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BETTER LATE THAN NEVER: A TAKINGS CLAUSE SOLUTION TO REPARATIONS

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I. Introduction

The movement for reparations to the descendants of American slaves is a volatile topic that invokes passionate responses. Popularly, arguments for reparations have been characterized by confrontation and demands. However, this approach is problematic because it alienates potential allies, including members of the Black community itself. The confrontation approach is also problematic in that it is over-inclusive of the Whites owing a debt and the Blacks having suffered a harm. It is significant that many whites in America are not descendants from slave owners, their ancestors having arrived on these shores after slavery and even the Jim Crow era. Likewise, many Blacks are not descendants of slaves, but of free Africans. Furthermore, the traditional demand for monetary reparations, a one-time payment to particular Blacks, does not right the wrong.

And yet, it is unconscionable that such a devastatingly tragic event and the resulting discrimination should go unacknowledged, the effects brushed aside. In regard to the effects, African-Americans continue to suffer with respect to education, property ownership, and gainful employment opportunities;[1] African-Americans are subject to forms of discrimination that Whites do not experience. The history of African-Americans in the United States is intertwined with the institution of slavery. Since the abolition of slavery, amidst racially oppressive laws and legally supported segregation, former slaves and their descendants have sought compensation for the wrongs perpetrated against them. To date, despite advocates from the political arena,[2] attempts to secure legislative redress have been futile. Further, the current litigation strategy is flawed.

This Note argues that slavery triggered the Fifth Amendment Takings Clause of the U.S. Constitution and presents a more successful argument on which to support a lawsuit than tort claims. Slaves, like the rest of White society, possessed a property right of self-ownership. When the government appropriated that right, slaves suffered uncompensated physical and regulatory takings. Slaves are thus constitutionally entitled to

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[1] *See infra* notes 238–49 and accompanying text (discussing the derivative effects of slavery on African-Americans today with the use of statistical comparisons between Whites and Blacks according to several social yardsticks).

[2] John Conyers (Rep. D. Mich.) introduced a bill in 1989 that would have established a committee to study the effects of slavery and recommend appropriate remedies if any should be forthcoming. The bill never made it out of committee. Conyers has reintroduced the bill nearly every Congressional session since 1989. Each time, the bill has died in committee. H.R. 3745, 101st Cong. (1989); H.R. 1684, 102d Cong. (1991); H.R. 40, 103d Cong. (1993); H.R. 891, 104th Cong. (1995); H.R. 40, 105th Cong. (1997); H.R. 40, 106th Cong. (1999); H.R. 40, 107th Cong. (2001); H.R. 40, 108th Cong. (2003).

compensation under the Takings Clause.[3] The descendants of slaves, having suffered discrimination, a direct vestige of slavery, are likewise entitled to compensation because this discrimination constitutes a derivative taking.

Part II of this Note identifies the flawed approach currently used in efforts to obtain reparations and proposes solutions to those problems. Part III sets forth the concept of the slaves' self-ownership and highlights the institution of slavery as a federally sanctioned tradition. Part IV discusses the Takings Clause as a legal theory for the basis of a lawsuit seeking reparations for slavery, but also for present societal discrimination. Part V considers the history of compensation.

II. Litigation Flaws

Since 1992, there have been at least six legal proceedings demanding reparations for slavery.[4] Though there is at least one other case,[5] these cases

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[3] I would like to clarify that any reference to compensation and reparations is not to be confused with a demand for monetary awards. I believe the form of reparation must be more meaningful, more permanent than money, which according to statistics, African-Americans are less likely to save or invest. Rather, I believe the form should be any program that would offer long term incentives and benefits, such as a free college education. Such an offer would give young African-Americans and their parents a reason to approach the world differently. If they knew college was possible, that their hard work would pay off, I believe they would be motivated to participate and compete. This suggested solution does not offer instant gratification, the perceived goal of most reparation litigation. But after careful consideration, it must be understood that monetary awards, whether in the form of tax breaks or a check, are simply fiscally impossible and entirely unlikely as a political matter. Obviously, any suggestion for the advancement of African-Americans would need to be structured such that certain entities in society could not simply counter with a ridiculous roadblock such as changing college entrance requirements to some unobtainable bar or a similar obstruction. I find it ironic that the Court has embraced with gusto the concept of "reverse discrimination," as a roadblock of considerable proportions to exercising affirmative action as it was intended. It is amazing that after several hundred years of class-based discrimination against African-Americans, the Court is unwilling to hold that a class-based remedy is permissible. It is perhaps even more likely that the country could simply acknowledge its compliance in establishing and maintaining slavery and apologize. This would address concerns regarding the fairness of paying for wrongs against persons long-dead, while acknowledging harm to their descendants. However, whether an apology would satisfy demands for reparations and end the matter could be the subject of more extensive discussion and presently will not be expounded upon further.

[4] In re African-American Slave Descendents Litigation, 304 F. Supp. 2d 1027 (N.D. Ill. 2004) is a consolidated case consisting of Barber v. N.Y. Life Ins. Co., No. 02–CV–2084 (D.N.J. May 2, 2002), Farmer-Paellmann v. FleetBoston Financial Corp., CV-02-1862 (Mar. 26, 2002), Carrington v. FleetBoston Financial Corp., No. CV-02-1863 (E.D.N.Y. Mar. 26, 2002), and Madison v. FleetBoston Financial Corp., No. CV-02-1864 (E.D.N.Y. Mar. 26, 2002). All of these are class action lawsuits on behalf of all African-American descendants of slaves presenting claims for conspiracy, human rights violations, conversion, and unjust enrichment, and a demand for accounting.

[5] Bell v. United States, No. 3:01-CV-0338-D, 2001 U.S. Dist. LEXIS 14812 (N.D. Tex. July 10, 2001). The *pro se* plaintiff, also a state inmate, sued the federal government, alleging that it illegally enslaved and committed inhumane crimes against his African-American ancestors. *Id.* at *2–3. The inmate sought damages, injunctive relief, and a temporary restraining order for his immediate transfer to federal custody. *Id.* at *3. The magistrate judge undertook a *sua sponte* review of the complaint and dismissed the claim with prejudice as frivolous, pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). *Id.* at *2, *7.

are to be distinguished as the most thoughtful approaches in achieving recognition of the harms directed toward African-Americans. Nevertheless, these cases have failed to convince a court that their claims are legitimate and substantial enough to survive a motion to dismiss. Of the six cases, *Cato v. United States*[6] encompasses every mistake the others share to one degree or another. Consequently, *Cato* will serve as the vehicle for analyzing the litigation flaws preventing African-Americans from gaining reparations for the harms perpetrated by the federal government.

A. Cato v. United States*: The Ultimate Failure*

1. Ninth Circuit Court of Appeals

On appeal, the Ninth Circuit reviewed the U.S. District Court for the Northern District of California for abuse of discretion regarding its § 1915(d) dismissal.[7] Cato[8] contended: 1) that the dismissal of her action was premature because she was given neither the opportunity to be heard regarding the adequacy of her complaint, nor the occasion to amend it, and that the complaint should not have been dismissed merely because the court doubted her ability to prevail;[9] 2) that the district court's dismissal on statute of limitations grounds was error because her action was based on statutory and constitutional prohibitions,[10] thus she need not allege discrimination within any particular time period because the discrimination suffered was a continuing act;[11] 3) she had standing because the Thirteenth Amendment created a national right to be free from the badges of slavery and the Federal Tort Claims Act (FTCA) provides for relief when the government fails to perform a duty;[12] and 4) that sovereign immunity did not bar her action because a) the government can be sued directly under the Thirteenth Amendment, b) there are theories of relief available under the FTCA, and c) the government waives its sovereign immunity whenever Congress has

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[6] Cato v. United States, 70 F.3d 1103 (9th Cir. 1995). The plaintiffs included Jewel Cato, Joyce Cato, Howard Cato, Edward Cato, Leerma Patterson, Charles Patterson, and Bobbie Trice Johnson. Collectively the case is referred to a "Cato."

[7] *Id.* at 1106.

[8] *Id.* at 1105 n.1. The *Cato* case began with four plaintiffs. It was joined with the Johnson case which consisted of three other plaintiffs. Since Cato was the only named individual to sign the complaint and the *in forma pauperis* declaration, and Johnson was the only such plaintiff in her action, the district court dismissed the other plaintiffs as a non-attorney may appear only on her own behalf. Both Cato and Johnson were represented by counsel on appeal.

[9] *Id.* at 1107–08.

[10] *Id.* at 1108. Cato identifies the Thirteenth Amendment has having created a national right for African-Americans to be free of the badges and indicia of slavery.

[11] *Id.* at 1107–08.

[12] *Id.* at 1109.

explicitly provided a private right of action in a statute or through legislative history.[13]

The Ninth Circuit affirmed the lower court, finding that the complaint could not be cured by amendment.[14] The court stated that it did not read the district court's order as dismissing Cato's complaint due to doubts about her ability to succeed.[15] Rather, the court determined that Cato had not met her burden of showing a waiver of sovereign immunity and that her claims were not legally cognizable because she raised "a 'policy question' which the judiciary has neither the authority nor wisdom to address."[16]

In making the statute of limitations argument, Cato analogized the constitutional wrongs against African-Americans to the statutory wrongs against Native Americans.[17] Cato argued that because courts have recently addressed hundred-year old claims by Native Americans based on the Indian Trade and Intercourse Acts, they should do the same for African-Americans' constitutional violation claims.[18] The district court had held that it did not have subject matter jurisdiction as a result of finding that Cato did not show a waiver of the government's sovereign immunity.[19] The Ninth Circuit agreed and stated that it consequently did not need to consider the statute of limitations argument.[20] The court dismissed Cato's "continuing violations doctrine" against the statute of limitations for the same reason.[21]

In regard to Cato's argument against immunity, the court of appeals noted that, to the extent that *Oneida Indian Nation v. New York*[22] can be

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[13] *Id.* at 1108, 1110–11.

[14] *Id.* at 1105.

[15] *Id.* at 1106.

[16] *Id.*

[17] *Id.* at 1107–08 (citing Oneida Indian Nation of New York v. New York, 691 F.2d 1070 (2d Cir. 1982)).

[18] *Id.* at 1108.

[19] *Id.*

[20] *Id.*

[21] *Id.* "We have. . . recognized the doctrine. . . . However, it can't create jurisdiction or help overcome jurisdictional hurdles."

[22] Oneida Indian Nation of New York v. New York, 691 F.2d 1070 (2d Cir. 1982). The plaintiffs filed suit alleging that the acquisition by the defendant of tribal land was invalid. *Id.* at 1073. The Second Circuit affirmed the portion of the lower court's order dismissing the plaintiffs' claims that the lands were held in trust by the defendant. *Id.* at 1095. The court held there was no evidence that state treaties placed the lands in trust. *Id.* However, the court held that the sale of tribal land was in violation of the Articles of Confederation, the Proclamation of September 22, 1783, and the 1784 Treaty of Fort Stanwix, and thus required further evidentiary proceedings. *Id.* at 1084–92. The court ruled that an evidentiary hearing was required because there were conflicts concerning the historical evidence used to interpret the language of the statutory authority. *Id.* at 1086. The court affirmed the dismissal of defendant's assertions that the plaintiffs' claims were time barred, as the federal government explicitly provided for the late filing of Indian property right actions. *Id.* at 1083–84. The court also held that defendant was not immune from suit, as the states surrendered their sovereignty in the regulation of commerce with Indian tribes. *Id.* at 1079–80.

distinguished, it did not turn on a claim of statutory or constitutional prohibition.[23] Rather, it was decided on the basis of a fiduciary relationship that courts have recognized to run from the federal government to the tribes as a result of specific treaty and statutory obligations.[24] Because neither the Thirteenth Amendment nor any combination of the Civil War Amendments created a similar relationship between the government and African-Americans, the court noted that there was no basis for relieving Cato of the need to show that the government consented to being sued.[25]

Cato also cited § 2 of the Thirteenth Amendment to argue that the government was obligated to enact legislation to enforce § 1 because otherwise the amendment would be meaningless.[26] She then argued that, according to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[27] when a constitutional right has been violated and there is no explicit declaration barring suit, an action for damages against the government may lie.[28] She inferred from this that Congress had waived sovereign immunity.[29] The Ninth Circuit disagreed, stating that the U.S. Supreme Court had declined to extend the *Bivens* rationale beyond individual employees to actions against the government, and the United States simply was not liable for constitutional tort claims.[30]

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

24 *Id.*

25 *Id.*

26 *Id.* at 1110

27 Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). In *Bivens*, the petitioner filed a complaint alleging that the agents, acting under federal authority, entered his apartment and arrested him for alleged narcotics violations. *Id.* at 839. The agents manacled the petitioner, threatened to arrest the entire family, and then searched the apartment. *Id.* Thereafter, the petitioner was taken to the federal courthouse where he was interrogated, booked, and subjected to a visual strip search. *Id.* The petitioner filed suit claiming the Bureau conducted an unlawful search and arrest in violation of U.S. Const. amend. IV. *Id.* The District Court dismissed the complaint on the ground that it failed to state a cause of action. *Id.* at 390. The Court of Appeals affirmed on that basis. *Id.* The U.S. Supreme Court granted certiorari. *Id.* The federal agents argued that petitioner's right to damages for an invasion of the state-created right to privacy was available only in a state court applying state law and thus they should stand before state law as private citizens if a constitutional violation was found. *Id.* at 390–91. The Court disagreed, saying that the relationship between federal agents, acting unconstitutionally, and a private citizen differed from that between private citizens. *Id.* at 391. Because the agents had a far greater capacity for harm, the Court reasoned, the Fourth Amendment limited the exercise of federal power. *Id.* The Court explained that the Amendment did not proscribe only those acts engaged in by private citizens that were condemned by state law, but that the interests of state laws regulating invasion of privacy and the Amendment's guarantee against unreasonable searches could be inconsistent, and that the awarding of damages to the petitioner following a violation of the Amendment by federal agents was a remedy normally available in the federal courts. *Id.* at 392–96. The Court reversed and remanded because a federal remedy for an unlawful search and arrest allegedly in violation of the Fourth Amendment was not limited to conduct condemned by state law. *Id.* 397–98.

