment to conclude that it

150 U.S. CONST. amends. XIII, XIV, XV.

151 *See* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 2 (2010); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1809 (2010); David H. Gans, *I Am Free but Without a Cent: Economic Justice as Equal Citizenship*, 93 GEO. WASH. L. REV. 221, 225–27 (2025); *see generally* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

152 *See* Melissa Murray, *Stare Decisis and Remedy*, 73 DUKE L.J. 1501, 1555–57 (2024).

153 *See id.*

should be applied in a color-blind manner.[154] Affirmative action programs, intended to be a corrective maneuver, were instead framed as discriminatory. However, this interpretation of the Fourteenth Amendment is hotly contested. The Court in *Bakke* noted that "many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white 'majority.'"[155] An amicus brief in *SFFA* argued that:

> Congress indisputably passed the Fourteenth Amendment to remedy the harms inflicted on Black Americans through centuries of slavery and white supremacy, and to mitigate the burdens Black Americans faced after the Civil War. Far from being constitutionally forbidden, race-sensitive policies are essential to achieving the Fourteenth Amendment's aim, based on the original understanding of those who enacted it.[156]

Interestingly, some of the earliest Fourteenth Amendment cases also show that these amendments were primarily intended to help Black Americans. The *Slaughter-House Cases*—though primarily famous for limiting the Privileges or Immunities Clause—also makes clear that:

> [T]he most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. . . . [W]e mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[157]

In addition, Thirteenth Amendment jurisprudence has been stunted. The legislative history surrounding the Thirteenth Amendment suggests that the amendment was considered by some to be expansive, intended to end incidents of slavery

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154 *SFFA*, 143 S. Ct. 2141, 2159 (2023) ("The Constitution, they were determined, 'should not permit any distinctions of law based on race or color' . . . . As soon-to-be President James Garfield observed, the Fourteenth Amendment would hold 'over every American citizen, without regard to color, the protecting shield of law.'" (first quoting Supp. Brief for U.S. on Reargument at 41, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1); and then quoting CONG. GLOBE, 39th Cong., 1st Sess. 2462 (1866))).

155 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 293 (1978).

156 Brief of the Washington Bar Ass'n and the Women's Bar Ass'n of the District of Columbia as Amici Curiae in Support of Respondents at 4, *SFFA*, 143 S. Ct. 2141 (2023) (No. 20-1199).

157 *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 67, 71 (1873).

beyond simply preventing legal ownership.[158] Some lawmakers in 1864 clearly believed that the Thirteenth Amendment could be used to address marriage and family life, the capacity and ability of formerly enslaved people to own property, education, and access to courts and legal remedy.[159] Unfortunately, this interpretation was soon quashed by the courts.

In the *Civil Rights Cases*, the Supreme Court held that "[w]e must not forget that the province and scope of the thirteenth and fourteenth amendments are different: the former simply abolished slavery."[160] In *Plessy v. Ferguson*, forced racial segregation was not found to be a violation of the Thirteenth Amendment despite arguments that segregation was a badge of slavery.[161] In 1926, the Court in *Corrigan v. Buckley* effectively upheld a racially restrictive covenant in Washington, D.C., that forbade the sale of homes to Black families.[162] While such covenants were eventually found unconstitutional under *Shelley v. Kraemer* in 1948, *Shelley* was decided under the Fourteenth Amendment and not the Thirteenth.[163] Despite the promise of the Thirteenth Amendment, and the wide range of applications it had initially appeared to invite, "[t]he Thirteenth Amendment nevertheless remained primarily relegated to the annals of history, with few legislative uses to expand its reach."[164]

In many ways, the Court's insistence upon interpreting the Reconstruction Amendments so simply and without regard for their historical context reflects the continuation of the Racial Contract. While serious education gaps still exist along racial lines,[165] it is somehow affirmative action meant to benefit

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158 Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 203 (1951) ("The Thirteenth Amendment nationalized the right of freedom. It thereby nationalized the equal right of all to enjoy protection in those natural rights which constitute that freedom.").

159 CONG. GLOBE, 38th Cong., 1st Sess. 1439–40 (1864) (Statement of Sen. James Harlan (Iowa)).

160 *The Civil Rights Cases*, 109 U.S. 3, 23 (1883).

161 Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896).

162 Corrigan v. Buckley, 271 U.S. 323, 329 (1926) (referring to the challenge as "so unsubstantial as to be plainly without color of merit and frivolous").

163 *Shelley v. Kraemer*, 334 U.S. 1, 19–21 (1948).

164 Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337, 1338 (2009).

165 Max Altman, *Miles to Go: The State of Education for Black Students in America*, S. EDUC. FOUND. iii–iv (2024), https://southerneducation.org/what-we-do/milestogo2024/ [https://perma.cc/DY7Y-27Y4] (highlighting increasing racial segregation, over-disciplining of Black students, and underrepresentation in postsecondary education).

Black children that becomes discriminatory. Programs meant to uplift groups that have struggled through no fault of their own—and often because of government-sanctioned violence, over-policing, and policy[166]—are cut short because they are instead seen as harming White Americans. This is due, in part, to the fact that the text of these laws does not explicitly protect Black Americans. Future reparative laws thus require strong legal protections and rights, along with specificity about who they are intended for.

Law professor Bernadette Atuahene argues that "[p]roperty-induced invisibility entails economic vulnerability, such that one is dependent on the state for basic needs, so restoration of assets must be a central element in any reversal strategy."[167] To be made dependent because one's property—or the property one should have rightfully received from an ancestor—has been stolen "[i]s part of a larger strategy of dehumanization . . . ."[168] Similarly, without laws that are explicitly for the benefit of Black Americans and other oppressed groups, there is a risk of *legal invisibility*. Instead of having clear legal remedy for discriminatory actions, Black Americans are often dependent upon the courts and legislatures to make and interpret law in their favor. Because most laws that are part of the anti-discrimination jurisprudence are written in race-neutral language, judges have great discretion on how to apply the law. In many cases, they have chosen to interpret these laws in a way that limits their protections for Black Americans. Judges have also had the freedom to weaken laws that could have potentially protected Black Americans from discrimination and dehumanization. This practice is exemplified most recently in the affirmative action cases but has a long history.[169] The transformation of laws clearly intended to benefit Black Americans into race-neutral laws is made possible

166 *See, e.g.*, *SFFA*, 143 S. Ct. at 2175 (rolling back affirmative action); Kevin Morris & Michael G. Miller, *After* Louisiana v. Callais*: Here's Proof of Just How Bad Voting Rights in America Are About to Get*, BRENNAN CTR. FOR JUST. (May 4, 2026), https://www.brennancenter.org/our-work/analysis-opinion/after-louisiana-v-callais-heres-proof-just-how-bad-voting-rights-america [https://perma.cc/BM57-JTSH] (describing the efficacy of the Voting Rights Act in protecting minority voters and the Supreme Court's recent decision to effectively end it).

167 Bernadette Atuahene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. REV. 1419, 1450 (2007).

168 *Id.* at 1453.

169 *See, e.g.*, Kimberly West-Faulcon, *Affirmative Action After* SFFA v. Harvard*: The Other Defenses*, 74 SYRACUSE L. REV. 1101, 1102–05 (2024).

because of the race-neutral language of the plain text. To fulfill their promise, reparative laws should be explicit about race to avoid future co-optation.[170]

A. Why Law as Reparations?

1. *Law Is Empowering*

Law as reparations means that recipient groups and individuals can craft their own remedy. Providing legal recourse allows individuals to bring claims and publicly enforce their rights. It allows them to do this again and again, as incidents of dehumanization arise. This enables them, even when contested,

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170 Of course, explicit racial classification is a double-edged sword and has often been used to the detriment of racial minorities. *See* Donna E. Young, *Defining Race Through Law: Enforcing the Social Norms of Power and Privilege*, 72 ALB. L. REV. 1041, 1042–43 (2009) ("[W]e are left with a patchwork of often incoherent, inconsistent, degrading, and superficial classifications that have been developed in order to ascertain racial group membership so as to assign advantages and disadvantages that go along with such membership . . . [B]ecause race is virtually impossible to define with any scientific certainty or social consensus, the way in which the courts have relied on racial classifications is inherently problematic."); Jonathan Berry, *Curbing Racial Classifications*, 22 GEO. J.L. & PUB. POL'Y 385, 393 (2024) ("The administrative state created racial classifications to enable it to regulate race relations. That may have had the intention of reducing racial discrimination, but today, racial classification serves only to accelerate discrimination."). However, other scholars have supported the idea that a facially race-blind justice system does little to address underlying structural biases, and in fact gives them a false legitimacy. Importantly, they note that while racial categorization was used in the past to further discrimination, racial colorblindness in the present is being used for the same ends. *See* Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1062 (2007) ("Colorblindness by this logic protects and validates as 'not-racism' the actions of intentional discriminators who exercise the smallest modicum of caution as well as, much more significantly, the inertial persistence of entrenched patterns of racial hierarchy. Simultaneously, no justification can exist for the government's use of racial classifications, since by definitional fiat race lacks all social relevance. Thus reactionary colorblindness condemns as 'racism' race-conscious efforts at social reconstruction."); Yijia Lu & Murat C. Mungan, *Contagious Discrimination: Why Race-Blind Justice in Courtrooms Is Not Enough*, 101 N.Y.U. L. REV. ONLINE 82, 84 (2026), https://nyulawreview.org/wp-content/uploads/2026/03/101-NYULRev-Online-82.pdf [https://perma.cc/LEN2-5ZD9] ("Even when courts and prosecutors are race-blind, discrimination outside the courtroom can still affect bargaining outcomes within. If, for example, police disproportionately arrest minority defendants—as patterns widely documented across jurisdictions suggest—minority individuals in plea negotiations will hold worse 'outside options'—what they expect to receive if plea negotiations fail. And because bargaining outcomes depend on outside options—what awaits the defendant if negotiations break down—individuals with worse outside options are more likely to accept worse plea-bargaining outcomes. Therefore, disparate impact may persist despite the complete impartiality of prosecutors and judges. In this sense, discrimination is contagious—it can permeate from one institution to another, even when the latter operates with complete impartiality." (citations omitted)).

to force others to recognize their humanity through contention in the courts. One-time payments or in-kind grants run the risk of being interpreted as paternalistic. Worse, they provide finite resources. As soon as they run out, the remedy is gone even if the harm or the need is still there. Oppressed groups are once again forced into a greater state of dependency on the state and the courts to protect them using law that, as noted, has increasingly been interpreted against racial minorities.

