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Reckoning With History’s Impact: Financial Institutions and Reparations for American Enslavement

I. INTRODUCTION

“[Frederick I.] Cox transfers ownership of two [enslaved men], Bryan and Southy . . . as collateral [for his debt of 797 dollars]. If Cox repays the debt within four years’ time, he may reclaim the [enslaved men].”¹ This quote comes from the Portland State University Library Digital Exhibits, which describe a mortgage deed for two enslaved men in their collection.² The mortgage deed was entered at the Wayne County, North Carolina, Registrar’s Office on January 24th, 1850.³

The mass enslavement of Black people is a significant and harrowing portion of United States history with which American society continues to reckon with. The lasting harmful impacts are still present

1. See *A Mortgage Deed for Two Slaves*, PORTLAND STATE UNIV. LIBR. DIGIT. EXHIBITS, <https://exhibits.library.pdx.edu/exhibits/show/gates/slavery-and-abolitionism/mortgagedeed.html> [<https://perma.cc/3P6X-FLRN>] (last visited Jan. 24, 2024) (outlining the terms of a mortgage deed securing a debt by using enslaved people as human collateral). In this quote, I have replaced language identified as out of date and offensive by the National Association of Black Journalists. See *NABJ Style Guide*, NAT’L ASS’N OF BLACK JOURNALISTS (2020), <https://nabjonline.org/news-media-center/styleguide/> [<https://perma.cc/SP8V-GL55>] (providing a style guide for contextually appropriate language usage when reporting on topics of special interest, including racially sensitive issues). Throughout this Note, I also use “enslaved person/man/woman” in recognition of the consensus that the use of “[s]lave” normalizes and reifies the condition of slavery as a state of being, rather than an active process of dehumanization and bondage imposed on a person or people.” See *Enslaved Person*, THE NAT’L ARCHIVES CATALOG (2023), <https://www.archives.gov/research/catalog/lcdrg/appendix/enslaved-person> [<https://perma.cc/L3TC-F3DU>] (explaining why the term “enslaved person” is preferred to “slave” when referring to an individual). I also capitalize Black and White throughout the Note to recognize that Blackness “is an indicator of personhood, culture, and history. The lowercase ‘b’ fails to honor the weight of this identity appropriately” and to recognize that “[c]hoosing to not capitalize White while capitalizing other racial and ethnic identifiers would implicitly affirm Whiteness as the standard and norm.” Kristen Mack & John Palfrey, *Capitalizing Black and White: Grammatical Justice and Equity*, MACARTHUR FOUND. (Aug. 26, 2020), <https://www.macfound.org/press/perspectives/capitalizing-black-and-white-grammatical-justice-and-equity> [<https://perma.cc/LGC2-BPRB>].

2. See *A Mortgage Deed for Two Slaves*, *supra* note 1 and accompanying text.

3. *Id.*

today, specifically in the form of the racial wealth gap.⁴ The early growth of the American economy owes a large part to the labor of enslaved people and to financial institutions that facilitated the use of enslaved people as human collateral.⁵ The oppression of Black people continued in the following centuries. Anti-Black policies and practices like Jim Crow laws and racial redlining perpetuated the idea that Black Americans were meant to be second-class citizens.⁶ These policies also made it harder for Black Americans to succeed financially compared to White Americans.⁷ The idea of reparations for the harm committed against Black people has been discussed and fought for since the abolition of slavery.⁸ Arguably few, if any, forms of reparations have come to fruition.⁹

This Note examines how early financial institutions in the United States used enslaved people as collateral for mortgages and explores whether payment of reparations for this practice is necessary or feasible. The discussion proceeds in five parts. Part II first provides background on early banks' practices of using human collateral for mortgages in the American South before exploring how the Northern states helped finance slavery.¹⁰ Part III discusses the road to the

4. See RASHAWN RAY & ANDRE M. PERRY, *WHY WE NEED REPARATIONS FOR BLACK AMERICANS*, BROOKINGS INST. 1–2 (Apr. 2020), https://www.brookings.edu/wp-content/uploads/2020/04/BigIdeas_Ray_Perry_Reparations-1.pdf [<https://perma.cc/UJQ9-926W>] (discussing the racial wealth gap in the United States, giving the example that the average White family has approximately ten times the amount of wealth as the average Black family).