28 *Cato*, 70 F.3d at 1110.

29 *Id.*

30 *Id.*

The court also found that under well-established principles, Cato lacked standing to pursue her claims.[31] The court noted that Cato tried to proceed on a generalized, class-based grievance, but that she did not allege that any conduct had run afoul of any constitutional or statutory right by any specific official.[32] To have standing, admonished the court, Cato should have alleged personal injury fairly traceable to the defendant's allegedly unlawful conduct that could likely be redressed by the relief sought.[33] Additionally, the court noted that Cato failed to trace the presence of discrimination and its harm to the government.[34] Furthermore, Cato's FTCA claim was irrelevant because the statute does not apply to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused."[35] Finally, the court of appeals stated that although 5 U.S.C. § 702 would have waived immunity for suit against the United States where a suit requests non-monetary relief, Cato did not have standing to seek relief at all.[36]

Consequently, the Ninth Circuit held that the district court did not abuse its discretion in dismissing the complaint with prejudice pursuant to § 1915(d).[37]

2. Cato's Mistakes

Cato made four notable blunders: 1) she failed to identify specific parties; 2) she failed to overcome the statute of limitations; 3) she failed to show a waiver or inapplicability of sovereign immunity; and 4) she sought an unsubstantiated and unrealistic remedy. A solution to each problem is discussed at length below.

a. Standing

Standing requires a plaintiff to show that his injury is separate and distinct from that of the public at large and that the harm in question is traceable to some wrongful action of the defendant.[38] Indeed, in the most recent reparations case, *In re African-American Slave Descendents*

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31 *Id.* at 1109.
32 *Id.*
33 *Id.*
34 *Id.* at 1110.
35 *Id.*
36 *Id.* at 1111.
37 *Id.*
38 Richard A. Epstein, *The Jurisprudence of Slavery Reparations: The Case Against Black Reparations*, 84 B.U. L. REV. 1177, 1179 (2004).

Litigation,[39] an Illinois District Court rejected the plaintiffs' claims as impossible to overcome because they demonstrated too tenuous a personal stake in the alleged dispute.[40] The *Cato* court was of the same opinion.[41] But even reparations critic Richard Epstein believes this is false and that standing is not a legitimate obstacle.[42]

In his recent article, Epstein notes that the traditional standing test requiring discrete injury is inappropriate in cases where the plaintiff seeks to enjoin the government from reaching beyond the scope of its power.[43] Indeed, that is the point in a Takings Clause-based reparation argument. In such a case, the plaintiff is arguing that the federal government extended beyond the scope of its authority in allowing, and indeed encouraging, the taking of private property without just compensation. Not even the federal government can ignore the Constitution. In cases of equity where the government has extended beyond its constitutional boundaries, all the members of the relevant class stand in the same position to the wrongdoer, such that one individual may become the spokesman, if you will, for the entire group.[44] Such cases, states Epstein, must have as their objective the protection against actions that are conducted in violation of structural limitations contained in the Constitution.[45] These violations go unredressed unless someone is able to step into the shoes of those who were unable to represent themselves. Though neither the litigants in the *African-American Slave Descendents Litigation* nor *Cato* fit this situation because neither is based on a constitutional claim, a Fifth Amendment Takings Clause argument would suit this constitutional violation requirement.

Epstein even argues that derivative actions seeking damages should be allowed because actions of this sort are akin to actions of loss of consortium brought by a spouse or a child, or a wrongful death action brought by a descendent under a tort theory.[46]

There are a number of other ways to avoid a standing issue if the action is against a state or a private individual or corporation. In *Hurdle v. FleetBoston Financial Corp.*,[47] the plaintiffs identified state statutes that

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[39] In re African-American Slave Descendents Litigation, 304 F. Supp. 2d 1027, 1047 (N.D. Ill. 2004).

[40] *Id.*

[41] *Cato*, 70 F.3d at 1109–10.

[42] Epstein, *supra* note 38, at 1180.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 1081.

[47] Hurdle v. FleetBoston Fin. Corp., No. 02-CV-4653 (N.D. Cal. Jan. 17, 2003). *Hurdle* was a class action lawsuit on behalf of all African-American descendants of slaves against various corporations claiming violations of the Cal. Bus. & Prof. Code § 17200 and demanding an accounting.

allow the complainant to sue for any type of fraudulent business practice.[48] Likewise, focusing on Jim Crow legislation identifies a discrete number of plaintiffs, avoiding the standing issue altogether. The most recent cases have had no problem identifying defendants.[49] Indeed, in *Cato*, the defendants accused the plaintiff of proceeding on a generalized, class-based grievance because she did not identify or even suggest either the parties seeking relief or those from whom relief was sought.[50] The plaintiffs in *Alexander v. Governor of Oklahoma*,[51] on the other hand, filed suit for reparations that even state agencies had already admitted were due.[52] In their complaint, the plaintiffs identified specific parties including the Governor, the city, the chief of police, and the police department, alleging civil rights claims under 42 U.S.C. §§ 1981, 1983, and 1985.[53] They also brought claims under the Fourteenth Amendment and the Equal Protection Clause.[54] Finally, the plaintiffs submitted state law claims based on negligence and promissory estoppel.[55]

Although the Tenth Circuit ultimately found that the plaintiffs were barred by the statute of limitations,[56] a similar approach to reparations would be appropriate where the harms are relatively recent and easy to identify and the suit can be limited to state and municipal actors. This allows for focus on the government entities that should be held responsible for the official policies of discrimination endorsed by the nation as a whole.

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[48] *Id.*

[49] In re African-American Slave Descendents Litigation, 304 F. Supp. 2d 1027 (2004). *In re African-American Slave Descendents Litigation* is a consolidated case consisting of Johnson v. Aetna Life Ins. Co., No. 02-2712 (E.D. La: Sept. 3, 2002), Barber v. N.Y. Life Ins. Co., No. 02-CV-2084 (D.N.J. May 2, 2002), Farmer-Paellmann v. FleetBoston Financial Corp., CV-02-1862 (Mar. 26, 2002), Carrington v. FleetBoston Financial Corp., CV–02–1862 (Mar. 26, 2002), Madison v. FleetBoston Financial Corp., CV-02-1862 (Mar. 26, 2002). All of these are class action lawsuits on behalf of all African-American descendants of slaves presenting claims for conspiracy, human rights violations, conversion, and unjust enrichment, and a demand for accounting.

[50] *Cato*, 70 F.3d at 1109–11.

[51] Alexander v. Governor of Oklahoma, 391 F.3d 1155 (10th Cir. 2004). In *Alexander*, a Black teenager accused of assaulting a white female was arrested. *Id.* at 3. Rumors of a lynching brought Blacks to the jail to protect him. *Id.* A gun was discharged, and a riot ensued. *Id.* The Blacks retreated, followed by the whites who indiscriminately fired machine guns at people and homes. *Id.* Although the Governor called for the National Guard, the isolation of Blacks only allowed the whites to burn their unprotected homes, a total of forty two square acres. *Id.* at 3–4. The court held that the statute of limitations had run and the time could not be tolled as a result of the plaintiffs' failure to show the government actively concealed necessary information, *id.* at 21–25, and detrimental reliance on the defendant's earlier promises of rebuilding assistance. *Id.* at 25.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 5–6.

[56] *Id.*

b. Statute of Limitations

According to Epstein's article, the statute of limitations is an impregnable obstacle that should remain so to prevent courts from making bad law on other issues that could spill over into cases that have little or nothing to do with reparations.[57] The thrust of his argument is based on the notion that reparations does not qualify for a tolling exception.[58] Even if one were to toll the statute for the sake of slavery (when the victims were unable to bring suits on their own behalf) Epstein says the statute began to run in 1865.[59] He argues that the subsequent segregation should not be tolled at all because segregation did not limit the right to bring suit, though it may have lessened any complainant's chances of winning.[60] Furthermore, Epstein asserts that the reparations cases do not represent cases where the plaintiff did not suffer an injury until years after the defendant's action and neither are these cases of concealment or of continuing wrong.[61] He concludes that not only are most cases in which the statute of limitations tolled seeking the return on a tangible, easily valuated object,[62] but there is a discrete class of people, easily identifiable for distribution.[63]

Despite the strong convictions that are the basis of his perspective, Epstein could not be more mistaken regarding various aspects of the nature of slavery and discrimination reparations. Equitable remedies tolling the statute of limitations are routinely available where filing suit is untimely due to the defendant's affirmative misconduct or because the relevant facts are unavailable to plaintiffs through no fault of their own.[64] Equitable estoppel "hinges on the defendant's representations or other conduct that prevents the plaintiff from suing before the statute of limitations has run,"[65] and is required where the defendant's affirmative misconduct undermines fairness or justice in its dealings with its citizens.[66]

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57 Epstein, *supra* note 38, at 1183, 1187.

58 *Id.* at 1184–87.

59 *Id.* at 1184.

60 *Id.*

61 *Id.*

62 *Id.* at 1186.

63 *Id.* at 1185–86. Although Japanese Americans have received reparations for the internment of their ancestors was not based on figures of tangible loss, he does not take issue with such payments.

64 *See* Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232–33 (1959) (stating that "no man may take advantage of his own wrong"). The Court also noted that "[d]eeply rooted in our jurisprudence, this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statute of limitations." *Id.*

65 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1056 (3d ed. 2002).

66 *See* Heckler v. Cmty. Health Servs. of Crawford County, Inc., 467 U.S. 51, 60–61 (1984) (stating that when a government agents' conduct has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined). The Court noted that at least two of its cases

Proponents of reparations should argue that African-Americans were in no condition to bring a claim on their own behalf, given their status after the Civil War. Post Civil War conditions, including political disenfranchisement, lack of education, impoverished conditions, *de facto* discrimination, and institutionalized segregation prevented former slaves and their descendants from bringing a claim. Moreover, even if these victims did have the wherewithal to contemplate a suit, there were few Black lawyers and even fewer White lawyers who would have taken their case. Additionally, there was little chance the plaintiffs would have found a court capable or willing to judge the case on its merits.[67] Epstein argues that the fact they would have lost is not important, because it has happened to others before.[68] If there is no equal opportunity to be heard regarding the merits of one's case, what is the purpose of having access to the legal system at all? The notion of giving someone the right to complain but deciding the outcome of the case on anything but the law prevents redress of wrongs, destroys the possibility of corrective action, and thus flies in the face of justice. The entire justice system might as well be dismantled.

Furthermore, the limitations period should be equitably tolled because the purpose underlying the statute of limitations is not served. The rationale behind the statute of limitations, that at some point a legal controversy will end so that the defendant may have a fair opportunity to defend himself before memories fade and evidence becomes stale, is inapplicable. To the contrary, where evidence was unavailable to the plaintiffs and has only recently been rediscovered through the defendants' actions, the defendants should not be able to escape legal responsibility for the crime identified.[69] The courts have already indicated a willingness to accept such an argument.[70] According to these cases, the statute of

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rest on the premise that when the government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception. *Id.* at 61.

[67] Cases like *Loving v. Va.*, 388 U.S. 1 (1967), *Brown v. Bd. of Educ.*, 348 U.S. 886 (1954), *Strauder v. W. Va.*, 100 U.S. 303 (1879), and *Ex Parte Virginia*, 100 U.S. 339 (1879) are clear indications that equality in the judicial system and the legislature simply did not exist and this would have prevented any perspective claimant from seeking reparations.

[68] Epstein, *supra* note 38, at 1184.

[69] Young v. United States, 535 U.S. 43, 50 (2002) ("[W]here the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.").

[70] *See, e.g.*, Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 134–35 (E.D.N.Y. 2000) ("Furthermore, plaintiffs could hardly have been expected to bring these claims at the end of World War II, and claim they have been consistently thwarted in their attempts to recover funds and information from defendant banks."). The court concluded that "[a]s such, the statute of limitation has been tolled from running and plaintiffs' claims are not time-barred." *Id*; Rosner v. United States, 231 F. Supp. 2d 1202, 1209 (S.D. Fla. 2002) ("In addition, the Court notes that, for the majority of Plaintiffs, the years following World War II were particularly difficult."). The court concluded that "[t]his, combined with the fact that the Government cannot benefit from its own alleged misconduct, tips the balance in favor of tolling the limitations period." *Id.*

limitations is to be tolled when there is: 1) violent repression, followed by; 2) active concealment of relevant facts surrounding the history of the repression;[71] and 3) an officially sanctioned study that uncovers the truth of that repression.[72]

Opponents will respond that the end of the Civil War brought about the Freedman's Bureau[73] and the NAACP,[74] organizations designed to improve Blacks' conditions, thereby eliminating the need for any kind of reparation. Such an opponent would do well to remember that the Freedman's Bureau was staffed by biased locals and limited in its accomplishments.[75] Although the Bureau may have been successful in assuring equality in process, it was not successful in assuring equality in results. Furthermore, the election of 1876 brought an early end to Reconstruction,[76] not because Congress was satisfied the freed slaves had been established as full and equal citizens, but because of Southern political scandal[77] and Northern miscalculation.[78] Any harms the Bureau had been established to address were forgotten and a new hostility took its place. The NAACP, although a formidable grassroots organization in its efforts to promote social justice, is not a federal program, and thus lacks the full

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[71] *Bodner*, 114 F. Supp. 2d at 135–36 ("[D]eceptive and unscrupulous deprivation of both assets and of information substantiating plaintiffs' . . . rights to these assets."); *Rosner*, 231 F. Supp. 2d at 1209 ("[T]he Government essentially turned a deaf ear to Plaintiffs' repeated requests for information about their property.").