Reparations should enable "a greater range of free choices and, consequently, allow[] the development, exercise, and expression of moral agency."[171] Having specific legal rights and enforcement powers allows for oppressed individuals to have a clear basis on which to protect and exercise their rights. It also signals that the justice system works for them, and not just to exploit them. Consider, for example, a reparative law that allows Black Americans extra procedures to challenge the use of eminent domain or determinations of just compensation by the government. The United States government has a long and unfortunate track record of using eminent domain to declare Black neighborhoods as blighted and to forcibly take property from Black Americans. Consider just two examples:

In *Berman v. Parker*, the Court sanctioned the condemnation of a Black neighborhood in Washington, D.C., despite local property owners contesting that the land was blighted.[172] The area condemned was majority Black, and inadequate programs were created to ensure that residents displaced by the ruling in *Berman* would have housing options or a right to return after redevelopment.[173] In Syracuse, New York, over one thousand members of the Fifteenth Ward, a majority Black community, were forcibly displaced in the 1950s for the creation of the I-81 highway using the eminent domain power.[174] Residents often found relocation incredibly difficult due to local housing discrimination, and those who were not displaced faced increased health risks because of their proximity to the new highway. The effects of this displacement are still felt today.

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171 Jagmohan, *supra* note 10, at 153.

172 Berman v. Parker, 348 U.S. 26, 31 (1954).

173 For example, in "Area B" of the condemned area, the redevelopment plan specified a maximum of 3,600 residents after development. Before development, Area B housed over 5,000 people and was 97.5% Black. Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423, 448 (2010).

174 *The I-81 Story*, N.Y. C.L. UNION (Mar. 12, 2021), https://www.nyclu.org/en/campaigns/i-81-story [https://perma.cc/4DHC-YGQM].

Given this history, a reparative law could provide Black Americans the right to independent evaluation of their land and reasonable alternative housing costs in order to ensure just compensation. It might also explicitly create instructions for government agencies to halt construction that has a disparate impact on owners and renters of different races, whether intentional or not. Such a law would signal to Black Americans that the government is taking seriously their previous poor treatment in issues of housing and property ownership and give them the ability to protect themselves against unequal treatment. Such a reparative measure would allow Black Americans to feel and be treated as contract makers in society, as people who cannot simply be moved out of the way when it is convenient for the government or to benefit their White neighbors.

2. *Law Allows Disappointments to Be Rectified*

We must take seriously the importance of building trust amongst the Black community. Reconciliation requires parties to have trust in common political projects. As in South Africa and Greensboro, the failure of the government to act can create serious issues of trust for aggrieved parties. Redress must help victims to trust that the harm they suffer will be recognized and remedied. Black Americans have been seeking reparations for slavery since Emancipation. They have been disappointed countless times by the government ever since reparations were first promised by General William Sherman in the form of forty acres and a mule, and as Congress repeatedly failed to acknowledge Callie House and the freedmen pensioners movement. While it may not be important that Black Americans believe the U.S. government is *sorry* for past harms, they must be able to trust that it will act to rectify harm. Without this trust, it is a mighty task to convince Black Americans that it is worthwhile to continue in a shared project of governance that will not rectify horrendous harm to them. McGary contends that reparations "allow[] people to have a sense of stability in their lives. This right allows us to feel justified in believing that we are entitled to shape our lives as we see fit provided that we respect the right of others to do the same. . . . assurance that when our property rights are violated, steps will be taken to make the victims whole."[175]

175 McGary, *supra* note 10, at 559.

Even when Black Americans have had some degree of control over their property and external environment, this was precarious and unlikely to remain consistent over time. For example, in the 1921 Tulsa Race Massacre, White terrorist mobs destroyed and looted the prosperous Black community in Tulsa, Oklahoma, over the course of two days.[176] This event left many dead and approximately 9,000 Black residents homeless. Almost sixty years after the formal end of slavery, the ability of Tulsa's Black community to control their own property and develop a sense of identity through new wealth was destroyed. Tulsa was not an isolated incident, with actions of extreme racial terror continuing to plague Black Americans throughout the 1900s.[177] To date, no proper legal remedy has been provided for these harms. The continued use of policy and physical violence to deny Black Americans control over their own bodies and treatment is an obstacle to developing personhood unlike any other group in America has faced.

Law can be a powerful tool for building trust by addressing previous harm and creating new remedies and protections. Importantly, laws and legal interpretation can also be used to create exceptions to existing legal doctrine or regime. This might allow for harms done specifically by the legal system to be remedied. In the early 2000s, several different descendants of enslaved people filed lawsuits against corporations for unjust enrichment.[178] These claims were consolidated, and the allegations included conspiracy to commit tortious acts, crimes against humanity, piracy, intentional infliction of emotional distress, conversion of profits earned by enslaved labor, and unjust enrichment.[179] The complaint alleged that the actions of these corporations had continued impacts on descendants of directly affected enslaved

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176 Kimberly Fain, *The Devastation of Black Wall Street*, JSTOR DAILY (July 5, 2017), https://daily.jstor.org/the-devastation-of-black-wall-street/ [https://perma.cc/R2AP-SRC3]; Chris M. Messer, *The Tulsa Race Riot of 1921: Toward an Integrative Theory of Collective Violence*, 44 J. SOC. HIST. 1217, 1218 (2011).

177 *Lynching in America Report*, EQUAL JUST. INITIATIVE (Oct. 25, 2022), https://eji.org/reports/lynching-in-america/ [https://perma.cc/6UC9-8TRS].

178 These defendants included FleetBoston Financial Corporation, CSX Corporation, Aetna Inc., Brown Brothers Harriman, New York Life Insurance Company, Norfolk Southern Corporation, Lehman Brothers, Lloyd's of London, Union Pacific Railroad, JPMorgan Chase Manhattan Bank, WestPoint Stevens Inc., R.J. Reynolds Tobacco Company, Brown & Williamson, Liggett Group Inc., Loews Corporation, Canadian National Railway, Southern Mutual Insurance Company, and American International Group ("AIG"). Second Consolidated and Amended Complaint at 1–5, *In re Afr. Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027 (N.D. Ill. 2004).

179 *Id.* at 5–6.

people, and that the descendants had, among other things, "suffered segregation, lost opportunity, diminished self-worth and value, loss of property rights, loss of derivative property rights, and psychological harm."[180] The court ultimately dismissed the case for lack of standing, raising a non-justiciable political question, and being barred by the statutes of limitation.[181]

In later appeals, the Seventh Circuit expounded upon the idea that litigation had come too late. In considering claims against the insurance company Aetna—which was valued at approximately $70 billion at the time of its acquisition by CVS Health in 2018[182]—the court denied the possibility that profiting off of slavery could be litigated years later.[183] Although Aetna was alleged to have issued insurance policies on slaves in the 1850s, the court ruled:

> [T]here is a fatal disconnect between the victims and the plaintiffs. When a person is wronged he can seek redress, and if he wins, his descendants may benefit, but the wrong to the ancestor is not a wrong to the descendants. For if it were, then (problems of proof to one side) statutes of limitations would be toothless. A person whose ancestor had been wronged a thousand years ago could sue on the ground that it was a continuing wrong and he is one of the victims.[184]

Judge Posner conveniently ignores the fact that slavery did not happen a thousand years ago and the fact that slaves did not have the ability to file suit against insurance companies like Aetna in the 1850s. In the interest of supposedly giving the statutes of limitations teeth, the Circuit Court deprioritized justice and accountability for those who profited from slavery. When calculating statutes of limitations, both Judge Posner and Judge Norgle in the original decision are clear that they would have expected these claims to come soon after Emancipation. Perhaps to a well-resourced individual with legal training, it isn't obvious why one wouldn't bring a lawsuit against one's former enslavers. However, this is a limited perspective. It disregards the decades of racial violence, segregation, and discrimination that followed—only formally

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180 *Id.* at 34.

181 *In re Afr. Am. Slave Descendants Litig.*, 304 F. Supp. 2d at 1051–63, 1065–75.

182 *CVS Health Completes Acquisition of Aetna, Marking the Start of Transforming the Consumer Health Experience*, CVS HEALTH NEWS (Nov. 28, 2018), https://www.cvshealth.com/news/company-news/cvs-health-completes-acquisition-of-aetna-marking-start-of.html [https://perma.cc/B5R5-AKUX].

183 *In re Afr. Am. Slave Descendants Litig.*, 304 F. Supp. 2d at 1051.