5. See Bonnie Martin, *Slavery's Invisible Engine: Mortgaging Human Property*, 76 J. S. HIST. 817, 819–22 (2010) (describing how human collateral was used to raise “significant amount[s] of cash and credit,” which allowed for greater expansion and wealth accumulation in the American South).

6. See *Examples of Jim Crow Laws – Oct. 1960 – Civil Rights*, JIM CROW MUSEUM, <https://jimcrowmuseum.ferris.edu/links/misclink/examples.htm> [<https://perma.cc/8YJT-D6BQ>] (last visited Dec. 27, 2023), (providing samples of Jim Crow laws in American states that enforced segregation and “impose[d] legal punishments on people for consorting with members of another race”).

7. See Benjamin Harris & Sydney Schreiner Wertz, *Racial Differences in Economic Security: The Racial Wealth Gap*, U.S. DEPT. OF TREASURY (Sept. 15, 2022), <https://home.treasury.gov/news/featured-stories/racial-differences-economic-security-racial-wealth-gap> [<https://perma.cc/X7N4-MN9Y>] (“The racial gaps in economic security in the United States are stark and have been exacerbated by policies that hinder people of color from building wealth.”).

8. See RAY & PERRY, *supra* note 4, at 3 (“The United States had multiple opportunities to atone for slavery . . . but has yet to undertake significant action.”).

9. See *id.* (giving examples of the 40 Acres and a Mule and The New Deal as “missed policy opportunities” to atone for slavery by providing reparations).

10. See *infra* Part II.

contemporary racial wealth gap.¹¹ Part IV explores the idea of reparations for the harms caused by slavery and anti-Black policies in the United States.¹² It also recounts reparations plans already implemented in the United States and other countries, and it compares them to the potential reparations that could be provided to Black Americans.¹³ Part V discusses whether financial institutions should be responsible, in courts or through federal legislation, for paying reparations, and if so, what those reparations could entail.¹⁴ It also discusses a reparation effort that has already been made, both commanded by a local government and undertaken voluntarily by a financial institution.¹⁵ Part VI concludes this Note.¹⁶

II. HISTORY OF HUMAN COLLATERAL

This section explores the history of human collateral in the South and the role financial institutions played in furthering the practice. It also explores the Northern states' lesser-known roles as contributors to the use of enslaved people as human collateral. This history shows how financial institutions facilitated a great expansion of wealth through human collateral and demonstrates how the impacts are still felt today.

A. *Human Collateral and Financial Institutions in the American South*

It is widely known that forced labor was a significant source of America's wealth and economic prosperity.¹⁷ Less discussed is the

11. *See infra* Part III.

12. *See infra* Part IV.A.

13. *See infra* Part IV.B., IV.C, IV.D, & IV.E.

14. *See infra* Part V.A & V.B.

15. *See infra* Part V.C.

16. *See infra* Part VI.

17. *See* Greg Timmons, *How Slavery Became the Economic Engine of the South*, HIST. CHANNEL (July 25, 2023), <https://www.history.com/news/slavery-profitable-southern-economy> [<https://perma.cc/Y4RK-AJ9H>] (“If the Confederacy had been a separate nation, it would have ranked as the fourth richest in the world at the start of the Civil War.”); Steven Mintz, *Historical Context: The Economics of Slavery*, GILDER LEHRMAN INST. OF AM. HIST. <https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-economics-slavery> [<https://perma.cc/6PJC-NC2E>] (last visited Jan. 19, 2024) (discussing how slavery was adaptable to a range of occupations and industries in the early national economy).

practice of using enslaved people as human collateral¹⁸ for loans. This practice began during the slave trade, and it is intertwined with the foundations and growth of the United States.¹⁹ The use of human collateral began in the American South in the eighteenth and nineteenth centuries when it was used by White Southerners to “raise large amounts of cash and credit.”²⁰