[72] *Bodner*, 114 F. Supp. 2d at 123. A French government commission, comprised of historians, diplomats, lawyers, and magistrates, studied the circumstances of how goods were illicitly acquired and made recommendations. *Id.*; *Rosner*, 231 F. Supp. 2d at 1209. It was only when the "'Presidential Advisory Commission on Holocaust Assets released its report on the Gold Train' that the facts necessary to file their Complaint came to light." *Id.* (quoting Complaint ¶ 90).

[73] Reginald Washington, *From Slavery to Freedom: Preserving the Records of the Freedman's Bureau*, http://www.archives.gov/about_us/calendar_of_events/features/jan_feb_2002_feature.html (Jan. 2002). The Bureau issued food and clothing, operated hospitals and refugee camps, established schools, helped freedmen legalize marriages, supervised labor contracts, and worked with African-American soldiers and sailors and their heirs to secure back pay, bounty payments, and pensions.

[74] NAACP Timeline, http://www.naacp.org/past_future/naacptimeline.shtml (last visited Oct. 13, 2005). On February 12, 1909, the National Association for the Advancement of Colored People was founded by a multiracial group of activists, and began its legacy of fighting legal battles addressing social injustice.

[75] W.E.B. DuBois, *The Freedmen's Bureau*, THE ATLANTIC MONTHLY, vol. 87, Issue 521, Mar. 1901, at 358, 363, *available at* http://cdl.library.cornell.edu/cgi-bin/moa/moa-cgi?notisid=ABK2934-0087-50 (last visited Oct. 12, 2004). Discusses the difficulties of finding help when men were still working for the military, when those available to help were of questionable character, the creation of Black schools and securing the recognition of Blacks before courts, but noting that it failed to fashion a workable relationship between once slave holders and newly freed slaves, discouraged self-reliance, and failed to enable large scale landownership among the freed slaves.

[76] Hayes v. Tilden: The Electoral College Controversy of 1876–1877, http://elections.harpweek.com/9Controversy/Overview-controversy-1.htm (last visited Oct. 11, 2005).

[77] *Id.*

[78] *Id.*

political and legislative backing and financial support of the federal government.

Epstein's concern regarding who and how many people should take part in any kind of distribution is unnecessary to discuss at this time.[79] That matter in and of itself would require extensive discussion. However, it is worth stating that the difficulties surrounding distribution should not dictate whether a case for reparations is legitimate. A case for reparations hinges on justice and righting past wrongs that continue to have a detrimental effect on African-Americans.

c. Doctrine of Laches

The doctrine of laches holds that equity aids the vigilant and not those who procrastinate; neglecting to assert a right or claim will, together with lapse of time and other circumstances, prejudice an adverse party.[80] Neglecting to do what should or could have been done to assert a claim or right for an unreasonable and unjustified time creates this disadvantage.[81] Laches is similar to the statute of limitations except that it is equitable rather than statutory, and is a common affirmative defense raised in civil actions.[82] Nevertheless, laches may be excused because of: 1) ignorance regarding the party's rights; 2) the obscurity of the transaction; 3) the pendency of a suit; and 4) where the party labors under a legal disability such as insanity or infancy.[83]

Opponents of reparations argue that African-Americans today are simply too far removed from those who suffered any actual harm, and thus the claim for reparations is too tenuous.[84] In response, proponents must rely on common law, which limits a laches defense when it is used to defeat a public interest.[85] The public interest being threatened is the right each citizen has to the protections of their government and the right to relief under laws designed to provide recourse for wrongs committed against them.

A plaintiff could also respond that the delay was not due to lack of diligence or neglect, but due to a concentrated effort to limit access to the legal system and political and economic disenfranchisement as a result of

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79 Epstein, *supra* note 38, at 1185–86.

80 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 2.4(4) (2d ed. 1993).

81 *Id.*

82 *Id.*

83 U.S. DEP'T OF LABOR, OFFICE OF THE SOLICITOR, CIVIL RIGHTS DIV., INDEX TO ADMIN. DECISIONS, UNDER SECTION 503 OF THE REHAB. ACT OF 1973, TOPIC 103: LACHES, http://www.oalj.dol.gov/public/ofccp/refrnc/ocdig130.htm. (last revised Nov. 1996).

84 David Horowitz, *Ten Reasons Why Reparations for Blacks Is a Bad Idea for Blacks—and Racist Too!*, http://www.adversity.net/reparations/anti_reparations_ad.htm (Mar. 12, 2001).

85 DOBBS, *supra* note 80, at 509.

Jim Crow laws. In addition, one could argue that the federal government should be precluded from asserting a laches defense because the government contributed to the lack of access to the legal system that was necessary to the expeditious exercising of one's rights to a claim.

d. Government Immunity

To date, the suits for reparation have been claims for tortious acts by corporations or the federal government. Suits against corporations are difficult because of the lapse in time. And suits against the federal government are nearly impossible because the federal government has to agree to be sued. Reparations to African-Americans are such a contentious subject that this is likely never to happen. Cato's only option was to avoid it altogether, which is possible to do under a tort theory because of the FTCA's time limitations, even if time was tolled or subject to a similar equitable exception.

A Takings Clause argument easily sidesteps an immunity defense. Although the Supreme Court has held that property regulations may constitute a Fifth Amendment taking of private property, some courts have nonetheless avoided recognizing the concept of regulatory takings[86] by drawing a distinction between the exercise of a government's eminent domain power and the exercise of its police power.[87] These courts have held that only formal condemnation accomplished through eminent domain amounts to a Fifth Amendment taking. Any such distinction is an artificial one however, since both practices allow for the involuntary, and uncompensated, transfer of private property.

It is significant that the U.S. Supreme Court has stated that the remedy provision under the Takings Clause is "self-executing"[88] and does

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[86] Mailman Dev. Corp. v. City of Hollywood, 286 So. 2d 614, 615 (Fla. Dist. Ct. App. 1973). Under the Florida Constitution, no private property shall be taken except for public purposes and with full compensation to the owner. *Id.* However, noted the court, there is a clear distinction between the appropriation of private property for public use in the exercise of the power of eminent domain, and the regulation of the use of property under the police power exercised to promote the health, morals, and safety of the community. *Id.* The enactment of a zoning ordinance under the exercise of police power does not entitle the property owner to seek compensation for the taking of the property through inverse condemnation. *Id.* If the zoning ordinance as applied to the property involved is arbitrary, unreasonable, discriminatory, or confiscatory, the relief available to the property owner is a judicial determination that the ordinance is either invalid, or unenforceable as pertains to plaintiff's property. *Id.*; *see* Fred French Inv. Co. v. City of New York, 39 N.Y.2d 587, 594 (1976) (finding that the United States Supreme Court's *Mahon* opinion only metaphorically equated an invalid exercise of the police power with a taking of property).

[87] *Mailman Dev. Corp.*, 286 So. 2d at 615.

[88] *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1989) (finding that the Fifth and Fourteenth Amendments required the city to compensate the church for the period of time of the taking). The Court concluded that city's actions already constituted a taking and, therefore, no subsequent action by the city could relieve it of the duty to compensate the church. *Id.*

not require further legislative action in order to enforce the right. This remedy provides a direct cause of action. The requirement of compensation is based in the Constitution and is fundamental to the notion of justice; government action that expropriates private property rights necessarily implicates the constitutional obligation for just compensation.[89]

As noted in Justice Brennan's dissent in *San Diego Gas & Electric Co. v. San Diego*,[90] it has been established since *Jacobs* v. *United States*[91] that claims, regardless if they are effectuated by traditional condemnation or by regulation, for just compensation are grounded in the Constitution itself:

> The suits were based on the right to recover just compensation for property taken by the United States for public use.... That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States.[92]

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[89] *Id.*

[90] San Diego Gas & Electric Co. v. San Diego, 450 U.S. 654 (1981) (Brennan, J., dissenting). Respondent city rezoned land, formerly zoned for industrial use, which affected property owned by the petitioner. *Id.* at 624. The landowner brought suit for inverse condemnation, *id.* at 626, and the Court of Appeals of California, Fourth Appellate District denied damages for inverse condemnation. *Id.* at 627–30. The U.S. Supreme Court determined that the decision of the court of appeals was not final, so the Court lacked jurisdiction to consider the question. *Id.* at 630. A state judgment only created a federal question when a taking and compensation for the taking were implicated. *Id.* However, the Court determined that the evidence showed that a taking had not actually occurred and the landowner's action was a challenge to legislative activities because the landowner had taken no action that established it had been deprived of the benefit of its land. *Id.* Under the circumstances, the appropriate relief was mandamus or declaratory relief, not compensation for inverse condemnation. *Id.* at 629. In addition, the landowner had other remedies before the state courts. *Id.* at 632. The Court dismissed the landowner's appeal. *Id.*

[91] Jacobs v. United States, 290 U.S. 13 (1933). In *Jacobs*, the petitioners' lands were damaged from an increase in the occasional overflows of an adjacent creek caused by the government's construction of a dam. *Id.* at 15. The petitioners filed suit to recover compensation for the property taken, under the Fifth Amendment, and were awarded the amount of damage caused by the construction commencing on the date of the dam's completion, excluding interest from the date of the government's taking. *Id.* The Supreme Court reversed the latter part of the lower court's decision, holding that interest was recoverable. *Id.* at 16. Since the petitioners' actions were founded upon the Constitution rather than an implied contract, the government's promise to pay was implied by the duty to pay imposed by the Constitution. *Id.* Therefore, the petitioners were entitled to just compensation, determined by the value of their property at the time of the taking and to such additions as would produce the full equivalent of that value paid contemporaneously with the taking; interest "is a good measure by which to ascertain the amount so to be added." *Id.* at 16–17.

[92] *First English Evangelical*, 482 U.S. at 315 (citing Jacobs v. United States, 290 U.S. 13, 16 (1933)).

Justice Brennan interpreted the just compensation requirement as barring the government from forcing some individuals to bear burdens that should be borne by the public as a whole.[93] Because the public receives benefits from the regulations, Justice Brennan believed it only fair that the public bear the cost of receiving those benefits when the burden of providing them is so severe that the property being regulated has been taken.[94] He pointed out that, from the perspective of the property owner, it matters little if the property is formally condemned or merely regulated to an unconstitutional extent.[95] The end result is that the public is receiving benefits at the sole expense of the owner unless the government tenders just compensation.[96] The Court has frequently repeated the view that, in the event of a taking, compensation is required by the Constitution.[97]

The judicial branch is not alone in recognizing the Fifth Amendment's unique, self-executing quality. President Reagan issued Executive Order 12,630[98] following the Supreme Court decisions in *Nollan v. California Coastal Commission*[99] and *First English Evangelical Lutheran*

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[93] *San Diego Gas*, 450 U.S. at 656 (1981).

[94] *Id.*

[95] *Id.* at 652.

[96] *Id.*

[97] *First English Evangelical*, 482 U.S. at 315; *see* Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 5 (1984) (indicating that 40 U.S.C. § 258a empowers the Government, "at any time before judgment" in a condemnation suit, to file "a declaration of taking signed by the authority empowered by law to acquire the lands [in question], declaring that said lands are thereby taken for the use of the United States"). The Government is obliged, at the time of the filing, to deposit in the court, "to the use of the persons entitled thereto," an amount of money equal to the estimated value of the land. *Id.* Title and right to possession thereupon vest immediately in the United States. *Id.* In subsequent judicial proceedings, the exact value of the land is determined, and the owner is awarded the difference between the adjudicated value of the land and the amount already received by the owner, plus interest on that difference. *Id.; see also* Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 304–06 (1923) (noting that Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation). There is no provision in respect of interest. *Id.* Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. *Id.* Its ascertainment is a judicial function. *Id.*; Monongahela Navigation v. United States, 148 U.S. 312, 337 (1893) ("Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property taken there can be as little doubt.").

[98] Governmental Actions and Interference with Constitutionally Protected Property Rights, Exec. Order No. 12,630, 53 Fed. Reg. 8859, 8862 (Mar. 18, 1988).

[99] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987). In *Nollan*, Appellant landowners brought suit to invalidate a condition on their land permit requiring them to grant the public an easement across their beachfront property. *Id.* at 828. The court of appeals found the condition to be valid and reversed the writ of mandamus issued by the superior court. *Id.* at 830. The United States Supreme Court granted review and found that the right to exclude others from private property was an essential right to the ownership of property. *Id.* at 831. If government action resulted in permanent occupation of land, it would effect a taking unless it substantially furthered legitimate state interests. *Id.* at 834. The Court found that California required the use of eminent domain to obtain easements across private property and the condition imposed was not a use of eminent domain. *Id.* at 841. The Court finally held that the

Church v. Los Angeles County.[100] The Order recognized that the Fifth Amendment Takings Clause is self-executing and requires that Executive Branch agencies undertake an internal review prior to any actions that may have takings implications.[101]

III. History

A. Self-ownership

To establish slavery as a taking, one must recognize that slaves had a property interest in their persons. The Supreme Court itself, at the height of the U.S. slave trade, acknowledged that every man has a natural right to the fruits of his own labor.[102] The fact that no one can deprive him of this fruit, and appropriate it against his will, is a necessary result of this admission.[103] Philosophers recognized and relied upon by the Framers in developing the Constitution,[104] such as Locke, have long discussed the idea that bodily integrity may be an independent right.[105]

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condition was a taking and that, if the state wanted an easement, it would have to compensate appellants. *Id.* at 842.