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

addressed by the Civil Rights Act of 1964. If individuals should have gone to the courts to vindicate harms done, what luck would they have in pursuing a claim during a time when racial subjugation was still normalized and in which more immediate needs required legal attention? Judge Posner is correct in that not every claim can lurk indefinitely in waiting, but he fails to fairly consider the barriers that the Black community faced in bringing claims forward.

Justice Ginsburg made a similar mistake in *City of Sherrill v. Oneida Indian Nation*.[185] At issue was whether the Oneida Indian Nation was required to pay taxes for land that had been possessed by the tribe in 1805, subsequently governed by New York state and its local governments, and then repurchased in 1997 and 1998 by the Oneida.[186] Despite documenting the efforts of the federal government to remove the Oneida from their ancestral lands,[187] Justice Ginsburg held that the Oneida did not have sovereignty over their property, writing that "the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders."[188] Key to this holding was the role of time and the doctrine of laches.[189] Justice Ginsburg, like Judge Posner, focused on the passage of time and the supposed complications of upending expectations of present-day New Yorkers while ignoring the necessity of challenging the fact that those expectations were based on race-based policies of removal and conquest of Native Americans:

> When a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations. There is no dispute that it has been two centuries since the Oneidas last exercised regulatory control over the properties here or held them free from local taxation. Parcel-by-parcel revival of their sovereign status, given the extraordinary passage of time, would dishonor "the historic wisdom in the value of repose."[190]

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185 *See* 544 U.S. 197, 217–18 (2005).

186 *Id.* at 202.

187 *See id.* at 205–06.

188 *Id.* at 203.

189 *See id.* at 217 ("The principle that the passage of time can preclude relief has deep roots in our law, and this Court has recognized this prescription in various guises.").

190 *Id.* at 218–19 (footnote omitted) (quoting Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 262 (1985) (Stevens, J., dissenting in part)).

The passage of time here serves as a laundering scheme for historic violence and dispossession. If enough time has passed, a twisted logic applies in which claims for redress not only become impracticable or untimely but *also* become unfair to modern beneficiaries of the original harm.

Consider the possibility of creating a law that suspends the doctrine of laches or statutes of limitations for individuals who can prove that they or an ancestor were harmed by racially discriminatory actions. The preclusion of claims against slave owners, White supremacists responsible for lynching, or intentional practitioners of redlining seems an injustice, especially when their actions made potential plaintiffs unable or under-resourced to bring claims.[191] Such a law would be valuable in providing a new legal ability that had previously been denied. It would signal to Black Americans that when harm is done to them, just like when harm is done to others, the government will allow them to seek remedy. Some have noted, specifically in respect to *In re African-American Slave Descendants*, that the decision of the courts reflects a public memory of slavery and its aftermath that is false.[192] Legal claims that lay bare the ongoing harms of the system of slavery (and its individual actors) are important to challenging the prevalent public memory. Suspending the doctrine of laches, changing the qualifications for standing, or allowing for claims to be heard past the statute of limitations acknowledges that many horrific discriminatory acts were done in the past to Black (and Native) individuals specifically. The legal doctrine as-is fails to account for these great historical harms and insulates corporations, governments, and individuals from the passage of time. Allowing individuals to bring claims and potentially receive remedy for past harm would validate claims of past harm as legally cognizable. Regardless of the result of such litigation, the recognition would be an important symbol.

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191 *See* Justice Oliver Wendell Holmes for a pithier description: "I refer to statutes of limitation and the law of prescription. The end of such rules is obvious, but what is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?" *The Path of the Law*, 10 HARV. L. REV. 457, 475 (1897).

192 Lolita Buckner Inniss, *A Critical Legal Rhetoric Approach to* In Re African-American Slave Descendants Litigation, 24 ST. JOHN'S J. LEGAL COMMENT. 649, 694 (2010).

3. *Law Is Flexible, Educational, and (Potentially) Less Controversial*

Giving powers, rights, and responsibilities is very different than giving a benefit. Unlike a payment of money, if a legal right no longer needs to be used, then this is a good signal that the recipient group is being treated justly. In such cases, the law lurks in the background, ready to be used if mistreatment occurs. Correspondingly, laws can also change and develop over time as needs change. Interpretation of a legal right can evolve, while a one-time payment has no such flexibility.

In addition, law creates precedent. As the laws are tested, stretched, and applied in different contexts, it becomes clearer and clearer (hopefully) what kinds of actions are permissible and which are not. Law as reparations has an advantage over other types of reparative policies because it provides an opportunity to publicly decide what kinds of behavior are discriminatory and what the consequences for such behavior are. By changing legal understanding, Black Americans exercising reparative laws are quite literally changing the legal and social fabric. In other words, they are contributing to the social contract that binds society.

Finally, financial reparations are hotly contested because of the sticker shock that most proposals pose. As discussed previously, it is impossible to put a dollar value on the evils of slavery and the harm that it caused. While it is easier to calculate the financial losses caused by redlining or increased risks to mortality, it is still impossible to determine exactly how Black American lives would be different if systemic and interpersonal racism did not exist. Meaningful financial reparations will likely cost a significant amount of money to even come close to the harm it seeks to remedy. Such a sum will likely draw the ire of White Americans, who have shown a strong antagonism to reparations even across the political aisle.[193]

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193 One of the earliest surveys on reparations (by ABC News in 1997) asked "Do you think the federal government should or should not pay money to [B]lack Americans whose ancestors were slaves as compensation for that slavery?" Only ten percent of White respondents and sixty-five percent of Black respondents supported reparations. Kendall Karson, *Divisions Emerge on Renaming Military Bases, Reparations Amid Unrest: Poll*, ABC NEWS (June 19, 2020), https://abcnews.com/Politics/divisions-emerge-renaming-military-bases-reparations-amid-unrest/story?id=71326039 [https://perma.cc/NU7J-XCCS]. Recent surveys have found that between fourteen and twenty-eight percent of White Americans support government-provided cash reparations to African American descendants of slaves for slavery. William Darity, Jr. et al., *Black Reparations in the United States, 2024: An Introduction*, 10 RSF: THE RUSSELL SAGE FOUND. J. SOC. SCIS. 1, 21 (2024).

A lower payment amount will probably satisfy White Americans, but also feel insufficient for Black Americans. While reparative laws may eventually lead to financial costs as rights are asserted and claims made, they do not come burdened with a hefty price tag right out of the gate. This, perhaps, might lead to broader acceptance and make debates about reparations more focused on harm and repair rather than quibbling over a number.

4. *The Catch: Laws Must Have Power and Enforcement Mechanisms*

> *Yet a right is hollow if the legal system provides insufficient means to protect it.*[194]

Laws can only be reparative if they make sufficient promises to those who wield them, and those promises are fairly upheld by the courts. Laws that seek to remedy past harm or to give long-denied rights and protections to Black Americans must be expansive enough to make meaningful change. It is unproductive to grant rights without corresponding legal powers to enforce and defend them. Charles Mills confirms that, although formal equality or legal protections are valuable, genuine equality will not be achieved if there is the ability to thwart the law's promises, either because there is a lack of enforcement mechanisms and resources or because other laws can be used by those wishing to enforce the status quo.[195] So-called civil rights law "does not constitute a genuine challenge to White supremacy unless and until the means to correct for the effects of past racial subordination are included in the rewriting. And this requires, inter alia, a formal recognition of the White-supremacist nature of the polity."[196] As considered, the Thirteenth, Fourteenth, and Fifteenth Amendments held great promise for Black Americans and certainly did important work in securing newly recognized freedom. However, these Amendments failed to be interpreted and applied in a way that realistically addressed the history of slavery and the thick atmosphere

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194 Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 160 (Wis. 1997).

195 MILLS, *Revisionist Ontologies: Theorizing White Supremacy*, *in* BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE, *supra* note 88, at 107 ("[B]y the evasion of juridical proscriptions by legal maneuverings; and by the continuing educational, cultural, and financial handicaps suffered by nonwhites disadvantaged by the race and class concentrations of economic power established under the previous system, which in a capitalist economy violate no laws.").

196 *Id.*

of racism that pervaded despite formal abolition of slavery. As these laws were written in a race-neutral way, they have become selectively robbed of their potency or even been adapted to advocate against the interests of minorities in America.

Even those parts of the Reconstruction Amendments that specifically sought to give Black Americans a political opportunity post-Emancipation were short-lived. For example, Section 3 of the Fourteenth Amendment states:

> No Person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[197]

The historical record suggests that these laws were applied with some success to remove from public office or judgeships those individuals who had supported the Confederacy.[198] Section 3 is important because it directly addresses the reality that Confederate officials might still retain influence and power in the South and impose a political agenda of discrimination upon newly freed Black Americans. Further, it provided an opportunity for Black Americans to be elected to political positions and take part in shaping what the Southern states would look like in the aftermath of slavery. Some estimates suggest that about 1,400 Black Americans were able to hold public office at federal, state, and local levels during Reconstruction.[199]

But just four years later, the Amnesty Act of 1872 was passed, largely removing the restrictions on voting and holding office that the Fourteenth Amendment had placed on former Confederates.[200] It is estimated that over 150,000 former Confederate troops had their political rights restored by this

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197 U.S. CONST. amend. XIV, § 3.

198 Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87, 87 (2021).

199 ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION vii (rev. ed. 1996).