An 1823 case from Kentucky illustrates this practice.²¹ In 1817, business partners A. Morehead and Robert Latham owed nearly \$16,000 to the Bank of Kentucky after taking out a series of short-term loans.²² Continued renewal of the loans presented a risk to the bank, so it required Morehead and Latham to provide collateral as protection.²³ The mortgage deeds empowered the bank to “sell the mortgaged property, in case of default in payment”²⁴ To meet the bank’s demand of collateral, Morehead and Latham used twenty enslaved people to secure their debt.²⁵ A couple years later, Morehead and Latham took out another loan from a man named Vance and used the same enslaved people as collateral.²⁶ After that, Morehead and Latham could no longer pay back their debts, which meant Vance and the bank could start selling the mortgaged enslaved people to satisfy the debts.²⁷ Vance took the enslaved people first and sold one of them.²⁸ The bank then obtained an order allowing it to take possession of the enslaved people and sold eleven of them.²⁹ Vance and the Bank of Kentucky sued

18. Collateral is defined as “property . . . pledged by a borrower to protect the interests of the lender.” *Collateral*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/collateral> [<https://perma.cc/X7NZ-534P>] (last visited Dec. 29, 2023).

19. Martin, *supra* note 5, at 819 (“[M]ortgage contracts were dispersed in courthouses . . . across the colonial South, camouflaging the power and scope of the financial engine created. A web of local credit networks anchored by mortgages began to grow in the colonial period. In the nineteenth century these informal community credit networks expanded.”).

20. *Id.* at 818.

21. *See* Bank of Ky. v. Vance’s Adm’rs., 4 Litt. 168, 168–70 (Ky. 1823) (explaining the practice of using enslaved people human collateral in the context of a legal dispute concerning who had the right to ownership of the enslaved people).

22. *Id.* at 168.

23. *See id.* at 168–70 (discussing Morehead and Latham’s securing of payment of their notes by posting collateral to the bank).

24. *Id.* at 169.

25. *Id.* at 168–69.

26. *Id.* at 170–71.

27. *Id.* at 170.

28. *See id.* (“Vance took possession of the slaves and sold one of them for \$350”).

29. *Id.*

each other in a priority dispute for who had rightful legal possession of the enslaved people.³⁰

In this case and others,³¹ the process of using human beings as collateral mirrors processes banks often use to satisfy debts, such as seizing land belonging to their debtors.³² It also shows how Southern financial institutions played a role in the slavery economy.³³ The court ruled in favor of the Bank of Kentucky following familiar principles of property law.³⁴ The bank had the first lien³⁵ on the enslaved people, so it was within its legal right to sell the people first to satisfy the debt.³⁶ Vance would receive excess payments only once the bank's debt was fully satisfied.³⁷

Many banks that engaged in this practice preferred to use enslaved people as collateral because people were easier to sell than land.³⁸ Unlike land, human beings easily moved from place to place. It was also easier to sell only the portion of the group of enslaved people necessary to meet the claims of creditors.³⁹ However, the “market value” of people could fluctuate just like the price of land.⁴⁰ Individual

30. *Id.* at 170–71.

31. For examples of disputes over debts for which enslaved people were held as collateral, see *Venable v. Bank of the U.S.*, 27 U.S. 107 (1829); *Milly v. Smith*, 2 Mo. 36 (1828); *Goodwyn v. State Bank*, 1 S.C. Eq. 389 (1813).

32. See *What Methods Can Creditors Legally Use to Collect Debts?*, JUSTIA, <https://www.justia.com/debt-management/creditor-collection-methods/> [<https://perma.cc/5G7S-VMCN>] (last visited Jan. 26, 2024) (explaining the process by which creditors collect assets from defaulting debtors, including the use of property liens).

33. See SHARON ANN MURPHY, *BANKING ON SLAVERY: FINANCING SOUTHERN EXPANSION IN THE ANTEBELLUM UNITED STATES* 12 (2023) (“[S]outhern commercial banks directly, knowingly, and explicitly interacted with the slave system.”).

34. *Bank of Ky.*, 4 Litt. at 176.

35. A lien is the “security interest created by a mortgage.” *Lien*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/lien> [<https://perma.cc/X7NZ-534P>] (last visited Dec. 30, 2023).

36. See *Bank of Kentucky*, 4 Litt. at 172 (“[The bank’s] mortgage is prior to Vance’s mortgage . . . the lien of the bank ought to be preferred to that of Vance.”).