[100] First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987). Appellant property owner filed a complaint after appellee county adopted an ordinance in response to a flood that destroyed a portion of appellant's property. *Id.* at 307–08. The complaint sought to recover in inverse condemnation and sought damages for the loss of use of a portion of the property. *Id.* at 308. The trial court found in favor of appellee county and the appellate court affirmed, holding that appellant could not recover for damages for the time before it was finally determined that the regulation constituted a taking of appellant's property. *Id.* at 309. The Supreme Court reversed the appellate court's decision. *Id.* at 310. The Court found that the Fifth and Fourteenth Amendments required that the appellee compensate appellant for that period of time. *Id.*

[101] Governmental Actions and Interference with Constitutionally Protected Property Rights, 53 Fed. Reg. at 8862.

[102] The Antelope, 23 U.S. 66, 120 (1825).

[103] *Id.*

[104] *See* LAURENCE TRIBE & MICHAEL DORF, ON READING THE CONSTITUTION 70–71 (1991) (discussing Locke as "one of the most influential thinkers for American statesmen" of the eighteenth century); *see also* Jeffrey S. Koehlinger, *Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 IND. L.J. 723, 758–59 (1990) (noting that Locke's liberal traditions inspired early United States leaders).

[105] *See* THOMAS HOBBES, LEVIATHAN 67–68 (Prometheus Books 1988) (1651) (stating that there are rights that no one can be presumed to have abandoned or transferred, and the loss of which would defeat the original purpose of the contract). For example, no one can be regarded as having laid down his right to resist anyone who attempts to take away his life, "because he cannot be understood to aim thereby at any good to himself." *Id.* Hobbes outlined the conflict between 1) the absolute right of the sovereign (his natural right to do anything, which he retains by virtue of having been outside the contract), and 2) the citizen's basic right of self-defense, which he had not renounced when entering into the contract.); JOHN LOCKE, *Second Treatise on Government, in* PRINCETON READINGS IN POLITICAL THOUGHT: ESSENTIAL TEXTS SINCE PLATO 243–44 (Mitchell Cohen et al., eds. 1996) (asserting that every human being holds absolute natural rights). The government does not grant these rights, but rather individuals give up some of their natural rights in order for the government to protect their lives, liberty, and property. *Id.* The major thrust of his work argues that individuals have rights protecting their autonomy and

Locke stated that a man's property included his life, liberty, and estate.[106] He included life and liberty as elements of property.[107] For Locke, one primary purpose of establishing government was for the protection of this fundamental right to property, including self-ownership.[108] Although the right of self-ownership is subject to limitations, one's property in one's self, stated Locke, is inalienable.[109]

Nearly all the Framers owned slaves–Jefferson owned as many as 200 slaves[110] and Locke himself penned the pro-slavery Carolina constitution.[111] But even James Madison argued that property "embraces everything to which a man may attach a value and have a right."[112] He also stated that a man has an important property interest in the safety and liberty of his person, that he has an equal property interest in the free use and application of his faculties, and that as a man is said to have a right to his property, he may also be said to have a property interest in his rights.[113]

Although legal scholars typically accept only a minimal definition of self-ownership,[114] a more expansive perspective exists to define self-

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property. *Id.* Government intrusions can only be legitimated by the consent of the governed; the government has no independent right to contravene individuals' rights other than those they freely give up. *Id.* These ideas of freedom from government intrusion are clearly identifiable throughout the Constitution and the Bill of Rights. Supreme Court opinions reaffirm Locke's principles of protection of personal autonomy and bodily integrity; *see also* Roe v. Wade, 410 U.S. 113, 153 (1973) (determining that the "right of privacy, whether it be found in the Fourteenth Amendment...or...in the Ninth Amendment..., is broad enough to encompass a decision whether or not to terminate the pregnancy"); Griswold v. Conn., 381 U.S. 479, 485–86 (1965) (asserting that laws prohibiting the use of contraceptives are unconstitutional); Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942) (holding that an Oklahoma law calling for the sterilization of repeat felons is unconstitutional). The Court recognized a right to be free from state intrusion into the bodies of individuals, claiming such an intrusion contradicted the "dignity and personality" inherent to each person. *Id.* at 546 (Jackson, J., concurring).

[106] LOCKE, *supra* note 105, at 262.

[107] *Id.*

[108] *Id.* "The great and chief end, therefore, of men's uniting into common-wealths, and putting themselves under government, is the preservation of their property." *Id.*

[109] *Id.* at 251. "[E]very man has a property in his own person: this no body has any right to but himself...." *Id.*

[110] Interview by Ken Burns with Clay Jenkinson, Professor of History and Literature at the University of Nevada at Reno, *Archives: Interview Transcripts*, http://www.pbs.org/jefferson/archives/interviews/Jenkinson.htm (last visited Oct. 12, 2005).

[111] The Avalon Project at Yale Law School, *The Fundamental Constitutions of Carolina: March 01, 1669*, http://www.yale.edu/lawweb/avalon/states/nc05.htm (last visited Oct. 12, 2005).

[112] James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, at 174, *reprinted in* THE LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865).

[113] *Id.*

[114] *See* Michelle Bourianoff Bray, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 220 (1990) (commenting that currently there is no defined legal position regarding property rights in the human body). *But see* YORAM BRAZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS 113 ("The current prohibition of slavery implies that each individual is the owner of the capital asset embedded in himself or herself.").

ownership as ownership of one's liberty.[115] This ownership is less about the body and more about the ability to make decisions and control one's destiny.[116] It is this perspective that relates to constitutional rights of privacy and integrity. Slaves possessed these rights under both the limited and expanded definitions of self-ownership.

B. Slavery Was Illegal Before 1865

As early as 1770, a colonial Massachusetts Superior Court found slavery, pursuant to state common law, to be unconstitutional.[117] In 1783, the court took steps to further analyze whether slavery was legal under the Massachusetts Constitution.[118] It found that nowhere did the State Constitution expressly enact or establish slavery.[119] The Massachusetts court further held that the idea of slavery was inconsistent with the nation's own conduct and the Constitution.[120] As a result, there could be no such thing as perpetual servitude, unless the individual forfeited his liberty as a result of criminal conduct or by personal consent or contract.[121]

Prior to these cases, however, the colonies themselves had outlawed slavery. The Virginia colony, for example, stated that people in the colony "shall have and enjoy all liberties, franchises and immunities within any of England's other dominions, to all intents and purposes as if they had been abiding and born within the realm of England."[122]

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[115] Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 724–37 (1993) (discussing the proposition that American law has recognized a property interest in Whiteness); Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 966 (1981) (suggesting that the tort law basis for a claim of assault is rooted in a property interest that "interference with my body is interference with my personal property").

[116] *See* Laura Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 136–39 (1990) (discussing how the works of James Madison, Alexander Hamilton, Joseph Story, and John Locke created and expanded the notion of man having a property right in his own person).

[117] James v. Lechmere (Mass. Superior Ct. 1770) (cited in Lemmon v. People, 20 N.Y. 562 (1860)).

[118] Quock Walker Case (Mass. Superior Ct. 1783, unpublished), The Quock Walker Case: Instructions to the Jury, http://www.pbs.org/wgbh/aia/part2/2h38.html (last visited Oct. 31, 2005; *see* Slavery: Quock Walker, http://www.masshist.org/longroad/01slavery/walker.htm (last visited Oct. 28, 2005).

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] William J. Wood, *The Illegal Beginning of American Negro Slavery*, 56 A.B.A. J. (Jan. 1970).

A number of other colonies wrote charters to the same effect.[123] In fact, "there were no colonial enactments that authorized the holding of slaves, or defined the relation and condition of slavery."[124] For example, the state of Georgia commenced under auspices decidedly hostile to slavery.[125] General James Oglethorpe, a member of the British Parliament, created the colony with the idea of opening the area for England's poor and for persecuted Protestants of all nations.[126] As a result, the colony's governing trustees strictly prohibited slavery, and declared it to be not only immoral, but contrary to the laws of England.[127]

In the late 1700s and into the 1800s, a number of cases emanating from state courts again held that slavery was unconstitutional. In *Commonwealth v. Jennison*,[128] the Massachusetts Superior Court found that slavery had not been expressly enacted or established. In fact, the court called it "a mere practice," and stated that the Constitution declared all men were born free and equal, thus slavery was totally repugnant to the nation's ideologies.[129]

In 1837, the Ohio Supreme Court came to the same conclusion, albeit by different reasoning. The state arrested James Birney for knowingly harboring a fugitive slave.[130] In his defense, Birney argued three points: 1) slavery is unconstitutional, so 2) he could not have harbored a slave, as it was a non-existent status in law, and 3) certainly could not have done it knowingly.[131] The Ohio Supreme Court unanimously ruled in Birney's

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[123] REV. WILLIAM GOODELL, SLAVERY AND ANTI-SLAVERY: A HISTORY OF THE GREAT STRUGGLE IN BOTH HEMISPHERES: WITH A VIEW OF THE SLAVERY QUESTION IN THE UNITED STATES 18 (New York, William Harned Pub. 1852). Maryland, the Carolinas, Georgia, New England, and Pennsylvania wrote charters specifying that the people in the colony shall enjoy all liberties; LYSANDER SPOONER, UNCONSTITUTIONALITY OF SLAVERY 21–31 (Boston, Bela Marsh 3rd ed. 1845) (1860) Maryland, the Carolinas, Georgia, New England, and Pennsylvania wrote charters specifying that the people in the colony shall enjoy all liberties.

[124] GOODELL, *supra* note 123, at 20–21.

[125] *Id.*

[126] *Id.*

[127] *Id.* (citing MARCIUS WILLSON, AMERICAN HISTORY 261–62 (1846)).

[128] Commonwealth v. Jennison (Mass. 1783, unpublished), The Quock Walker Case: Instructions to the Jury, http://www.pbs.org/wgbh/aia/part2/2h38.html; Slavery: Quock Walker, http://www.masshist.org/longroad/01slavery/walker.htm. In *Jennison*, the defendant was indicted and charged with assault and battery against Walker. *Id.* The Attorney General argued that Jennison had attacked a free man, based on testimony that Jennison was aware that Walker's former master had promised him freedom once he reached the age of 25, a promise that was renewed by the widow. *Id.* Jennison's lawyer argued that the 1780 state constitution did not specifically prohibit slavery. *Id.* In his instructions to the jury, Chief Justice William Cushing held that the constitution granted rights that were incompatible with slavery. *Id.*

[129] *Id.*

[130] Ohio v. Birney, 8 Ohio 230, 237–38 (1837).

[131] *Id.* at 238.

favor,[132] on the basis that Birney could not be guilty of the alleged criminal acts without an averment that he in fact knew his actions were illegal.[133] The court noted the issue of slavery was too important to discuss if it was not necessary to resolving the case.[134]

Cases of this nature are prevalent through this nation's early history.[135] The question then is how and why slavery persisted. Historians have proffered a number of arguments ranging from greed[136] to Christian duty[137] to explain the "Why" aspect of this conundrum. Indeed, the truth may never be known, however, the "How" portion of the mystery is clear.

When the Framers of the Constitution met to mold the principles of this nation, the issue of slavery arose to confront them, forcing them to reconcile it with their philosophical ideals of human rights and personal dignities. Whereas they could have followed English common law,[138] colonial charters, colonial courts, and the principles that stated they themselves, as Whites, could not be enslaved, they chose instead to compromise their principles for the sake of political support and regional peace. It was this newly established federal regime that instituted and protected slavery. It was the Founders, who proclaimed themselves and all men free of English tyranny, who created the basis on which states and private citizens would declare their right to buy and sell other humans like chattel. The federal government laid the foundation for slavery, for violations of human rights, for the subsequent discrimination that persists today, for the sake of politics,[139] federal revenues,[140] and personal comfort of its political leaders.[141]

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[132] *Id.*; *see* Hone v. Ammons, 14 Ill. 28, 29 (1852) (acknowledging that the state's Constitution and court precedent made slavery unconstitutional); State v. Lasselle, 1 Blackf. 60, 62 (Ind. 1820) (acknowledging that the state's Constitution and court precedent made slavery unconstitutional); Stoutenborough v. Haviland, 15 N.J.L. 266 (1836) (questioning the presumption that Blacks were slaves absent contrary evidence because most Blacks in New Jersey were free).

[133] *Birney*, 8 Ohio at 238.

[134] *Id.*

[135] *See supra* note 132 and accompanying text (discussing illegality of slavery according to state law).

[136] JOHN A. AUPING, RELIGION AND SOCIAL JUSTICE THE CASE OF CHRISTIANITY AND THE ABOLITION OF SLAVERY IN AMERICA 7–10 (1994); KENNETH M. STAMPP, THE PECULIAR INSTITUTION, 385–88 (1956).

[137] MARGARET KNIGHT, HONEST TO MAN: CHRISTIAN ETHICS REEXAMINED, 143 (1974); Charles Bradlaugh, *Humanity's Gain From Unbelief, in* ATHEISM, A READER, 181 (S. T. Joshi ed., 2000).

[138] *See* Somerset v. Stewart, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) (stating that slavery is incapable of being legally established for any reason, moral or political, except by written law). The court notes further that since England had not approved such a law, Somerset had to be freed. *Id.*

[139] WILLIAM K. KLINGAMAN, ABRAHAM LINCOLN AND THE ROAD TO EMANCIPATION, 1861–65, at 49–51, 71 (Viking 2001); BENJAMIN QUARLES, LINCOLN AND THE NEGRO 84 (1962).

[140] Kevin Outterson, *Slave Taxes, in* SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS 135 (Raymond A. Winbush ed., 2003).