200 *Amnesty Act of 1872*, HERITAGE LIBR., https://heritagelib.org/history-culture/hilton-head-eras/amnesty-act-of-1872/ [https://perma.cc/SK39-E7WL] (last visited May 4, 2026).

act.[201] The effect of this about-face was to empower former Confederates to take political control of the South once again, to the detriment of the Black Americans living there. The number of Black officeholders declined when Reconstruction ended in 1877, and the removal of Reconstruction policies led to violence and intimidation at the polls by White supremacists.[202]

Outside of the Fourteenth Amendment, the law as a reparations model can be observed most poignantly in the post-Emancipation era's brief embrace, then rejection, of the Freedmen's Bureau and other accompanying laws. The Freedmen's Bureau Act and the Civil Rights Act of 1866[203] explicitly protected non-White Americans from discrimination.[204] Unlike other laws, which were interpreted in such a way that robbed them of any bite,[205] the Freedmen's Bureau Act created legal protections and provisions primarily for Black Americans. These laws, although short-lived, provide a kind of proof of concept for the power of providing laws to make right historical and ongoing harms.

The Freedmen's Bureau Act was passed on March 3, 1865.[206] The Act was specifically designed to benefit newly freed Black Americans and refugees of the Civil War, as they navigated a post-Emancipation America. The purpose of the Act was unambiguously designed to "provide[] former slaves and refugees with the goods and services they needed to make the transition from slavery to full American citizenship and to avoid falling into a permanent state of destitution inconsistent with the independence necessary for full citizenship in a democratic republic."[207] The Bureau was responsible for providing a range of services that included education, medical services, shelter, and

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201 *Id.*

202 Olivia B. Waxman, *The Legacy of the Reconstruction Era's Black Political Leaders*, TIME (Feb. 7, 2022), https://time.com/6145193/black-politicians-reconstruction/ [https://perma.cc/8EDB-3UXW].

203 Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

204 John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1141–42 (1990).

205 Hart, *supra* note 147, at 469 ("That said, the commitment to formal equality adopted by the Reconstruction Congress only made sense because the people in the Reconstruction Congress held key misconceptions about the world in general and the people in it. More specifically, elected officials erroneously assumed that, once they obtained freedom and were granted the same rights as all other citizens of the country, the newly-freed slaves should take care of themselves.").

206 Freedmen's Bureau Bill, ch. 90, 13 Stat. 507 (1865).

207 Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361, 1362 (2016).

clothing.[208] It also had success in mediating contracts and labor disputes between freedmen and employers, although it was limited by a lack of adequate federal support and the inability to provide assistance across the South.[209]

Unlike other Reconstruction Amendments, the Freedmen's Bureau Act was explicit in its intent to support formerly enslaved people. The Act, as expanded in the summer of 1866, directed the Bureau "to aid [freedmen] in making the freedom conferred by the proclamation of the commander-in-chief, by emancipation under the laws of States, and by constitutional amendment, available to them and beneficial to the republic."[210] It also allowed for the commissioner of the Bureau to "seize, hold, use, lease, or sell" buildings and lands held by formerly Confederate states, and to use the proceeds for "the education of the freed people."[211] The Freedmen's Bureau Act provided the kind of recognition that is necessary to treat aggrieved people as equals. It clearly names the harmed party, freed people, and the aggressor, Confederate governments, and then provides for a wide range of remedies.[212] This approaches the ideal of recognition that Baldwin and others describe as necessary to upending the Racial Contract and achieving reconciliation.

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208 John M. Bickers, *The Power to Do What Manifestly Must Be Done: Congress, the Freedmen's Bureau, and Constitutional Imagination*, 12 ROGER WILLIAMS U. L. REV. 70, 85 (2006); W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 225 (1935) ("Twelve labors of Hercules faced the Freedmen's Bureau: to make as rapidly as possible a general survey of conditions and needs in every state and locality; to relieve immediate hunger and distress; to appoint state commissioners and upwards of 900 bureau officials; to put the laborers to work at regular wage; to transport laborers, teachers and officials; to furnish land for the peasant; to open schools; to pay bounties to black soldiers and their families; to establish hospitals and guard health; to administer justice between man and former master; to answer continuous and persistent criticism, North and South, black and white; to find funds to pay for all this."); GEORGE R. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU 76, 80–81 (1955).

209 DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS 1865–1868, at 11–24 (1979); Case Comment, *To Set the Law in Motion: The Freedmen's Bureau and the Legal Rights of Blacks, 1865–1868*, 79 MICH. L. REV. 979, 980–81 (1981).

210 Freedmen's Bureau Bill, ch. 200, § 2, 14 Stat. 173, 174 (1866).

211 *Id.* § 12.

212 *Id.* ("That the commissioner shall have power to seize, hold, use, lease, or sell all buildings and tenements, and any lands appertaining to the same, or otherwise, formerly held under color of title by the late so-called confederate states . . . and any buildings or lands held in trust for the same by any person or persons, and to use the same or appropriate the proceeds derived therefrom to the education of the freed people . . . ."); Schnapper, *supra* note 151, at 772 (noting the wide range of powers given to the Bureau, at least on paper: "[T]he Bureau was authorized to aid blacks in almost any manner related to their newly-won freedom . . . .").

The Civil Rights Act of 1866 also gave Black Americans the legal rights necessary to act as equals in society. Section 1 declares that:

> [People] of every race and color . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[213]

Section 1 was enforceable against private parties and government officials, and so was given potency in theory. Section 1 is notable because it goes into detail about different important aspects of being recognized as a person under the law and makes clear that no distinction or privilege should be given to White Americans. This was recognized at the time. President Andrew Johnson vetoed the Civil Rights Act of 1866 because its intent was "to afford discriminating protection to colored persons,"[214] and it made a "distinction of race and color . . . [that] operate[s] in favor of the colored and against the white race."[215] Congress later overrode the veto.[216] The language of both the Civil Rights Act of 1866 and the Freedmen's Bureau Act looks like a real repudiation of the Racial Contract that had been implicitly and explicitly governing the United States. The legislative history suggests that proponents of the bill recognized the need to address the inequalities in power that Black Americans faced and to provide resources to protect against discrimination.[217]

In practice, these laws did seem to have some positive effects on Black Americans. The Freedmen's Bureau went to

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213 Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27.

214 6 A Compilation of the Messages and Papers of the Presidents, 1789–1902, at 408 (James Richardson ed., 1907).

215 *Id.* at 413.

216 Du Bois, *supra* note 208, at 284 ("Thus on April 6 and 9 Congress overrode the veto. The Civil Rights Bill became law, and Johnson faced a Congress able to work its will.").

217 As Congressman Moulton explained, "[t]he very object of the bill is to break down the discrimination between whites and blacks" and to make possible "the amelioration of the condition of the colored people." Cong. Globe, 39th Cong., 1st Sess. 632 (1866) (statement of Rep. Moulton). Representative Phelps similarly explained that the Freedmen's Bureau Act focused on providing assistance to Black citizens because they lacked the same political power as white citizens to advance their rights. *See id.* at App'x 75 (statement of Rep. Phelps).

great lengths to create educational programs, serving over 150,000 students.[218] It provided funding and land to establish colleges and universities for Black students.[219] The Freedmen's Bureau managed contracts between freedmen and Southern planters who hired them, helped locate family members of the formerly enslaved, legalized marriages, operated hospitals, and provided necessities like food and clothing.[220] Bureau courts also provided some relief for complaints of freed Black individuals by providing an avenue for such individuals to vindicate their newly granted rights.[221] Other contemporary legislation provided race-conscious protections for Black Americans, especially those who fought for the Union.[222]

Despite these successes, laws also must be upheld by the courts and political actors to remain impactful. The Freedmen's Bureau Act and its companions fell prey to the same political forces of compromise and discrimination that ultimately made the Fourteenth Amendment ineffective. From the start, some noted that the Bureau embraced segregation and implemented its programming accordingly.[223] By 1866, the Freedmen's Bureau courts were soon replaced with state courts that did not follow through on hasty promises—such as promises to allow the admission of testimony of Black individuals—by their legislatures to fairly treat Black complainants.[224] Additionally, the autonomy of the Freedmen's Bureau deteriorated as the passage of the Military Reconstruction Act in 1867 placed the Bureau under the auspices of the military. In 1868, Congress began withdrawing the Bureau from various states.[225] Further, locations with Bureau field offices faced increased backlash from White supremacist groups like the KKK in the form of

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218 ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 144 (1988).

219 Schnapper, *supra* note 151, at 781–82.

220 *The Freedmen's Bureau*, NAT'L ARCHIVES (Dec. 29, 2022), https://www.archives.gov/education/lessons/freedmen [https://perma.cc/7HQU-WUA3].

221 Zachary Newkirk, *A Brief Moment in the Sun: The Reconstruction-Era Courts of the Freedmen's Bureau*, 101 JUDICATURE 49, 50 (2017).

222 Freedman's Savings and Trust Company, ch. 92, 13 Stat. 510, 511 (1865); Joint Resolution of July 26, 1866, No. 86, § 1, 14 Stat. 367, 367–68; Act of Feb. 14, 1863, ch. 33, § 1, 12 Stat. 650, 650.

223 W.E.B. Du Bois, *The Freedmen's Bureau*, 87 ATL. MONTHLY 354, 364–65 (1901); Ira C. Colby, *The Freedmen's Bureau: From Social Welfare to Segregation*, 46 PHYLON 219, 219 (1985).

224 James Oakes, *A Failure of Vision: The Collapse of the Freedmen's Bureau Courts*, 25 CIV. WAR HIST. 66, 70–71 (1979).

225 Colby, *supra* note 223, at 224 ("Through political manipulation the Freedmen's Bureau functions were reduced to a minor role in Reconstruction.").

racial violence and attacks on Black schools.[226] By 1869, the Bureau had effectively ended its work and was formally discontinued by Congress in 1872.[227] The failure to support the work of the Bureau cut short the project of Reconstruction, leaving Black individuals without sufficient economic, legal, or social protections to adequately recover from the aftermath of slavery.