37. See *id.* at 176 (“[I]f the slaves should bring more than shall be sufficient for that purpose, the surplus should go towards satisfying Vance’s demand . . .”).

38. See MURPHY, *supra* note 33, at 20 (“In a rapidly growing economy centered on slavery, the enslaved individuals themselves were often the most liquid assets available.”).

39. See *id.* at 20–21 (“Not only could creditors sell human property quickly at auction, they could also seize only the number of people necessary to repay the debt, tearing apart enslaved families and communities in the process.”).

40. See *id.* at 180 (“[T]he market value of individual slaves could vary widely based on age, health, and skill . . .”).

people lost value due to their declining health or increasing age.⁴¹ To account for this risk, human collateral could be a group of enslaved people rather than just one person or family.⁴² A similar practice is used today—balancing risky investments with less risky ones helps spread the overall risk.⁴³

Using humans as collateral started to happen on a larger scale during the eighteenth century, supporting the accumulation of massive wealth in the South.⁴⁴ “[M]ortgages on enslaved people allowed the resources [that are] central to the expansion of local and regional economies to grow and to circulate more easily . . . [and] this circulation, whether of [enslaved people], goods, cash, or credit, was especially important on agricultural frontiers[.]”⁴⁵

As the practice of leveraging humans as assets grew, Southerners began forming new ways to utilize and grow the wealth created by forced labor.⁴⁶ “Plantation banks” were formed, which “drew their very capital from the land and human property of the region.”⁴⁷ These banks significantly exploited forced labor in the United States because, unlike traditional banks, plantation banks permitted slaveholders to mortgage their human property in exchange for equity in the plantation banks.⁴⁸ Plantation banks were able to essentially “buy

41. *See id.* (discussing variability in market value of an enslaved person based on these factors).

42. *See id.* at 79–80 (describing one example in which a group of about 100 enslaved people were mortgaged against a \$50,000 bank loan given to John Spear Smith and Esther Smith Carr from the United States Bank of Pennsylvania for their Louisiana sugar plantation).

43. *See How Diversification in Investing May Reduce Risk*, U.S. BANK: WEALTH MGMT., <https://www.usbank.com/investing/financial-perspectives/investing-insights/diversification-important-in-investing-because.html> [<https://perma.cc/3DKW-N2FW>] (last visited Jan. 19, 2024) (“Diversification involves spreading your investment dollars among different types of assets to help temper market volatility.”).

44. *See* Martin, *supra* note 5, at 818 (“This article analyzes 8,840 mortgages recorded in the eighteenth and nineteenth centuries and demonstrates that southerners used human collateral to raise large amounts of cash and credit Southerners . . . who wanted to retain their workforce used human collateral to convince merchants to make cash advances and to sell supplies on credit.”).

45. *Id.*

46. *See* MURPHY, *supra* note 33, at 138 (“Throughout the 1820s, southern banks creatively adapted traditional banking practices to meet the growing credit needs of slaveholders”).

47. *Id.*

48. *Id.* at 142 (“[C]harters of plantation banks . . . required no paid-in capital to begin operations; the reserves of the bank were based solely on borrowed money. Investors

[enslaved people] with mortgages that made those same [people] the collateral for their own purchase.”⁴⁹ Though the plantation bank era was short-lived as a result of the nationwide economic depression from 1837–1842⁵⁰, it generated a great amount of capital and wealth at the expense of enslaved people.⁵¹

The practice of using enslaved people as human collateral provided economic opportunity and growth for White property owners and financial institutions in the American South. If these practices had not been allowed, there would not have been as much wealth created from American enslavement.⁵² The ability of slaveholders to use humans as collateral while also using those people to buy stock was important for developing their businesses and building generational wealth.⁵³

B. *The Northern States Contributed to the Financing of Slavery*

Scholars and historians have noted the large role that Northern states played in the maintenance of the slavery system as a whole, which challenges the idea that slavery was just an institution of the American South.⁵⁴ Some ways in which the North aided and benefitted

mortgaged their plantations and enslaved laborers in return for bank shares, and the entirety of the bank’s capital stock was based on these mortgages.”).

49. Martin, *supra* note 5, at 865.

50. See MURPHY, *supra* note 33, at 171 (“Despite a brief recovery in 1838, a second panic hit in 1839 and the nation settled into a prolonged depression that lasted until around 1843.”).