[141] *See The Founding Fathers: A Brief Overview*, http://www.archives.gov/exhibit_hall/

C. Federal Responsibility

Slavery, as would be defined and practiced by the American colonists, was virtually non-existent in England in the 18th century.[142] In fact, a mere fifteen years before the Constitutional Convention, the King's Bench, an early English equivalent to the modern U.S. trial court, presided over by one of the most important and well-regarded judges of the time, found that slavery could not be held to exist without positive law.[143] Since none existed in England, slaves had to be freed.[144] Despite the fact that *Somerset v. Stewart*[145] should have become a part of American common law, the absence of institutionalized slavery in England served only to motivate the colonial governments to pass statutes that created slavery as a legally protected practice.[146]

The federal government went so far as to institutionalize slavery in its most precious document, even though these provisions would create incongruence in the document. For example, Article I, § 9 of the Constitution permitted the federal government to obtain monetary benefits

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charters_of_freedom/constitution/founding_fathers_overview.html (last visited Oct. 16, 2005) ("Twelve [signers] owned or managed slave-operated plantations or large farms: Bassett, Blair, Blount, Butler, Carroll, Jenifer, Mason, Charles Pinckney, Charles Cotesworth Pinckney, Rutledge, Spaight, and Washington. Madison also owned slaves."); *see also* Sarah Booth Conroy, *The Founding Father and His Slaves*, WASHINGTON POST, Feb. 16, 1998, at D02 ("He inherited 10 slaves at his father's death in 1743. When he died on Dec. 14, 1799, 317 slaves, 123 belonging to Washington himself, lived on his five plantations.").

[142] *See* William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1715–20, 1723–26 (1996) (discussing that while one may be a "villain" or a serf, in England, one was not a slave; noting, although not completely accurately, that when an African slave entered England, he was free).

[143] Somerset v. Stewart, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772); *see* Matter of Cartwright, 11 Elizabeth, 2 Rushworth's Coll 468 (1569) (finding slavery unconstitutional and stating, "England was too pure an air for slaves to breathe in"); Shanley v. Hervey, 2 Eden 126 (Chancery, March 1762) (stating that "As soon as a man puts foot on English ground, he is free: a Negro may maintain an action against his master for ill usage, and may have a Habeas Corpus, if restrained of his liberty"); Smith v. Brown & Cooper, 2 Ld Raym 1274, 2 Salk 666, 91 Eng Rep 566 (1765) (stating that "that as soon as a negro comes into England, he becomes free: one may be a villein in England, but not a slave").

[144] Somerset v. Stewart, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772).

[145] *Id.* In *Somerset*, James Somerset had been sold to Charles Stewart in Jamaica. Stewart took Somerset to England for some temporary business, intent on taking him back to Jamaica at the close of that business. *Id.* While in England, Somerset refused to serve Stewart, intending to stay in England. Stewart returned Somerset to the custody of the ship they would be returning on. *Id.* The captain surrendered Somerset to the authorities. *Id.* The King's Bench noted an early chancellor's case in which prevailed the notion that if a slave entered England, he became emancipated. *Id.* The Bench upheld this notion, stating that slavery is incapable of being legally established for any reason, moral or political, except by written law. *Id.* And since England had not approved such a law, Somerset had to be freed. *Id.*

[146] *Colonial Law,* http://www.pbs.org/wgbh/aia/part1/1h315t.html; Boston African-American National Historical Site, *The Fugitive Slave Law of 1850*, http://www.nps.gov/boaf/fugitiveslavelaw2.htm (last visited Oct. 28, 2005) ("As early as 1643, colonists had recognized a need for the regulation of fugitive slaves."). In Massachusetts, for example, there was the New England Confederation (1643–1684) that was founded, in part, to strengthen colonial cooperation in the return of fugitive slaves. *Id.*

from slavery. The article states that "a tax or duty may be imposed on such importation not exceeding ten dollars for each person."[147] The plain meaning of this language indicates that the federal government intended to derive monetary benefits from the slave trade. The logical extension of this is that the government, by retaining the authority to tax the traders' property, recognized the slaves as property, with its authority enforceable under the Constitution.

Furthermore, Article IV, § 2, clause 3, the Fugitive Slave Clause, recognized the individual property rights of a slave owner in a slave, indicating a constitutional protection of slave property.[148] Article IV implicitly sanctioned the product that flowed from slave property, namely, slave labor.[149]

The Constitution's endorsement of slavery is clear.[150] Just as clearly, the Fifth Amendment made it a violation to take property without compensation.[151] Existing together, the two concepts are in conflict with one another. Unless we are to deny the plain meaning of the document's words as they pertain to slavery or to deny that the Fifth Amendment requires compensation, it can only mean that the slaves' constitutional rights to own property were violated and that they are owed compensation for the taking of their property.

The federal government even used the geographical expansion of the country as a vehicle for increasing the number of slave states, and ultimately the number of slaves. The government did this through the Missouri Compromise, which admitted Missouri as a slave state and Maine as a free state.[152] This behavior continued into the mid-19th century: between 1821 and 1848 every free state (Michigan, Iowa, and Wisconsin) was countered with a slave state (Arkansas, Florida, and Texas);[153] the Compromise of 1850 admitted California as a free state in exchange for stricter fugitive slave

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147 U.S. CONST. art. I, § 9, cl. 1, *repealed by* U.S. CONST. amend. XIII, § 1.

148 U.S. CONST. art. IV, § 2, cl. 2, *repealed by* U.S. CONST. amend. XIII, § 1.

149 *Id.* ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of Law or Regulation therein, be discharged from Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

150 *See supra* notes 147–149 and accompanying text (indicating the Constitution supported the institution of slavery). *But see* Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U.L. REV. 191 (2003) (arguing that the Constitution could not support slavery and that if it did, there could be no Fifth Amendment takings argument to recover for the uncompensated taking of the slaves' property).

151 U.S. CONST. amend. V ("[N]nor shall private property be taken for public use, without just compensation.").

152 GLOVER MOORE, THE MISSOURI CONTROVERSY, 1819–1821, at 86–88 (1953).

153 DON E. FAHRENBACHER, THE SOUTH AND THREE SECTIONAL CRISES 16–17, 29, 53 (1980); MICHAEL GANNON, FLORIDA: A SHORT HISTORY 37 (2003); WILLIS FREDERICK DUNBAR, MICHIGAN: A HISTORY OF THE WOLVERINE STATE 313 (1965); DAVID G. MCCOMB, TEXAS: A MODERN HISTORY 50, 59–60 (1989).

laws;[154] and the Kansas-Nebraska Act divided the territory such that the former was a slave state and the latter was a free state.[155] The government actively ensured the longevity of slavery.

After the federal government adopted slavery, government actors conducted auctions, included slaves as probate property, allowed them to be seized as assets,[156] and passed regulations facilitating the recapture of runaway slaves.[157] The language of the Fugitive Slave Clause itself indicates that slavery was a creature of statute and regulation.[158]

Finally, the Supreme Court itself recognized slavery, stating that the Framers directly sanctioned slave property.[159] This is notable, and when considering the outcome of *Harry v. Decker*,[160] supports an argument that the Court proceeded based on personal biases. In *Decker*, a case with issues identical to those in *Dred Scott*, the Mississippi Supreme Court granted the slave his freedom.[161] The fact that the highest court of a slave state would come to such a conclusion is incredible, but also an indication that even those states steeped in slave culture could and did recognize limitations to the institution already prescribed as unconstitutional.

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[154] GEORGE D. HARMON, ASPECTS OF SLAVERY AND EXPANSION, 1848–60, at 47, 51 (Reprinted from Vol. 21, No. 4, Jan., 1929 Journal of the Illinois State Historical Society).

[155] MICHAEL A. MORRISON, SLAVERY AND THE AMERICAN WEST: THE ECLIPSE OF MANIFEST DESTINY AND THE COMING OF THE CIVIL WAR 126–54 (1997).

[156] *See* THOMAS MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 82 (1996) (chronicling the intestate and testate laws regarding the lineal descent of slaves between family members upon the death of the slaves' owner).

[157] *See* U.S. CONST. art. IV, § 2, cl. 2, *repealed by* U.S. CONST. amend. XIII, § 1 ("No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.").

[158] *See* U.S. CONST., *supra* note 148 (indicating that the Fugitive Slave Clause stated that slaves from each state were held "under the Laws thereof," underscoring that slaves were regulated by law).

[159] *See* Dred Scott v. Sandford, 60 U.S. 393, 423 (1856) (stating that if African were citizens, then they would have the rights and privileges of other citizens, protected by the Constitution). And if states could limit or restrict these rights, then the Constitution would be without meaning. *Id.* Citizens would have no rights other than those the state gave hi and this would be contrary to the Constitution. *Id.* Rather, the Constitution guarantees rights that the states cannot deny. *Id.* And this "makes it absolutely certain that the African race w[as] not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States." *Id.* If Africans are not citizens with Constitutionally protected rights, states are permitted to place them in an inferior position, one sanctioned by the Court.

[160] Harry v. Decker & Hopkins, 1 Miss. (1 Walker) 36 (1818). John Decker took several slaves from Virginia into Indiana, where slavery is prohibited, for a period of more than 20 years. *Id.* at 36. The court noted that though Virginia law guarantees its inhabitants their titles, rights, and liberties, Virginia cannot render void "that article of the ordinance of Congress of 1787," which prohibits slavery in that territory. *Id.* at 37. The court further noted that "[s]lavery is condemned by reason and the laws of nature. *Id.* at 42. It exists, and can only exist, through municipal regulations, and in matters of doubt, is it not an unquestioned rule that courts must lean '*in favorem vitæ et libertatis*'. . . . *Id.* How should the Court decide . . .? I presume it would be in favor of liberty." *Id.* at 43.

[161] *Id.* at 43.

Despite this, the Supreme Court protected the institution pursuant to the Fifth Amendment.[162] The Fifth Amendment prohibits the federal government from depriving a property owner of their property without due process.[163] The Court reasoned that slave property was similar to other forms of property and was thus entitled to the same constitutional protections.[164] The Court subsequently recognized the property right of slave owners.

IV. Slavery as a Taking

A. Purpose of the Takings (Just Compensation) Clause

It has long been difficult for constitutional lawyers to distinguish between valid exercises of "police power," valid even though a person may be less well off than before the regulation, and governmental "takings" that are not permitted unless monetary compensation is paid.[165] A related problem, albeit one not discussed in this Note, is how much compensation is due when property is taken. Despite its complexity, the Fifth Amendment has become the central constitutional restriction on government confiscation of private property and nearly all state constitutions contain similar language.[166]

According to one preeminent legal scholar, there are at least five recognized compensable takings: 1) any physical occupation of real property, even if for only a limited period; 2) regulations that deny the owner all economically beneficial use of the property; 3) conditional approval of improvement to property, where the conditions are unrelated to the development or when the conditions for approval relate to the development but are disproportionate to the scope or degree of the problems any development could cause; 4) expropriation of cash; and 5) regulations that

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[162] *Id.* at 450.

[163] *See supra* note 151 (stating that "nor shall private property be taken for public use, without just compensation").

[164] *Sandford*, 60 U.S. at 451 ("And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government."). The *Sandford* Court added, "Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution." *Id.*

[165] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1167 (1964).

[166] ROBERT MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 3 (1999).

greatly impact the economic situation of the owner, the regulation's consistency with reasonable investment-backed expectations, and the general character of the government's action.[167]

There are a number of theories regarding the purpose of the Takings Clause. The two theories discussed here qualify slavery as a taking, mandating compensation.

1. Frank Michelman

Frank Michelman has argued that the Takings Clause offers a way to adjust transactions that increase societal wealth but decrease the wealth of particular parties, creating transactions that benefit all parties.[168] He argues that takings should be evaluated under a utility or a fairness analysis, both of which support compensation for slavery.

a. Fairness

Compensation for the involuntary transfer of property is appropriate if redistribution is unfair.[169] Michelman suggests that compensation is required to achieve fairness under certain circumstances, including ones in which one party suffers an unusually great harm.[170] This analysis dictates that compensation is appropriate where a societal taking has unequally impaired liberties, where harm is disproportionately focused on certain individuals or where "visible reciprocities of burden and benefit" are not present.[171]

Slavery meets each of these compensable alternatives. The taking of the slaves' property interest in their self-ownership concentrated harm (loss of identity, decision-making power, lack of physical mobility) on certain individuals (African-Americans) with no reciprocity (uncompensated labor). The benefits accrued affected only one group (the slave owner and arguably, Whites generally), while the other suffered immense harms. The result has been long term inequities, including the impairment of liberties with respect to education, property ownership, and employment opportunities. The fairness analysis therefore provides a takings claim for slavery.

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[167] Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 716 (2002).

[168] Michelman, *supra* note 165, at 1172–83.

[169] *Id.* at 1221.

[170] *Id.*

[171] *Id.*

b. Utility

Under Michelman's utilitarian analysis, compensation is appropriate where the negative effect of an action is greater than the cost of compensation.[172] Michelman argues that it is just to compensate victims because the risk of exploitation by the majority creates a greater disincentive for minority parties to contribute to society.[173] This compensation is due where societal actions cause disproportionate burdens to fall on particular parties,[174] where actions tend to channel benefits and burdens to different groups,[175] and where there has been capricious behavior on the part of the majority.[176]

Slaves, in the sense that they were a powerless minority, had their self-ownership confiscated by the exploitive majority. This confiscation of property caused a disproportionate burden to fall on this particular group of people. Once confiscated, this property created benefits to one group, the slave traders and slave owners, while harming another group. The fact that the slaves were grouped together and identified as an inferior race is evidence of the majority's capricious behavior. The utilitarian analysis, like the fairness analysis, also provides for takings compensation for slavery.