The pattern of positive advances for Black Americans being stymied by retrenchment was common at this time. Another example is the Southern Homestead Act of 1866, which provided for public lands in five Southern states to be open to homesteaders.[228] The bill was clearly designed to punish ex-Confederates and reward Black Americans and Whites who had never sworn loyalty to the Confederacy.[229] The act was largely a failure, and it was swiftly attacked by Southern leaders concerned about economic opportunity and by the failure of federal agents to effectively implement the program for freed individuals.[230]

V
What Does Law as Reparations Look Like?

The Article concludes by considering different examples of reparations being provided in the form of exclusive legal rights and protections. The Freedmen's Bureau and accompanying legislation, as discussed above, is perhaps the most directly relevant example of law as reparations, although it was short-lived. This Part considers examples from the Indigenous justice sphere, New Zealand/Aotearoa and Hawai'i. Special focus is given to Hawai'i, given that it exists under United States occupation and law. Through federal and state laws,

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226 Eric Chyn, Kareem Haggag & Bryan A. Stuart, *Inequality and Racial Backlash: Evidence from the Reconstruction Era and the Freedmen's Bureau* 41 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32314, 2024), https://doi.org/10.3386/w32314 [https://perma.cc/US2K-L2PT]; Herbert Shapiro, *Afro-American Responses to Race Violence During Reconstruction*, 36 Sci. & Soc'y 158, 165 (1972) ("Hundreds of black witnesses played a remarkable role, coming forward to testify during the hearings on the Ku Klux Klan in 1871 and offering abundant evidence of the impact of Klan violence upon the South.").

227 *Freedmen's Bureau*, Va. Commonwealth U. Libr. Soc. Welfare Hist. Project, https://socialwelfare.library.vcu.edu/federal/freedmen's-bureau/ [https://perma.cc/ZRY6-MC7H] (last visited May 4, 2026); Nat'l Archives, *supra* note 220.

228 Act of June 21, 1866, ch. 127, 14 Stat. 66.

229 Paul Wallace Gates, *Federal Land Policy in the South 1866–1888*, 6 J.S. Hist. 303, 304–05 (1940); Cong. Globe, 39th Cong., 1st Sess. 716–17 (1866); Cong. Globe, 39th Cong., 1st Sess. 2735 (1866).

230 Warren Hoffnagle, *The Southern Homestead Act: Its Origins and Operation*, 32 The Historian 612, 628 (1970).

judicial interpretation, and the state constitution itself, Native Hawaiians (Kānaka Maoli) have been given resources for remedying the harms done to them by United States annexation and imperialism. Critically, they have also been given legal authority over how these resources are used. Examples include the development of the public trust doctrine,[231] the creation of government agencies dedicated to Native Hawaiian advancement, traditional burial and gathering rights, and control over large portions of land. Now, these measures still fall woefully short of the demands of many Native Hawaiians and many of these laws have faced restrictions by the courts.[232] Still, Hawai'i provides an interesting counterexample to many of the forms of reparation being proposed for Black Americans. Because Native Hawaiians have been given unique legal rights as a form of reparations, they have been able to shape their own remedies to ongoing issues of displacement, co-option, and colonization. Further, the presence of law-as-reparations makes it possible for Kānaka Maoli to fight back when their communities are threatened. This would not be possible if they had been simply given a one-time payment for past harms.

A. Case Study: New Zealand

In 1867, the Māori of Aotearoa/New Zealand were formally enfranchised by the Māori Representation Act.[233] Prior to this, the Indigenous people of New Zealand were largely disenfranchised due to property requirements imposed by the British colonial government on the right to vote.[234] Under the 1867 Act,

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231 *See* McBryde Sugar Co. v. Robinson, 504 P.2d 1330, 1345–46 (Haw. 1973), *aff'd on reh'g*, 517 P.2d 26 (Haw. 1973); Robinson v. Ariyoshi, 658 P.2d 287, 310–11 (Haw. 1982); Kauai Springs, Inc. v. Plan. Comm'n of Kaua'i, 324 P.3d 951, 984 (Haw. 2014); Ching v. Case, 449 P.3d 1146, 1150 (Haw. 2019); HAW. CONST. art. XI, § 1.

232 *See* Rice v. Cayetano, 528 U.S. 495, 523–24 (2000) (holding that the voting process for the trustees of the Office of Hawaiian Affairs, which had been limited to people who were descended from inhabitants of the Hawaiian Islands in 1778, violated the Fifteenth Amendment).

233 Paul Moon, "*A Proud Thing to Have Recorded": The Origins and Commencement of National Indigenous Political Representation in New Zealand through the* 1867 Māori Representation *Act*, 16 J. N.Z. STUD. 52, 60 (2013).

234 *Id.* at 55 ("As for the entitlement to vote, this was limited to males from the age of twenty-one who owned property with a net value of at least fifty pounds (or sufficient equity in a leasehold property, or owned a property in a town). Women were excluded from voting (as they were throughout the rest of the world at this time), but in practice, so too were almost all Māori. The provision for land ownership as a prerequisite to the entitlement to vote excluded the vast majority of Māori whose land was still in communal possession. So while Māori were still

Māori could vote for Māori electorates in four regions across the islands. In 1975, the definition of Māori was expanded to include any descendants of a person of the Māori race, replacing blood quantum provisions that required at least half Māori ancestry.[235] In the same year, the Electoral Amendment Act was passed, which allowed Māori individuals to choose whether they wanted to vote in their Māori district (the Māori roll) or the general electoral district.[236] In 1993, the number of Māori electorates was expanded to be proportionate to the number of Māori who wished to be on the Māori roll—the previous disproportionality had not been addressed since 1867, at which time each of the four Māori electorates represented 12,500 people while each of the seventy-two European electorates represented 3,500 people.[237] The new method allowed for the number of Māori electorates to be determined by the number of voters on the Māori roll.[238]

Granting guaranteed Māori representation in New Zealand's Parliament might be considered a version of election law being crafted as reparations. It is important to note that for the first one hundred years of enfranchisement, the Māori electorate appears to have been a tool of political erasure for the Māori. Māori were not given a choice in which electorate they belonged to, and the limited number of seats meant that the Māori representatives would likely only ever be a vocal political minority.[239] However, with the more recent flexibility in choosing whether to vote as a member of a Māori electoral roll or the general roll, there are now certain benefits to Māori citizens. The passage of the 1975 and 1993 laws allowed for Māori people to be

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(just) the majority in the country, in the 1853 election – the first held under the provisions of the *Constitution Act* – of the 5,849 voters enrolled throughout the colony, only three hundred (approximately five per cent) were Māori.") (internal citation omitted).

235 Guillem Riambau, *Māori in New Zealand: Voting with Their Feet?*, 72 POL. SCI. 93, 97–98 (2020).

236 Electoral Amendment Act 1975, § 17 (N.Z.).

237 Rawiri Taonui, *Ngā māngai – Māori Representation*, TE ARA: ENCYCLOPEDIA OF N.Z. (July 15, 2016), https://teara.govt.nz/en/nga-mangai-maori-representation [https://perma.cc/YT2H-RNTQ].

238 *Id.*

239 David Denemark, *Choosing MMP in New Zealand: Explaining the 1993 Electoral Reform*, *in* MIXED-MEMBER ELECTORAL SYSTEMS: THE BEST OF BOTH WORLDS? 70, 79 (Matthew Soberg Shugart & Martin P. Wattenberg eds., 2003) ("From the 1970s on, however, because the number of districts for the general electorate rose while Maori seats remained fixed at four, Maori became 'substantially unrepresented'—this despite their increasingly fervent desires for a stronger parliamentary voice." (citing KEITH JACKSON & ALAN MCROBIE, NEW ZEALAND ADOPTS PROPORTIONAL REPRESENTATION: ACCIDENT? DESIGN? EVOLUTION? 267 (1998))).

proportionally represented in Parliament without limiting their political expression. While the political effects of these laws remain unclear and largely unstudied, research has found positive effects on the Māori population. Māori roll participants were found to be more likely to vote and were more interested in politics, had higher political efficacy, and felt better represented.[240]

> Broadly speaking, those who believe that being Māori is a positive and important part of their identities, who believe in the continued importance of past injustices and te Tiriti o Waitangi (the Māori language version of the Treaty of Waitangi), and those who feel they stand up for Māori rights, tend to choose the Māori roll.[241]

Political recognition and agency, especially considering the history of colonization and disenfranchisement of the Māori, is a potent reparative model.

The Law as Reparations model has also been enacted in the courtrooms of New Zealand. In 2003, the New Zealand Court of Appeal in *Ngati Apa v. Attorney General* ruled that the Māori Land Court had jurisdiction to determine if lands in the coastal foreshore and seabed are Māori customary land.[242] This opened the possibility for Māori people to claim title to private lands in areas that had previously been understood as belonging to the British Crown. This was a reversal of the Court's 1963 decision in *In re Ninety Mile Beach*, which held that "Māori customary title to land depended 'wholly on the grace and favour' of the Crown."[243] The Court's decision in *Ngati Apa* is important because it created a new legal route for Māori to claim land back from the governmental body that took the land from the Māori people. The Court's decision also affirmed the authority and importance of the Māori Land Court to determine Māori land claims.[244] However, this legal victory for the Māori was short-lived. In response to the Court's decision, the legislature

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240 Susan A. Banducci, Todd Donovan & Jeffrey A. Karp, *Minority Representation, Empowerment, and Participation*, 66 J. POL. 534, 550–51 (2004).