2. Richard Epstein

Richard Epstein asserts that the Takings Clause exists "to guarantee a proportionate distribution of gains among the parties from whom the government took private property."[177] Like any private actor, the government should be held accountable for the harms it inflicts on parties for its own benefit. Epstein further argues that the greater the number of takings, the greater the wrong.[178]

According to Epstein's approach, the taking of slaves' property interest in their self-ownership is a compensable taking. If the Takings Clause was designed to equitably distribute gains from confiscated property, then slaves should receive compensation to offset the fact they received none of these gains. The result of this confiscation culminated in a taking. Epstein's belief that the greater the taking, the greater the wrong, suggests

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[172] *Id.* at 1215.
[173] *Id.* at 1216–17.
[174] *Id.* at 1217.
[175] *Id.* at 1218.
[176] *Id.* at 1217.
[177] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 15 (1985).
[178] *Id.* at 94.

that slavery ought to be compensable, considering the mass confiscation of property.

B. Takings Clause Violations

The Takings Clause states, "nor shall private property be taken for public use, without just compensation."[179] A Takings Clause violation claim has four prerequisites: 1) private property must exist; 2) this property must be taken by the government; 3) the taking must be for public use; and 4) the original owner must not have been compensated for the taking.

Elements one and two will be discussed in detail below. Elements three and four however, are not discussed as thoroughly since their existence is of little doubt. Clearly the reason for the utilization of slaves was for the performance of manual labor. This labor ultimately made it possible for the public to use raw materials that otherwise would not have been produced as quickly, abundantly, or as cheaply as they were as a result of this "peculiar institution."[180] The public reaped the benefits of slavery in their daily lives. The results of slavery manifested themselves in cheaper prices at the market for individuals and an increased availability in raw materials that allowed Southern planters to expand their market beyond that of the industrial North, and into Europe.[181] In addition, the returns allowed plantation owners to continue to reinvest and expand their production capabilities.[182]

Economic studies have demonstrated that the Southern economy was driven by slave labor; one estimate places the slave contribution to the U.S. economy at $40 million.[183] This sum is in addition to the revenue raised as a result of the federal and state property taxes on the slaves themselves. Indeed, one source states that between the colonial era and the Civil War, slave taxes raised more revenue than any other source.[184]

Just as clearly, slaves were not compensated for the taking of their self-ownership. Although there were promises of "Forty Acres and a Mule" during the Civil War, by and large, the land and beasts never materialized.[185] Even if they had, it was for payment for the slaves' loyalty and participation

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[179] U.S. CONST. amend. V.

[180] Harold D. Woodman, *Profitability of Slavery, in* DICTIONARY OF AFRO-AMERICAN SLAVERY 592, 595–96 (Randall M. Miller & John David Smith eds., 1997).

[181] *Id.*

[182] *Id.*

[183] Complaint and Jury Trial Demand P 10, Farmer-Paellmann v. FleetBoston Fin. Corp., No. CV-02-1862 (E.D.N.Y. Mar. 26, 2002).

[184] OUTTERSON, *supra* note 140, at 135.

[185] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 69–71 (1988).

in military regiments, not for the illegal taking of their property.[186] Further, although it may be tempting for opponents of reparations to argue that emancipation was in and of itself compensation, restoration of the taken property is insufficient compensation.[187] After all, what was taken cannot be given back with the owner restored as new, as is evident by both the blatant and subtle racism directed toward African-Americans today.[188] The taking continued for too long, resulting in effects too devastating to ignore.

Physical and regulatory takings can be permanent or temporary, but courts have been reticent to find a temporary invasion of property to be a taking.[189] They have nevertheless, even if the taking has been only partial, allowed compensation.[190] Permanency, in terms of the length the government has occupied the property, does not mean literally forever in the sense that most people would understand it.[191] What has been permanently taken is not the property itself, but the value of the property for the term of the invasion.[192] In at least one case, the Supreme Court has found the length of the occupancy to be irrelevant if the purpose of the taking was for the benefit of the owners.[193] In *YMCA v. United States*,[194] fairness and justice

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[186] *Id.* at 69.

[187] *See First English Evangelical*, 482 U.S. at 321 (concluding that the appellee's actions already constituted a taking and, therefore, no subsequent action by appellee could relieve it of the duty to compensate appellant for the period during which the taking was effective); *San Diego Gas*, 450 U.S. at 621 (1981) (Brennan, J., dissenting) (refuting the proposition that once a regulatory taking has been established, mere invalidation or amendment of the regulation is a constitutionally sufficient remedy). Recognizing that the concept of just compensation is to place the property owner in the same position monetarily as he would have occupied if the property had not been taken, Justice Brennan declared that invalidation or amendment of the regulation, unaccompanied by payment of damages, does not compensate the owner for any economic loss suffered during the time the invalid regulation was in effect. *Id.*

[188] *See infra* notes 239–49 and accompanying text (discussing the derivative effects of slavery on African-Americans today with the use statistical comparisons between Whites and Blacks according to several social yardsticks).

[189] MELTZ, *supra* note 166, at 124.

[190] *Id.*

[191] *See* Hendler v. United States, 952 F.2d 1364, 1376 (Fed. Cir. 1991) ("As Justice Marshall said in *Loretto:* 'when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred....'"). "In this context, 'permanent' does not mean forever, or anything like it." *Id.*

[192] MELTZ, *supra* note 166, at 125.

[193] YMCA v. United States, 395 U.S. 85, 92–93, 432–33 n.9 (1969); *see* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982) (observing that where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, the cases have uniformly found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner).

[194] *YMCA*, 395 U.S. at 85. In *YMCA*, the petitioners' buildings were situated next to one another in Panama. *Id.* at 86–87. Rioting began and many members of a mob proceeded to petitioners' buildings, looting and wrecking the interiors. *Id.* at 87. All of petitioners' buildings were either badly damaged or destroyed; only one building had been occupied by U.S. troops. *Id.* at 88. Petitioners brought an action against respondent, seeking compensation for the damage done to their buildings. *Id.* Petitioners sought just compensation under the Fifth Amendment. *Id.* at 86. The lower court held that the actions of the U.S. Army did not constitute a "taking" within the meaning of the amendment, and entered summary

did not require compensation. This is not the case regarding the physical, regulatory, and derivative takings from African-Americans throughout early U.S. history. The result of this confiscation culminated in a taking. Epstein's belief that the greater the taking, the greater the wrong, suggests that slavery ought to be compensable, considering the mass confiscation of property.

1. Physical Taking

In first year property law courses, law students are instructed to think of property as a "bundle of sticks." Physical takings involve the appropriation of the title to property of one or more of these sticks that comprise the property owner's interest.[195] Governmental imposition of an easement will trigger the Takings Clause, for example. Title remains with the owner,[196] but the government has nonetheless taken a valuable stick from the bundle.

The property right of self-ownership is inalienable. Unlike other property rights, it may not be freely traded, bought, sold, or otherwise treated as a transferable commodity. To be able to do so would undermine personal identity and violate our deepest understanding of what it means to be human.[197] This inalienable nature is not the same as a person's property right in removed body parts, deemed by at least one court to be an alienable property right.[198]

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judgment in favor of the government. *Id.* at 86. The Supreme Court affirmed the lower court's decision, holding that the Constitution did not require compensation every time violence aimed against government officers damaged private property. *Id.* at 93. The temporary, unplanned occupation of petitioners' buildings did not constitute sufficiently direct and substantial government involvement to warrant compensation. *Id.*

[195] United States v. Craft, 535 U.S. 274, 278 (2002) (describing the "bundle of sticks" as a collection of individual rights which, in certain combinations, constitute property); L.A. Zaibert, *Real Estate as Institutional Fact: Towards a Philosophy of Everyday Objects, in* AMERICAN JOURNAL OF ECONOMICS AND SOCIOLOGY 267 (1999).

[196] *See* CATO INSTITUTE, *CATO Handbook for Congress: Policy Recommendations for the 108th Congress*, at 2 (discussing what is becoming commonplace event: The government appropriates property through regulatory takings, reducing the value of the property, but leaves title in the owner), *available at* http://www.cato.org/pubs/handbook/hb108/hb108-15.pdf (last visited Oct. 13, 2004).

[197] *See* Planned Parenthood v. Casey, 505 U.S. 833, 926–27 (1992) (citing Union Pacific R.R. Co. v. Botsford, 141 U.S. 250 (1891), the Court reaffirmed the holding that "no right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others..."). Throughout this century, the Court also has held that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as procreation, child-rearing, marriage, and contraceptive choice. *Id.* at 926–27. The Court noted that these cases embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government. *Id.* at 927 (citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

[198] Moore v. Regents of the University of California, 793 P.2d 479 (Cal. 1990). In *Moore*, the plaintiff alleged that his physician failed to disclose preexisting research and economic interests in the

One obstacle to recovering for a taking is the possibility that slavery was not an institution involving property at all, but was merely a system of contractual agreements between employers and employees. For this to be true, however, slavery would have to be the same, or at the very least, similar to indentured servitude or peonage.

However, unlike slavery, peonage and indentured servitude involve rights enforceable against specific persons. These rights have traditionally been associated with contracts. Indentured servants obligate themselves to another person for a specified length of time. The master's rights of enforcement were against the person contractually subject to the obligation. The relationship was often defined based on a debt owed.[199]

Likewise, peons were subject to contractual obligations. No such contract existed between slaves and slave owners.[200] The slaves' existence was solely at the mercy of the owner. History explains that slave owners dictated the amount and character of the slaves' food, clothing, and housing.[201] They decided whether the slaves learned to read and write, were permitted to marry, and the conditions of their "employment"—whether they were to be a field or house slave.[202] Slave owners, as a result of the absence of positive law prohibiting the murder of slaves, quite literally held the slaves' lives in their hands.[203]

Slavery, unlike peonage, is a right enforceable against a large group of undetermined persons. These rights have been associated with property, not contracts. In fact, in most jurisdictions, slaves were prohibited from owning real property, entering into contracts, inheriting property, voting, marrying, or obtaining an education since all of these required signatures and the ability to direct one's destiny. Not even the inclusion of slaves into the

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cells before obtaining consent to the medical procedures by which they were extracted. *Id.* at 124. The superior court sustained all of the defendants' demurrers to the third amended complaint, and the court of appeal reversed. *Id.* The supreme court held that the complainant stated a cause of action for breach of the physician's disclosure obligations, but not for conversion, because the plaintiff had no ownership interest in cells after they left his body. *Id.* at 136–44. The court remanded the case to the superior court for further attention to the defendants' remaining demurrers. *Id.* at 148.

[199] In the 18th century, it was typical that an individual would "sell" himself or herself into indentured servitude in exchange for some benefit. For example, poor Europeans promised their labor to wealthy soon-to-be-Americans in exchange for the cost of transportation and food associated with the journey from Europe to the New World. *See generally* Virginia Places, *Acquiring Virginia Land By "Headright,"* http://www.virginiaplaces.org/settleland/headright.html (last visited Oct. 11, 2005); Houghton Mifflin, *The Great American History Fact-Finder,* http://college.hmco.com/history/readers comp/gahff/html/ff_088100_headrightsys.htm (last visited Oct. 11, 2005).

[200] *See* JOHN HOPE FRANKLIN & ALFRED A, MOSS, JR., FROM SLAVERY TO FREEDOM 141 (2000) (indicating that slaves were seen as irresponsible). Thus their oaths meant nothing and they could not make contracts. *Id.*

[201] *Id.* at 147–48.

[202] *Id.* at 141, 144.

[203] *See id.* (stating that although a slave could not strike a white person, even in self-defense, the killing of a slave, however malicious, was rarely regarded as murder).

political representation debate can change the fact that slaves were property.[204]

A second obstacle is the court system itself. Courts have clung to the idea that the government is required to pay compensation only when it has confiscated the entire bundle of sticks.[205] This narrow interpretation would allow the government to regulate away nearly all individual property rights, without having an obligation to compensate the owner, even though the owner now possesses only an empty title.[206] This cannot be consistent with the core purpose of the Just Compensation Clause. In fact, the principles behind the Clause suggest that if property is a bundle of sticks, then taking merely one stick lessens the property's value and something has been taken from the owner. The inquiry that remains is not whether the taker owes the owner for his loss, but how much the owner is owed for the appropriation of his property. In regard to slavery, the federal government appropriated the entire bundle, completely extinguishing the slaves' property interests.

In addition, given the inalienable nature of the property right, and the purpose of the Just Compensation Clause, it is unlikely that title to the slaves' property right of self-ownership was transferred to the government. Since the interest in the property was not voluntarily transferred, yet clearly was taken, a taking resulted: the government confiscated all of the sticks including life, liberty, and the benefit of one's labor.

2. Regulatory Taking

The regulatory takings doctrine allows compensation for regulations that deprive an owner of a substantial amount of property value.[207] First recognized in *Pennsylvania Coal Co. v. Mahon*,[208] compensatory recovery

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[204] Recognizing slaves for the purpose of representation was a convenient tax compromise for the heads of state at the Constitutional Convention. It is not indicative of their intention to render Blacks as free, much less equal persons.

[205] *See Nollan*, 483 U.S. at 841–42 (concluding that if government action resulted in permanent occupation of land, it would effect a taking unless it substantially furthered legitimate state interests); CATO, *supra* note 196, at 8 (adopting a 100 percent rule and asking whether there has been a loss of value before asking whether there has been a taking, which entitles an owner to compensation only if the entire value has been lost).

[206] CATO, *supra* note 196, at 8.

[207] *See* MELTZ, *supra* note 166, at 137 ("The application of a generally zoning law to particular property effects a taking is the ordinance does not substantially advance legitimate state interest...or denies an owner economically viable use of his land....").

[208] Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922). In *Mahon*, the Pennsylvania Coal Company appealed the appellate court's decision in Mahon's favor in his suit to enjoin the company from mining under his house and removing the supports, causing subsidence. *Id.* at 412. A deed granted Mahon the surface rights to certain land but reserved to the company the right to mine all coal under the house. *Id.* at 394–95. Mahon argued that the Kohler Act extinguished the company's right to mine under his surface

requires a regulation that affects property interests.[209] Until *Mahon*, federal courts only recognized physical takings claims.[210] The *Mahon* Court restates the general rule that although property may be regulated by the government, regulations that go "too far" will be deemed a compensable taking.[211] The focus on going "too far" indicates the Court's intent to recognize partial takings as opposed to complete appropriation. The Court's effort to expand takings goes beyond that intended by the Framers. The drafters of the Bill of Rights intended the Takings Clause to be limited only to the government's physical seizure of private property.[212] The Court has admitted as much,[213] but has nonetheless continued to entertain regulatory takings claims.

The Supreme Court more clearly defined the issue in the *Penn Central Transportation Co. v. NYC*[214] test as it attempted to distinguish partial takings from government action that confiscates private property in its entirety. The factors required to establish a complete taking are more difficult to overcome given that the potential award will be more costly than the award such a plaintiff could receive under a partial takings claim.

In allowing for compensation according to the *Penn Central* analysis, the Court created a three part test for measuring regulatory takings: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation has interfered with distinct, investment-backed expectations; and 3) the character of the governmental action.[215] The regulatory framework that facilitated slavery is one that qualifies as going too far,[216] fulfilling the requirements of the *Mahon* test,[217] and producing a partial taking. The government's actions, however, also fulfill the requirements of the *Penn*

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land. *Id.* at 412. The Supreme Court of Pennsylvania found that although the company had valid contractual and property rights, the Kohler Act was a valid exercise of police power. *Id.* The court thus issued an injunction to prevent the coal company from mining under Mahon's surface land. *Id.* The U.S. Supreme Court reversed the lower court's decision, finding that the Kohler Act was not a legitimate exercise of police power, *Id.* at 414, but rather was an unconstitutional taking of the company's contractual and property rights because it served to take away those valid rights without adequate and just compensation. *Id.* at 413.

[209] *See* Agins v. Tiburon, 447 U.S. 255, 260 (1980) (stating that an ordinance affecting a property interest is a taking if it does not substantially advance legitimate state interests).

[210] MELTZ, *supra* note 166, at 119.

[211] *Mahon*, 260 U.S. at 415–16 ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

[212] MELTZ, *supra* note 166, at 129.

[213] *Id.* at 130.

[214] *See* Penn Cent. Transp. Co. v. NYC, 438 U.S. 104, 124 (1978) (holding there was no taking after identifying the economic impact, the extent of interference with investment-backed expectations, and the character of the government's action as the factors to be analyzed). The Court found no taking in this case since the owners could still earn a reasonable return without the offices and the availability of transferable development rights lessened the economic impact. *Id.* at 137.

[215] *Id.* at 104.

[216] *See infra* notes 142–164 and accompanying text (discussing the federal government's responsibility for slavery).

[217] *Mahon*, 260 U.S. at 415–16.

Central test, producing a complete taking of the slaves' property interest in their self-ownership.

Considering that slaves never have been compensated for the loss of their property, the economic impact of the taking was and is currently devastating. One can only imagine if a slave had been paid a mere fraction of the value of her labor, it may have been feasible to buy freedom or at least pay a slave owner to prevent the owner from selling members of a family. Likewise, if slaves had been compensated and been able to save their money, passing it from generation to generation to ensure the survival and well being of their family members as Whites did, it is possible that modern vestiges of slavery, discrimination, and cultural, political and economic destruction of African-Americans at large, may have been prevented.

The government's activities speak directly to the character of the government's action throughout the time period. In *Penn Central*, the Court noted that in deciding whether a particular governmental action has affected a taking, courts focus both on the character of the action and on the nature and extent of the interference.[218] From the act of capturing and shipping the slaves to the daily control of their activities and the restriction of their rights, the federal government paid only lip-service to the treaties and laws that made the transportation of slaves from Africa illegal.[219] In fact, only the British committed substantial naval and political resources to stamping out the illegal trade.[220] The United States did little and, until the Civil War, actually obstructed the suppression of the slave trade by refusing to allow the British to board and search American ships.[221] Slave traders, whether American or not, routinely used the American flag as a cover for their crimes.[222]

The federal government's conduct toward African-Americans constituted extreme behavior that sanctioned the enslavement of a race. The beatings and lynchings, and threats of being beaten and lynched, were prevalent throughout the slave era.[223] These acts caused irreparable physical

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[218] *Penn Central*, 438 U.S. at 130.

[219] Gaddis Smith, "The *Amistad* in a Global Maritime Context," *The Connecticut Scholar: Occasional Papers of the Connecticut Humanities Council* (1992) no. 10: 37–43, http://amistad.mysticseaport.org/discovery/themes/connscholar.92/smith.global.context.html (last visited Nov. 09, 2004); W. E. B. DU BOIS, THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA, 1638–1870, at 1 (New York, Harvard Historical Studies 1 1896); WARREN S. HOWARD, AMERICAN SLAVERS AND THE FEDERAL LAW, 1837–1862 (Berkeley, U. of California Press 1963).

[220] Smith, *supra* note 219.

[221] *Id.*

[222] *Id.*

[223] *See* ARNO PRESS & THE NEW YORK TIMES, THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889–1918, at 29 (William Katz ed., 1969) (citing 2,522 lynchings between these years); *see also* ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909–1905, at 6–7 (1980) (citing 4,742 lynchings between 1882 and 1968).

harm and imminent apprehension of bodily harm and death. In addition, the government perpetrated repeated acts of false imprisonment when it intended to and did confine the slaves within fixed boundaries, directly confining them while they were conscious of the confinement and were harmed by it.[224] The beginning of this imprisonment began with the initial capture and transportation of Africans to the United States. This control over the slaves' movement continued throughout plantation life.

This manner of treatment is facially outrageous, but even more so beneath the surface because the government knew, or should have known, that this treatment would cripple African-Americans socially and politically thereafter for generations to come. Even after emancipation the federal government allowed the states and private individuals to make concerted efforts to deprive African-Americans of opportunities relating to education, employment, voting, property ownership, and personal mobility. This treatment was intended to, and had the ultimate effect of, subordinating African-Americans to permanent second-class citizenship. African-Americans have been indoctrinated with the belief that their culture, their religion, their language, their political influence, and their basic existence are inferior to that of Whites. The U.S. government created and continually perpetrated the feeling of hopelessness.[225]

Reconstruction was the government's first attempt to correct the wrongs it actively participated in creating and maintaining. This short-lived, feeble effort was replaced with decades of "separate but equal" facilities and Jim Crow laws,[226] effectively destroying any benefits of Reconstruction. Affirmative action, a system of being able to consider race in areas such as higher education and job opportunities, took the place of legislated discrimination, but has run into problems as well.[227] Regardless of whether

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[224] RESTATEMENT (SECOND) OF TORTS § 35 (1965).

[225] *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 543 (1896) (stating that a statute that implied merely a legal distinction between differing races did not tend to destroy the legal equality of the two races or to reestablish a state of involuntary servitude). There was no violation of the Thirteenth or Fourteenth Amendments because the legislature was at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to preserving public peace and good order. *Id.* at 550.

[226] *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (commemorative ed. 2002) (recounting the history of post-Civil War Jim Crow discrimination). A brutally cruel, repressive, and exploitative system of racial subjugation, the Jim Crow system survived into the second half of the twentieth century. *Id.*

[227] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). Petitioner, the low bidder on a federal contract, was denied the contract because a presumptive preference was given to minority business entities; the petitioner sued, claiming violation of its Fifth Amendment Equal Protection rights. *Id.* at 205–06. The lower courts rejected the claim, relying upon precedent which subjected Equal Protection claims to intermediate scrutiny. *Id.* at 210. The Supreme Court reversed and remanded, holding that a) the petitioner could claim injury owing to a discriminatory classification which prevented it from competing on an equal footing; b) the Fifth and Fourteenth Equal Protection claims are analyzed applying

there were successful attempts to level the playing field, they cannot substitute for the property already taken.[228]

In his dissent in *San Diego Gas & Electric Co.*, Justice Brennan refuted the proposition that once a regulatory taking has been established, mere invalidation or amendment of the regulation is a constitutionally sufficient remedy.[229] Recognizing that the concept of just compensation is to place the property owner in the same position monetarily as he would have occupied if the property had not been taken,[230] Justice Brennan declared that invalidation or amendment of the regulation, unaccompanied by payment of damages, does not compensate the owner for any economic loss suffered during the time the invalid regulation was in effect.[231] He proposed that once a court finds that a regulation has effected a taking, the government entity must pay just compensation for the period commencing on the date the regulation first effected the taking and ending on the date the government entity chooses to rescind or amend the regulation.[232]

The government-sponsored regulations destroyed all value that the slaves originally held in their property; the magnitude of the taking and the involuntary transfer of the ownership right to another rendered self-ownership worthless by removing all beneficial economic use.[233]

3. Derivative Taking

Though the Supreme Court has never endorsed this particular theory, a derivative taking occurs whenever a partial or complete taking diminishes

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strict scrutiny analysis; and c) since the lower courts applied intermediate scrutiny, remand for strict scrutiny analysis was required. *Id.* at 217–27; Gratz v. Bollinger, 539 U.S. 244 (2003). The university's undergraduate admissions policy was based on a point system that automatically granted 20 points to applicants from underrepresented minority groups. *Id.* at 252. This class-action equal protection suit alleged racial discrimination. *Id.* The Court found that the policy made race the decisive factor for virtually every minimally qualified underrepresented minority applicant. *Id.* at 271–72. As the policy was not narrowly tailored to achieve respondents' asserted compelling interest in diversity, it violated the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981. *Id.* at 275.

[228] *First English Evangelical*, 482 U.S. at 320. "We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."

[229] *San Diego Gas*, 450 U.S. at 653–54.

[230] *Id.* at 657.

[231] *Id.* at 655.

[232] *Id.* at 658.

[233] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). The South Carolina Supreme Court found that the plaintiff could not recover for a taking violation. *Id.* at 1009–10. However, the U.S. Supreme Court found that where all economic use had been lost, the action constituted a taking, requiring compensation to the property owner. *Id.* 1014–19. The Court noted that a state may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate showed that the proscribed use interests were not part of his title to begin with. *Id.* at 1027. In this case, the Court denied compensation under the Takings Clause, remanding the case for the state supreme court to reconsider the regulation's effect on the landowner's property value. *Id.* at 1022–23.

the value of surrounding property.[234] Derivative takings allow third parties, not directly affected by the regulation but harmed by the original taking nonetheless, to recover damages.[235] A derivative taking, a hybrid of both the regulatory and physical takings, results from either a physical or regulatory taking.[236] Proponents of derivative takings argue that a policy of not compensating damage to third parties cannot be justified on either efficiency or fairness grounds.[237] Courts however, have consistently rejected derivative takings claims, despite the fact that the federal and state governments would be encouraged to exercise what is in essence eminent domain power only when such use would enhance social utility.[238]

In the case of slavery, the taking has led to institutionalized racism, causing harm to subsequent generations of African-Americans. According to recent census figures, 24.3% of Blacks lived in poverty in 2003, compared with 10.3% of Whites.[239] Education statistics show that where only 78.7% of Blacks have a high school diploma, 88.7% of Whites have obtained this level of minimal achievement.[240] Likewise, only 17% of Blacks have obtained a bachelor's degree or more, compared to 29.4% of Whites.[241] Black per-capita income in 2001 was a mere $14,953 compared with $24,127 for Whites.[242] The percent of Blacks below the poverty level has more than doubled that of Whites for the last 26 years.[243] As would be expected given the previous numbers, the percentage of unemployed Blacks more than doubles that of Whites. More telling, however, is the difference between those who do and do not own homes. In 2002, 47.3% of Blacks owned their own homes.[244] This does not begin to compare to the 74.5% of Whites who owned their own homes.[245] Yet more disturbing are the incarceration statistics. As of the year 2000, there were only 132 more Black males in

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[234] Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 550 (2001).

[235] DAN DOBBS, 1 LAW OF REMEDIES, DAMAGES, EQUITY, RESTITUTION, PRACTITIONER TREATISE SERIES § 3.11(9) (2d ed. 1993).

[236] Bell & Parchomovsky, *supra* note 234, at 550, 559.

[237] *Id.* at 578–85.

[238] *See* EPSTEIN, *supra* note 177, at 52 (noting that courts uniformly deny consequential damages on the theory that the government did not take the consequentially lost items).

[239] U.S. BUREAU OF THE CENSUS, *Historical Poverty Tables, Table 4: Percent of People in Poverty, by Definition of Income and Selected Characteristics: 2002–2003*, http://www.census.gov/hhes/poverty/poverty03/table4.pdf (last visited Oct. 13, 2005).

[240] U.S. BUREAU OF THE CENSUS Table 7: *Educational Attainment of the Population 25 Years and Over by Sex, and Race and Hispanic Origin: March 2002*, http://www.census.gov/population/socdemo/race/Black/ppl-164/tab07.pdf (last visited Oct. 12, 2005).

[241] *Id.*

[242] N.Y. TIMES 2004 ALMANAC 624 (Beth Rowen ed., 2003).

[243] *Id.* at 627. Between 1975 and 2001, the percent of Blacks below the poverty level ranged between 31.3% and 22.7%. For whites, although the number reached a high of 11.4% in the mid-nineteen-eighties, they averaged a mere 9.8% otherwise.

[244] *Id.* at 624.

[245] *Id.* at 181.

college than in prison.[246] While the number of Black males attending college has risen only slightly, the number going to prison has increased dramatically over the years.[247] In addition, Black males are more than six times more likely than White males to go to prison.[248] The Department of Justice notes that in 2000, Blacks had a 18.6% chance of going to prison, compared with a 3.4% chance for Whites.[249]

Blacks trail Whites with regard to every social yardstick including education, life expectancy, income, and homeownership. These disparities are linked to the legacy of slavery. It is of no consequence to argue which came first, slavery or racism. The result has been the reinforced presumption that African-Americans are inferior, unintelligent, and prone to violence and crime. These disparities stem from the original taking.