241 Lara M. Greaves et al., *The Predictors of Māori Electoral Roll Choice and Knowledge: Rangatahi Māori Voter Enrolment in a Representative New Zealand Youth Survey*, 18 KŌTUITUI: N.Z. J. SOC. SCIS. ONLINE 290, 293 (2023) (citation omitted).

242 *Ngati Apa v. Attorney-General*, [2003] NZCA 117; [2003] 3 NZLR 643 at [2] (N.Z.).

243 F.M. Brookfield, *Maori Customary Title in Foreshore and Seabed*, 2004 N.Z. L.J. 34, 34 (quoting *In re the Ninety-Mile Beach*, [1963] NZLR 461, 468).

244 *See* Christian N. Siewers Jr., *Balancing a Colonial Past with a Multicultural Future: Maori Customary Title in the Foreshore and Seabed After Ngati Apa*, 30 N.C. J. INT'L L. 253, 265 (2004).

passed the Foreshore and Seabed Act of 2004, which gave the Crown ownership over the foreshore and seabed of New Zealand.[245] This legislative rebuke of the Court of Appeal and the Māori litigants sparked outrage, especially given the widespread disapproval of the Act by the Māori community before its passage.[246] The Act also catalyzed the creation of the Māori Party, which has since won seats in Parliament and served as a legislative voice for Māori issues.[247] One example is the Marine and Coastal Area Act of 2011, which replaced the Foreshore and Seabed Act of 2004. Critically, the 2011 Act allowed for the exercise of Māori customary rights[248] and the establishment of customary marine title—an interest in land, but without the rights of disposition or alienation.[249] Alongside other tools, the law has been a way for Māori to advocate for themselves and to respond to backlash.

B. Case Study: Hawai‘i as a Limited Success Story

Calls for the preservation of the sovereignty of Hawai‘i and the self-determination of its people have been unceasing since the beginnings of Western colonization of the land.[250] Put in

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245 Nin Tomas, *Update on Foreshore and Seabed Developments Since 2004*, 2 Te Tai Haruru 141, 183 (2006).

246 Jamie Tahana, *A New Generation of Activism: Marking 20 Years Since the Foreshore and Seabed Hīkoi*, The Spinoff (May 2, 2024), https://thespinoff.co.nz/atea/02-05-2024/a-new-generation-of-activism-marking-20-years-since-the-foreshore-and-seabed-hikoi [https://perma.cc/99PZ-WQ6N]; Willie Jackson, *Looking Back: The Day Māoridom Descended on Parliament in Protest at the Foreshore and Seabed Legislation*, The N.Z. Herald (May 6, 2024), https://www.nzherald.co.nz/kahu/looking-back-the-day-maoridom-descended-on-parliament-in-protest-at-the-foreshore-and-seabed-legislation/UXRLVK6DUBFN7OTMNCZ42RRBSY/ [https://perma.cc/Z3EA-APRS].

247 Louise Humpage, *Does Having an Indigenous Political Party in Government Make a Difference to Social Policy? The Māori Party in New Zealand*, 46 J. Soc. Pol'y 475, 477 (2017) ("The party was established in 2004 when Labour MP, Tariana Turia, refused to vote for legislation proposed by her own government because it placed the foreshore and seabed into public ownership, thus denying Māori tribes an opportunity to seek judicial recognition that they owned this important resource. Backed by widespread Māori rejection of the legislation, Turia won the by-election as co-leader of the new Māori Party, which went on to gain five of seven Māori electorate seats in the 2008 general election.").

248 Marine and Coastal Area (Takutai Moana) Bill 2011, §§ 51–52 (N.Z.).

249 *Id.* §§ 53–54.

250 Keanu Sai, *The Illegal Overthrow of the Hawaiian Kingdom Government*, Nat'l Educ. Ass'n (Apr. 2, 2018), https://www.nea.org/nea-today/all-news-articles/illegal-overthrow-hawaiian-kingdom-government [https://perma.cc/R4FA-VP3N]; Barbara Sprunt, *Simmering Disputes over Statehood Are About Politics and Race. They Always Have Been*, NPR (Aug. 21, 2020), https://www.npr.

other words, claims for reparation have been clear and unceasing. In 1887, a group primarily consisting of White businessmen and missionary descendants forced King Kalākaua to sign the "Bayonet Constitution," backed by the threat of the Honolulu Rifles militia.[251] This Constitution expanded voting rights to foreign resident aliens and provided voting rights only to those Hawaiian, American, or European men who could pass economic and literacy barriers.[252] In 1893, Queen Lili'uokalani attempted to create a new constitution to rectify these issues and protect Native interests.[253] In response, a group of businessmen from the United States, led by Sanford B. Dole and Minister John L. Stevens, ordered U.S. troops stationed at Pearl Harbor to force Lili'uokalani's abdication.[254] Hawai'i was officially annexed in 1898,[255] although the validity of this annexation remains contested.[256] Even some members of the U.S. federal government recognized the violation of sovereignty. U.S. President Grover Cleveland urged Congress "to make all possible reparation" and restore the monarchy that had been "robbed of its independence and its sovereignty by a misuse of the name and power of the United States."[257] Notably, there were 21,269 signatories to an official petition by Native Hawaiians opposing annexation.[258] The newly formed "Republic of Hawai'i" promptly ceded 1.5 to 1.8 million acres of land to the United States, a theft of land that remains contested

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org/2020/08/21/902334807/simmering-disputes-over-statehood-are-about-politics-and-race-they-always-have-b [https://perma.cc/5LQR-V9ZG] ("[T]here's still a painful aspect to the whole history of Hawaii and its overthrow, annexation and statehood . . . There are a lot of people who do not consider [today] as a time of celebration because of the painful history" (alteration in original) (quoting Sen. Mazie Hirono)).

251 JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 1 (2002).

252 HAW. CONST. OF 1887, art. 59, §§ 1–4.

253 Annmarie M. Liermann, Comment, *Seeking Sovereignty: The Akaka Bill and the Case for the Inclusion of Hawaiians in Federal Native American Policy*, 41 SANTA CLARA L. REV. 509, 516 (2000).

254 *Id.*

255 Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, No. 55, 30 Stat. 750 (1898).

256 Williamson Chang, *Darkness over Hawaii: The Annexation Myth Is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL'Y J. 70, 104 (2015).

257 26 CONG. REC. S312 (Dec. 18, 1893) (message from Pres. Grover Cleveland), *reprinted in* AFFAIRS IN HAWAII, *in* FOREIGN RELATIONS OF THE UNITED STATES, 1894, APP. II, 53D CONG., S. EXEC. DOC. NO. 47, at 245–60 (1895).

258 NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 4 (2004).

today.[259] Hawai‘i was granted statehood in 1959, a measure that was met with hostility from both Native Hawaiians—who were forced to choose between statehood and continued annexation via plebiscite[260]—and racist lawmakers from the South.[261]

Like many other Indigenous groups, Native Hawaiians have a very strong claim to reparations. The historical and ongoing harm to Native Hawaiians is tremendous. It is estimated that between first contact by Europeans in 1778 and 1890, the Native Hawaiian population decreased by ninety-six percent due to factors directly introduced by European settlers, including diseases—tuberculosis, scabies, smallpox, measles, leprosy, and typhoid fever—drought, and destruction of the native environment.[262] Today, Native Hawaiians continue to face disproportionate and severe health impacts. Native Hawaiians have higher rates of mental and physical health issues compared to all other major ethnic groups in Hawai‘i.[263] Native Hawaiians are only twenty percent of the population but are forty percent of the prison population.[264] Native Hawaiians and Pacific Islanders have the highest rates of houselessness, with approximately 121 out of every 10,000 people experiencing homelessness in 2022.[265] There have also been serious cultural

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259 *See* Lane Kaiwi Opulauoho, *Trust Lands for the Native Hawaiian Nation: Lessons from Federal Indian Law Precedents*, 43 Am. Indian L. Rev. 75, 75 n.1 (2018).

260 Arnie Saiki, *Statehood Plebiscite*, Statehood Haw., https://www.statehoodhawaii.org/plebiscite/ [https://perma.cc/6TBD-3PDN] (last visited May 4, 2026).

261 Sprunt, *supra* note 250 (quoting Senator George Smathers, D-Fla., saying, "Perhaps we should become the United States of the Pacific and finally should become the United States of the Orient.").

262 Kalamaoka‘aina Niheu, Laurel Mei Turbin & Seiji Yamada, *The Impact of the Military Presence in Hawai‘i on the Health of Na Kanaka Maoli*, 13 Pac. Pub. Health 172, 172–73 (2006).

263 Ashley K. Morisako et al., *Beyond the Ability to Pay: The Health Status of Native Hawaiians and Other Pacific Islanders in Relationship to Health Insurance*, 76 Haw. J. Med. & Pub. Health 36, 36 (2017); Joseph Keawe'aimoku Kaholokula, *Colonialism, Acculturation, and Depression Among* Kānaka Maoli *of Hawai‘i*, *in* Penina Uliuli: Contemporary Challenges in Mental Health for Pacific Peoples 180, 186 (Philip Culbertson, Margaret Nelson Agee & Cabrini ‘Ofa Makasiale eds., 2007); Marjorie K. Mau et al., *Cardiometabolic Health Disparities in Native Hawaiians and Other Pacific Islanders*, 31 Epidemiologic Revs. 113, 127 (2009).