V. History of Compensation

In recent history, various racial groups have been compensated for harms suffered at the hands of the U.S. government. Most notably, Native Americans have been compensated for the theft and destruction of their property that occurred at the turn of the century.[250] This compensation, although not a direct cash payment and not explicitly cited as necessary for current retribution for past wrongs, is nonetheless an acknowledgment of the federal government's guilt and acceptance of responsibility. Government documents, however, make clear that the financial assistance, most popularly in the form of free or nearly free higher education, but also in tax breaks,[251]

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[246] PRISON POLICY INITIATIVE, AFRICAN-AMERICAN MALE POPULATIONS, 2000, http://www.prisonpolicy.org/graphs/Blackmalepop.shtml (last visited Mar. 12, 2005)

[247] PRISON POLICY INITIATIVE, INCREASES IN THE AFRICAN-AMERICAN MALE POPULATIONS, 1980–2000, http://www.prison_policy.org/graphs/Blackpopincreases.shtml (last visited Mar. 12, 2005).

[248] PRISON POLICY INITIATIVE, INCARCERATED MALES, BY RACE, http://www.prisonpolicy.org/graphs/malesinc.shtml (last visited Mar. 12, 2005).

[249] U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, CRIMINAL OFFENDERS STATISTICS, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON, http://www.ojp.usdoj.gov/bjs/crimoff.htm#lifetime (last revised Dec. 8, 2004).

[250] If enrolled in a federally recognized tribe, there are some colleges that offer a free education. The student first files the FAFSA and then applies to a college that is sponsored by the particular tribe. INTER-TRIBAL COUNCIL OF MICHIGAN, INC., http://www.itcmi.org/ (last visited Oct. 12, 2005); UNIVERSITY OF MINNESOTA, http://www.mrs.umn.edu/services/msp/exempt.htm (last visited Oct. 12, 2005); MASSACHUSETTS COMMISSION ON INDIAN AFFAIRS, http://www.mass.gov/dhcd/components/Ind_Affairs/page5.htm (last visited Oct. 12, 2005); NATIVE AMERICAN RIGHTS FUND, http://www.narf.org/nill/resources/education/BLUE/e.htm (last visited Oct. 12, 2005).

[251] Native American Indian tribes are not among the entities made taxable under the Internal Revenue Code. Accordingly, federally recognized tribes are exempt from federal income taxation. *See* Rev. Rul. 67-284, 1967–2 C.B. 55 (showing that although there is no general exemption from federal income taxation for Native American individuals, some tax exemptions in favor of Native American individuals may be found in treaties and statutes); *see also* DAVID H. GETCHES, ET AL., FEDERAL INDIAN LAW 656–57 (3d ed. 1998); Squire v. Capoeman, 351 U.S. 1, 7–8 (1956) (holding that income derived

available for "eligible" Native Americans is not an entitlement program.[252] Surprisingly, there are no comparable programs for other minorities. If the education "scholarship" were the same as any other federal financial aid program for those showing financial need, why require that the applicant have a certain percentage of Native American blood or be on a tribe's membership roster? The language itself indicates that the Native Americans have been identified as a group receiving special services as a result of their being Native American.[253]

Significantly, Native Americans have been permitted to recover where other victims of government brutality were not due to courts' recognition of a fiduciary duty that exists between the government and the tribes. In at least one case, the U.S. Court of Appeals for the Ninth Circuit considered and subsequently rejected any attempt by African-American plaintiffs to situate themselves in the same or similar relationship as Native Americans to the U.S. government.[254]

Native Americans have been successful in gaining the right to sue the government and have obtained monetary and non-monetary relief as a result of their suit.[255] The *Cato* court acknowledged that regardless of whether there are factual similarities between the treatment accorded Indian Tribes and African-American slaves and their descendants, there is nothing in the relationship between the United States and African-American slaves and their descendants that is legally comparable to the unique relationship between the U.S. federal government and Indian Tribes.[256] The court noted that other courts have recognized a fiduciary responsibility running from the government to Indian Tribes because of specific treaty obligations and a

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from allotted lands held by the federal government in trust for an individual tribe member is excluded from income and therefore not subject to taxation); Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) ("[A] State is without power to tax reservation lands and reservation Indians.").

[252] BUREAU OF INDIAN AFFAIRS, OFFICE OF INDIAN EDUCATION PROGRAMS, http://www.oiep.bia.edu/ (last visited Oct. 14, 2005).

[253] *Id.* (Applicants must "[b]e a member of, or at least one-quarter degree Indian blood descendent of a member of an American Indian tribe who are eligible for the special programs and services provided by the United States through the Bureau of Indian Affairs to Indians because of their status as Indians").

[254] *See Cato*, 70 F.3d at 1108 (finding Cato's analogy to Indian land claim cases unpersuasive, and stating that the court's willingness to entertain the Oneida's suit was not based on a prohibition, but on the trustee relationship that exists between the government and the Indian tribes).

[255] *See* Seminole Nation v. United States, 316 U.S. 286, 307–08 (1942) (reversing the lower courts dismissal of the Nation's petition and remanding for consideration of the government's fiduciary duty to the Nation); *Oneida Indian Nation*, 691 F.2d at 1083–84 (holding that the Nations claims required further proceedings considering the Nation's claim could not be time barred since the government explicitly provided for the late filing and finding that the government was not immune from suit); United States v. Mitchell, 463 U.S. 206, 226 (1983) (holding that the timber management statutes and various other statutes and regulations could be fairly interpreted to mandate compensation by the government for violation of its fiduciary responsibilities in the management of Native American property).

[256] *Cato*, 70 F.3d at 1108.

network of statutes that impose specific duties on the government.[257] This unique relationship has extended statutes of limitations that would have otherwise barred claims against the government,[258] and has allowed for monetary relief where otherwise only injunctive relief would have been permitted.[259]

African-Americans are unable to point to any such treaties or statutes that require a similar obligation or create such exceptions. Fortunately, African-Americans do not need to establish any such relationship given the self-executing nature of the Takings Clause.

Nationally, President Clinton apologized to indigenous Hawaiians for the illegal United States-aided overthrow of the sovereign nation's local government and the near decimation of traditional Hawaiian culture that followed;[260] the Methodist Church apologized to Native Americans in Wyoming for the 1865 post-treaty slaughter at the hands of the U.S. cavalry led by a Methodist minister;[261] the Florida legislature awarded reparations to survivors of the Rosewood massacre;[262] the federal government offered an apology to the African-American victims of the Tuskegee syphilis experiment,[263] and agreed to apologize to and provide limited reparations for Japanese Latin Americans kidnapped from Latin American countries and placed in U.S. internment camps as hostages during WWII.[264]

The Japanese survivors and descendants of the Japanese-American WWII internment victims based their reparations case primarily on a legal strategy that couched their claims in an individual rights context and focused on tolling or otherwise avoiding the statute of limitations.[265] Specifically, 1)

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[257] *Id.*

[258] *See Oneida Indian Nation*, 691 F.2d at 1983–84 (affirming the dismissal of defendant's assertions that plaintiffs' claim were time barred, as the federal government explicitly provided for the late filing of Indian property right actions).

[259] *See Mitchell*, 463 U.S. at 216–26 (stating that the Tucker Act did not create a substantive right enforceable for monetary damages, but that the timber management statutes, used to regulate government use of timber on reservations, can be fairly interpreted as mandating compensation by the government for damages sustained).

[260] U.S. COMM'N ON CIVIL RIGHTS, RECONCILIATION AT A CROSSROADS: THE IMPLICATIONS OF THE APOLOGY RESOLUTION AND *Rice v. Cayetano* FOR FEDERAL AND STATE PROGRAMS BENEFITING NATIVE HAWAIIANS, http://www.usccr.gov/pubs/sac/hi0601/pref.htm (last visited Oct. 17, 2005).

[261] Dinah Shelton, *The World of Atonement Reparations for Historical Injustices*, Miskolc International Journal of Law, Vol. 1 (2004) No. 2, pp. 259–89, *available at* http://www.uni-miskolc.hu/~wwwdrint/20042shelton1.htm#_ftn1 (last visited Oct. 17, 2005).

[262] Race with History, Rosewood Reborn, 1923 and After, http://www.racewithistory.org/html/bcwcr.html (last visited Oct. 17, 2005).

[263] Brandt Williams, The Case for Slavery Reparations, http://news.minnesota.publicradio.org/features/200011/13_williamsb_reparations/ (Nov. 13, 2000).

[264] Japanese Latin Americans Imprisoned During World War II Win Bittersweet Victory from Department of Justice, http://www.aclu-sc.org/News/Releases/1998/100003/ (June 12, 1998).

[265] Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African-American Claims*, 19 B.C. THIRD WORLD L.J. 477, 490 (1998).

their challenge addressed a specific executive order and ensuing military orders; 2) their challenge was based on then-existing constitutional norms (due process and equal protection); and 3) both a congressional commission and the courts identified specific facts amounting to violations of those norms. Furthermore, the claimants (those who had been interned and were still living) and the government agents (specific military and Justice and War Department Officials) were both easily identifiable as individuals. These agents' wrongful acts resulted directly in the imprisonment of (and thus injury to) innocent people. The damages to these people, although uncertain, covered a fixed time and were limited to survivors, and the payment of these damages meant finality.[266]

The descendants of the Japanese-Americans interned during WWII have been monetarily compensated twice within the last fifteen years for the loss of their property.[267] In 1948, President Harry S. Truman signed the Japanese American Evacuation Claims Act allowing reimbursements.[268] Some 23,689 claims were filed asking for $131,949,176.[269] By the time these claims outlasted federal procedures which required itemized claims and receipts, the federal government recompensed Japanese Americans $38,000,000 or about 29 cents for every dollar claimed.[270] On September 17, 1987, the U.S. House of Representatives passed a law including a formal apology to Japanese Americans for the internment and providing $1.2 billion in compensation.[271]

The plight of the slaves' descendants is most similar to that of the Korean women who filed suit in the Tokyo District Court[272] against the Japanese government for crimes during WWII.[273] Between 1932 and 1945, Japan forced Korean women into slavery and prostitution in Manchuria, China, the Philippines, and Thailand, among other regions of the Pacific.[274] The resulting experience of this treatment was similar to that experienced by African-Americans after abolition: discrimination, higher unemployment,

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[266] *Id.*

[267] NATIONAL JAPANESE AMERICAN MEMORIAL FOUNDATION, JAPANESE AMERICANS RECLAIM THEIR RIGHTS: AFTERMATH OF WWII, http://www.njamf.com/redeem.htm (last visited Oct. 9, 2005).

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] YOSHIAKI YOSHIMI, COMFORT WOMEN: SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II 32 (Suzanne O'Brien trans., Columbia University Press 2000).

[273] *See* David Boling, *Mass Rape, Enforced Prostitution, and the Japanese Imperial Eschews International Legal Responsibility*, 32 COLUM. J. TRANSNAT'L L. 533, 555 (1995) (stating that the women argued that these acts constituted crimes against humanity).

[274] YOSHIMI, *supra* note 272, at 1, 43 & 91.

fewer educational opportunities, substandard housing and political oppression.[275]

Most recently, the Japanese government awarded these women reparations.[276] Their legal strategy, arguing that Japan violated international law by perpetrating crimes against humanity,[277] is unlike those of the Japanese-American internees, but presents a viable possibility for African-Americans who suffer as a result of the treatment of their ancestors.

Holocaust survivors have been the most successful in gaining, not only apologies, but also monetary compensation for their experience as forced laborers and slave laborers. The sources of the reparation funds have come from not only Germany, but also from banks and private and government-owned companies spanning the four corners of Europe.[278]

VI. Conclusion

Reparations offer the country a unique opportunity to reconstruct fractured communities. It is necessary to acknowledge the ongoing inequities and create a workable plan to restore to African-Americans their rightful place in society. It is not conducive or even recommended that the process attempt to lay blame; reparations is a moral obligation that we all share to take care of those who have suffered. The perpetuation of pain as a direct result of slavery and discrimination taints us all. And yet, coming to grips with injustice is not easy. However, it is not justice's duty to make reconciliation palatable. There is no doubt that reparations must be the result of America's struggle with a problem that is older than the nation itself. And there can be no doubt that the U.S. owes a debt to the descendants of those who were the backbone of the nation's growth.

The Fifth Amendment's Takings Clause mandates the federal government pay for private property that it commandeers without the permission of the property owner. Slaves lost the value of their labor, and more importantly, the value of their self-ownership. As a result, their surviving descendants and African-Americans at large continue to suffer from the vestiges of slavery that manifest in modern day society's treatment of the race. In acknowledging the wrongs, a Takings Clause argument

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[275] Paul E. Kim, *Darkness in the Land of the Rising Sun: How the Japanese Discriminate Against Ethnic Koreans Living in Japan*, 4 CARDOZO J. INT'L & COMP. L. 479, 486, 488 (1996).

[276] Marina Kamimura, *Japanese Court Rules in Favor of 'Comfort Women': WWII Sex Slaves to be Compensated*, CNN, Apr. 27, 1998, http://www.cnn.com/WORLD/asiapcf/9804/27/japan.comfort/ (last visited Oct. 04, 2005). *'Sex Slaves' Sue Japan*, BBC, Sept. 19, 2000, http://news.bbc.co.uk/1/hi/world/asia-pacific/931367.stm (last visited Oct. 05, 2005).

[277] Boling, *supra* note 273, at 32.

[278] The Conference on Jewish Material Claims Against Germany, At-a-Glance: Compensation and Restitution by Country, http://www.claimscon.org/forms/Compensation_Guide.pdf.

creates a kinder, more gentle and reasonable approach to the idea of repairing the damage and expands the possibilities for conversation and debate in the process of attaining just compensation.