264 Charlotte West, *Native Hawaiians Are Overrepresented in Prisons. Cultural Education Could Help*, Civ. Beat (May 21, 2023), https://www.civilbeat.org/2023/05/native-hawaiians-are-overrepresented-in-prisons-cultural-education-could-help/ [https://perma.cc/M7AG-59GZ].

265 Mary Frances Kenion, *Long Overdue: Visibility for Native Hawaiian and Pacific Islanders Experiencing Homelessness*, Nat'l All. to End Homelessness: Blog (Aug. 14, 2023), https://endhomelessness.org/blog/long-overdue-visibility-for-native-hawaiian-and-pacific-islanders-experiencing-homelessness/ [https://perma.cc/4MK3-VB5X].

harms, including a ban on the Hawaiian language in public schools.[266]

In response to this history of harm, Hawai'i advocates and lawmakers have developed a set of legal remedies that might be considered reparative. While several of these remedies are notable, this Article focuses on three. First, the development of the public trust doctrine and its success in protecting Native Hawaiian interests. Second, amendments to the state constitution that explicitly preserve tradition and culture for Native Hawaiians. Finally, the Hawaiian Home Lands Act is a highly criticized but notable example of a land back system. In each case, we see government bodies being specifically tasked (or even created) to uphold Native Hawaiian rights and resources. Unlike race-neutral laws, these actions are unambiguously for the benefit of Native Hawaiians. Unlike direct, one-time financial compensation, these legal reparations allow for longer-lasting protections of Native Hawaiian interests. Further, they allow for the development of new doctrine over time that expands and re-interprets the rights and protections of Native Hawaiians, while allowing advocates to respond with legal action to active harms. Finally, in the spirit of Baldwin, these laws and legal rights create a formal recognition of Native Hawaiians by the State.[267] Native Hawaiian history and unique struggles in a post-colonization context are formally acknowledged, rather than being swept away by race-neutral language that intentionally fails to consider histories of racial discrimination. The road to reparations and reconciliation has been rocky but also far more promising than what other groups have encountered. Many of the reparative legal frameworks, which will be discussed in greater detail below, arose at the 1978 Constitutional Convention in Hawai'i.

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266 In 1896, the Republic of Hawai'i passed Act 57, which restricted public and private instruction to only use English, effectively banning the use of Hawaiian language in instruction. The law was repealed in 1986. Ben Gutierrez, *Lawmakers Adopt Resolution Apologizing for Ban on Hawaiian Language in Schools*, HAW. NEWS NOW (Apr. 28, 2022), https://www.hawaiinewsnow.com/2022/04/28/lawmakers-adopt-resolution-apologizing-ban-hawaiian-language-schools/ [https://perma.cc/Q27Z-FXZW].

267 These local reforms have also been recognized at the federal level. For example, President Bill Clinton signed Public Law 103-150 in 1993, the 100th anniversary of the overthrow, apologizing to Native Hawaiians for the role of the United States government. Pub. L. No. 103-150, 107 Stat. 1510 (1993).

1. *Direct Legal Protections*

a. *Governmental Positions*

The Hawaiian Homestead Act was passed in 1921—signed into law by President Warren Harding—and was designed to provide ninety-nine-year land leases for one dollar to individuals who could demonstrate that they were at least fifty percent Hawaiian.[268] The blood quantum requirement has been controversial,[269] and it was later expanded to allow individuals with one quarter "Hawaiian blood" to succeed leases from qualified leaseholders.[270] Although far short of full sovereignty, the Hawaiian Home Lands program is remarkable. Providing a mechanism to give land to a wronged Indigenous group and the creation of a state agency to execute upon this reparative goal is fairly unique compared to how other minority groups seeking reparations have fared. It is also a promising form of providing tangible redress. However, the failure to adequately fund and support the Department of Hawaiian Home Lands has led to many Hawaiians being stuck on a waitlist for a home.[271] In addition, the federal government still owes the return of Hawaiian home lands to the state trust. The 1995 Hawaiian Home Lands Recovery Act was meant to encourage the return of land or equivalent proceeds to the State, but recent investigations suggest that loopholes in federal legislation allowed federal entities like the Navy to instead sell the land to private groups.[272] Further, the scheme is not universally seen as reparative. The legislative history suggests that the creation of the Hawaiian Home Lands Act was meant to be "rehabilitative" rather than a form

268 Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, § 208, 42 Stat. 108, 111 (1921).

269 J. Kēhaulani Kauanui, Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indigeneity 152–61 (2008).

270 *Designating Successors Q&A*, Dep't of Hawaiian Home Lands, https://dhhl.hawaii.gov/lessee-information/designating-successors-qa/ [https://perma.cc/2KQA-PXW4] (last visited May 20, 2026).

271 Kiana Cablayan-Kennedy & Leia Hernandez, *The Intersection of Law and Culture: Native Hawaiian Rights and the Hawaiian Homes Commission Act* (2024) (B.A. research poster, Chapman University), https://digitalcommons.chapman.edu/cusrd_abstracts/631 [https://perma.cc/Z84N-ZW2W].

272 Rob Perez, *Promised Land: The U.S. Owes Hawaiians Millions of Dollars Worth of Land. Congress Helped Make Sure the Debt Wasn't Paid*, Star Advertiser (May 7, 2021), https://www.staradvertiser.com/2021/05/07/breaking-news/promised-land-the-u-s-owes-hawaiians-millions-of-dollars-worth-of-land-congress-helped-make-sure-the-debt-wasnt-paid/ [https://perma.cc/3JPN-3L7R].

of reparations, and that Congress treated the land grants as a handout rather than as what was owed for historical wrongs.[273]

The Office of Hawaiian Affairs ("OHA") was created during the 1978 Constitutional Convention and was codified in Hawai'i Revised Statutes Chapter 10.[274] The state statutes make clear that "betterment of conditions for native Hawaiians" is part of the public responsibility[275] and OHA is created "to address the needs of the aboriginal class of people of Hawaii."[276] Further, the creation of OHA also tasked all other state departments with supporting OHA in the advancement of Native Hawaiians, while privileging OHA by explicitly noting that it operated as a "separate entity independent of the executive branch."[277] Until 2000, the trustees that comprised OHA were voted on in elections whose candidates and constituents had to be Native Hawaiian ("any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778") or Hawaiian ("any descendant[s] of the aboriginal peoples inhabiting the Hawaiian islands . . . in 1778, and which peoples thereafter have continued to reside in Hawaii").[278] This was another way for the law to preserve the political power of Native Hawaiians, given the special responsibilities that OHA is tasked with.

Unfortunately, the Fifteenth Amendment was used in *Rice v. Cayetano* to overrule the legal scheme for OHA elections that protected and privileged Native Hawaiians.[279] Rice, a resident of Hawai'i, sued the Governor of Hawai'i when his application to vote in an OHA election was denied, alleging Fourteenth and Fifteenth Amendment violations. The District Court and Court of Appeals defended the use of qualifications in OHA elections, but the Supreme Court ruled that these elections violated the Fifteenth Amendment because they prohibited voting based on race.[280] Perversely, the Court drew a parallel between the ancestry requirements that were used to define "Hawaiian" and "Native Hawaiian" in OHA elections and the grandfather

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273 Troy J.H. Andrade, *Belated Justice: The Failures and Promise of the Hawaiian Homes Commission Act*, 46 AM. INDIAN L. REV. 1, 18 (2022).

274 1979 Haw. Sess. Laws 398–99.

275 HAW. REV. STAT. § 10-1(a) (1979).

276 *Id.*

277 HAW. REV. STAT. §§ 10-1(b), 10-4 (2013).

278 HAW. REV. STAT. § 10-2 (2013).

279 528 U.S. 495, 512 (2000).

280 Rice v. Cayetano, 963 F. Supp. 1547, 1555 (D. Haw. 1997), *aff'd*, 146 F.3d 1075, 1081 (9th Cir. 1998), *rev'd*, 528 U.S. 495 (2000).

clauses used in the South to deny Black freedmen the franchise.[281] The Court chose to ignore the context and importance of OHA and instead blindly applied the text of the Fifteenth Amendment rather than its intent.[282] This mirrors other uses of the Fifteenth Amendment in a way that harms people of color, as previously discussed.

b. *Constitutional Protections*

Article XII, Section 7 of the Hawai'i State Constitution, ratified during the 1978 Constitutional Convention, is another clear legal protection for Native Hawaiians. It reads: "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."[283] Other statutes protect the gathering rights of Native Hawaiians[284] and adopt traditional and customary Hawaiian values into the state common law.[285]

These constitutional protections have had an impact on Hawai'i's legal development, providing legal benefits to Native Hawaiians not seen in other legal jurisdictions. These benefits have, for the time being, remained in place and expanded over time.[286] For example, the courts have applied Hawai'i's unique common law provisions to recognize the value of tradition and custom to Native Hawaiians.[287] Further, they have concluded that, because of the constitutional and statutory provisions for Native Hawaiians, legal values and expectations in realms like property have become unique as case law in Hawai'i has

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281 *Rice*, 528 U.S. at 496.

282 *Id.* at 512 (stating that the Fifteenth Amendment, while enacted to help newly free Black Americans, should be read such that its "terms transcend[] the particular controversy which was the immediate impetus for its enactment").

283 HAW. CONST. art. XII, § 7.

284 HAW. REV. STAT. § 7-1 (1955).

285 HAW. REV. STAT. § 1-1 (2005) ("[E]xcept as otherwise expressly provided by the Constitution of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, *or established by Hawaiian usage* . . . ." (emphasis added)).

286 *See* Kalipi v. Haw. Tr. Co., 656 P.2d 745, 749–50 (Haw. 1982) (defining and expanding the right to enter undeveloped lands to gather items for Native Hawaiian customs and traditions); Pele Def. Fund v. Paty, 837 P.2d 1247, 1272 (Haw. 1992) (expanding the areas, in certain circumstances, in which a cultural practitioner may exercise their rights).

287 Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm'n, 903 P.2d 1246, 1268–69 (Haw. 1995).

developed.[288] In 2023, for instance, the Hawai‘i Legislature created a Native Hawaiian Intellectual Property Working Group to study and protect Indigenous knowledge.[289]

These legal protections have been enduring and flexible. For instance, they were used to challenge an administrative rezoning decision that would have allowed a development corporation to turn former conservation land in Ka’ūpūlehu into a luxury development project. The Hawai‘i Supreme Court agreed, holding that reclassifying the land use would harm the traditional and customary rights, and that the state and its agencies are obligated to protect the exercise of these rights and affirmatively engage in an impact assessment.[290]

2. *Indirect Cultural Protections: Public Trust*

The modern public trust doctrine in Hawai‘i was most clearly announced by the courts in *McBryde Sugar Co. v. Robinson*[291] and *Robinson v. Ariyoshi*.[292] These cases involved a dispute over water rights between two private landowners, sugarcane farmers who brought a legal action when one sought to appropriate and divert significant amounts of water to the detriment of the other.[293] The Supreme Court of Hawai‘i, rather than limit its analysis to the question posed by the parties, instead offered a more expansive holding—first introduced in *McBryde* and later upheld in *Robinson* against a challenge that *McBryde* was a judicial taking.[294] The Court ruled that all surplus water in Hawai‘i is the property of the State;[295] therefore, neither of the parties in the case had legitimate water rights. Instead, the state has an obligation to steward these resources for the

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288 *Id.* at 1268 (“Our examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawai‘i.”).

289 Haw. H.R. Con. Res. 108, 32 Leg. (2023) (enacted).

290 Ka Pa’akai O Ka’Aina v. Land Use Comm’n, 7 P.3d 1068, 1073 (Haw. 2000).

291 504 P.2d 1330 (Haw. 1973), *aff’d on reh’g*, 517 P.2d 26 (Haw. 1973).

292 658 P.2d 287 (Haw. 1982).

293 Bradford H. Lamb, Robinson v. Ariyoshi: *A Federal Intrusion Upon State Water Law*, 17 Env’t L. 325, 338 (1987).

294 Williamson B.C. Chang, The Enforcement of Consistency in Hawaiian Water Rights: An Introduction to Robinson v. Ariyoshi 3 (1978); Williamson B.C. Chang, *Unraveling* Robinson v. Ariyoshi*: Can Courts “Take” Property*, 2 U. Haw. L. Rev. 57, 62 (1979).

295 *McBryde*, 504 P.2d at 1345.

common good. The principles established in *McBryde* were enshrined in the state constitution in 1978.[296]

The Hawai‘i Supreme Court subsequently made clear that the state, when making decisions about state lands, must not be a "mere 'umpire passively calling balls and strikes for adversaries appearing before it,' but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process."[297] Going further, when considering the balance between public and private interest regarding land use, there is "a presumption in favor of public use, access, and enjoyment" and "use consistent with trust purposes [i]s the norm or 'default' condition."[298]

Ching v. Case[299] is notable for extending the public trust doctrine not only beyond water rights (as in *Waiahole* and *McBryde*), but to land leases to the military. Clarence Kū Ching and Mary Maxine Kahā'ulelio—both Native Hawaiians—brought suit against the State of Hawai‘i's Department of Land and Natural Resources ("DLNR") for inadequately stewarding public lands at Pōhakuloa that had been leased to the United States Military.[300] Plaintiffs argued that DLNR had failed to investigate the military's compliance with the lease, allowing for public lands to be destroyed. The Hawai‘i Supreme Court ruled that the State has a duty to aloha ʻĀina, or a cultural, legal, and spiritual responsibility to steward and care for the land.[301] It accordingly found a constitutional obligation to ensure that lands leased to the military are protected from damage and contamination, pursuant to the terms of these leases and the

296 HAW. CONST. art. XI, § 1 ("For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.").

297 *In re* Water Use Permit Applications, 9 P.3d 409, 455 (Haw. 2000) [hereinafter *Waiahole*] (quoting Save Ourselves, Inc. v. La. Env't Control Comm'n, 452 So. 2d 1152, 1157 (La. 1984)).

298 *Id.* at 454.

299 449 P.3d 1146 (Haw. 2019).

300 *Id.* at 1152.

301 D. Kapuaʻala Sproat & MJ Palau-McDonald, *The Duty to Aloha ʻĀina: Indigenous Values as a Legal Foundation for Hawai‘i's Public Trust*, 57 HARV. C.R.-C.L. L. REV. 525, 526–27 (2022); *see also* NOELANI GOODYEAR-KAʻŌPUA, THE SEEDS WE PLANTED: PORTRAITS OF A NATIVE HAWAIIAN CHARTER SCHOOL 31–34 (2013) (explaining the meaning and deep importance of aloha ʻāina).

State's public trust duty. In a later case, *Kaua'i Springs, Inc. v. Plan. Comm'n*, six principles were provided for agencies to apply in order to satisfy their public trust mandate when considering a use for public trust lands.[302] One of these principles explicitly requires agencies to determine if the proposed use is consistent with the protection of water in the exercise of Native Hawaiian and traditional and customary rights.[303]

The public trust doctrine's grounding in Native Hawaiian history and culture matters because the public trust is relatively weak in other places, limited largely to certain conditions on bodies of water rather than land use. In the continental United States, the public trust doctrine is considered to have its origins in Roman law.[304] It was subsequently incorporated into British and American common law, introduced by the American courts in *Illinois Central Railroad Co. v. Illinois*.[305] In *Illinois Central*, as in many public trust cases, the right of the public to certain types of enjoyment of common bodies of water was affirmed.[306] However, the public trust has not been applied as extensively or as effectively in places outside of Hawai'i. For example, a recent case, *Navahine v. Hawai'i Department of Transportation*,[307] settled after the court refused to dismiss the plaintiff's argument that the state was responsible under the public trust doctrine to address the impacts of climate change.[308]

The explicit connection to the traditions, culture, and history of Native Hawaiians has made the public trust doctrine into a potent tool in Hawai'i where in other states it remains a relatively weak environmental measure. The strong public trust provisions codified in law and in court precedent have allowed the people of Hawai'i to enact reparative measures against

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302 324 P.3d 951, 984–85 (Haw. 2014).

303 *Id.*

304 Michael C. Blumm & Zachary A. Schwartz, *The Public Trust Doctrine Fifty Years After Sax and Some Thoughts on Its Future*, 44 PUB. LAND & RES. L. REV. 1, 36 (2021); Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741, 741 (2012); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

305 146 U.S. 387 (1892).

306 *See also* Nat'l Audubon Soc'y v. Super. Ct., 658 P.2d 709, 723–24 (Cal. 1983).

307 No. 1CCV-22-0000631 (Haw. Cir. Ct. filed June 1, 2022).

308 *Historic Agreement Reached in Hawai'i Youth-Led Constitutional Climate Complaint*, EARTHJUSTICE (June 20, 2024), https://earthjustice.org/press/2024/historic-agreement-settles-hawaii-youth-led-constitutional-climate-complaint [https://perma.cc/GRJ7-57FQ].

historical and present overdevelopment of the land by Western corporate influences. When thinking about reparations to an oppressed minority group, Native Hawaiians serve as a bellwether of sorts. In the continental United States, the ongoing struggle for reparations and sovereignty in Hawai'i underscores the importance (and the limitations) of law as reparations.

Conclusion

Social contract theories provide telling insight into how our political, social, and economic systems came to be, and the ideals that we ask them to live up to. Mills' descriptions of the Racial Contract, how the Western world intentionally dehumanized and exploited people of color for economic gain, hew closely to reality. While it is impossible to physically rip up the Racial Contract and start over from scratch, it remains necessary to address the legacy of past harm and existing inequalities that Black Americans have faced. Previous efforts to codify reparative frameworks have failed due to the lack of specificity in laws like the Fourteenth and Fifteenth Amendments. These sweeping laws have become narrower through judicial interpretation, and in some cases are used to advance the causes of discriminatory and conservative movements. Other forms of reparations, like housing grants or direct cash payments, also have their merit but are limited in their transformative potential. Martha Ertman's interpretation of the Racial Contract as being resolved through financial payment fails to capture the necessity of changing the terms of contract, of getting an entirely new playing field.

The consequences of getting reparations wrong are serious. Baldwin and Mills warn us about the danger of half measures and of letting racial resentment and discrimination linger despite incremental improvements to the law.[309] Contract law principles also remind us of the need to acknowledge where terms of the Racial Contract may be coercive or lacking consent, and to use the law to create new terms that are corrective. Doing so is key to treating individuals as free and equal parties to the social contract, rather than objects of it. The reparations-as-law approach also directly involves aggrieved parties, in this case Black Americans, in devising their own remedies and being able to express what they need to be equal contract makers. As debates intensify about the form reparation should

309 Baldwin, *supra* note 94, at 32–34; Mills, *supra* note 28, at 59.

take and who should receive them, as well as if reparations ought to be given at all, the framework of the Racial Contract is helpful in asking whether those directly harmed by slavery, racial segregation, and discrimination are able to set the terms of their own liberation.[310]

310 Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 387–88, 397 (1987).