51. See *id.* at 4 (“The Citizen’s Bank . . . was the nation’s largest financial institution after the Second Bank of the United States, having been incorporated in 1833 as a plantation bank with a massive capital of \$12 million.”). When accounting for inflation, \$12 million in 1833 is worth almost \$440 million in 2024. See *CPI Inflation Calculator*, OFFICIAL DATA, officialdata.org/us, <https://www.officialdata.org/us/inflation/1833?amount=12000000> [<https://perma.cc/2Q9S-NDQJ>] (filling in the amount of \$12 million, setting the start and end years at 1833 and 2024, respectively).

52. See Martin, *supra* note 5, at 865 (“If it had not been legally and socially permissible to buy slaves with mortgages that made those same slaves the collateral for their own purchase, slave ownership and staple production would have grown more slowly . . .”).

53. See *id.* at 865–66 (“[I]f those who already owned slaves had not been able to reassure lenders with human collateral, they would not have been able to borrow so quickly or so much of the significant cash and credit they needed to buy additional slaves and land in order to expand their operations.”).

54. Zoe Thomas, *The Hidden Links Between Slavery and Wall Street*, BBC NEWS (Aug. 28, 2019, 7:04 AM), <https://www.bbc.com/news/business-49476247> [<https://perma.cc/LM2R-EUNV>] (citing historians and scholars discussing the role northern industries and merchants had in the slavery economy).

from slavery included Northern manufacturers supplying Southern plantations with their goods, transporting the goods, and transporting enslaved people.⁵⁵ Indeed, the plantations had to depend on people outside of them to stay in business and reap the economic rewards produced by the forced labor.⁵⁶ The people outside the plantations, oftentimes Northerners, “brought the captives . . . food, clothing, wood, and other basic necessity”; plantations would not have been as financially successful without this outsourcing.⁵⁷

Southern banks were also not the only ones accepting human collateral for their loans.⁵⁸ As it is today, “New York City was also the banking center of the United States and New York banks helped finance the expansion of enslavement in the South.”⁵⁹ Northern banks gave loans to enslavers who wished to expand their operations and enslave more people.⁶⁰ The banks also used human collateral to back their investments, knowing that “they could take and sell enslaved people if their enslavers failed to pay back their debts.”⁶¹

The South was also not the only region where forced labor was utilized.⁶² The New England colonies exploited captive people for labor

55. See *An Enduring Legacy: The Role of Financial Institutions in the Horrors of Slavery and the Need for Atonement: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Servs.*, 117th Cong. 8 (2022) [hereinafter *Fin. Insts. & Slavery Hearing*] (statement of Sven Beckert, Laird Bell Professor of History, Harvard University) (“Many other industries directly served or benefited from slavery as well, including northern manufacturers supplying the Southern plantation economy, the slave trade itself, mercantile houses, and industries dependent on slavery-produced inputs, as well as banks and insurance companies.”).

56. See Teaching Hard History Podcast, *Slavery and the Northern Economy*, S. POVERTY L. CTR.: LEARNING FOR JUST., Transcript, <https://www.learningforjustice.org/podcasts/teaching-hard-history/american-slavery/slavery-and-the-northern-economy> [<https://perma.cc/2SLY-B6RR>] (last visited Feb. 2, 2024) (“[Slave plantations] were dependent upon the activities of people outside of the plantation . . . to thrive and exist.”).

57. See *id.* (“Slave plantations did not exist in isolation. It’s the people outside the plantation that bring the captives, that bring food, clothing, wood, and other basic necessity [sic].”).

58. See TASK FORCE TO STUDY & DEVELOP REPARATIONS PROPOSALS FOR AFRICAN AMERICANS., THE CALIFORNIA REPARATIONS REPORT 103 (2023) [hereinafter CAL. REPARATIONS REP.] (“[New York] banks also accepted enslaved people as security for these loans, which meant that they could take and sell enslaved people if their enslavers failed to pay back their debts.”).

59. *Id.*

60. See *id.* (“Banks loaned money to enslavers to buy more land and more enslaved people.”).

61. *Id.*

62. See Thomas, *supra* note 54 (noting, for instance, that enslaved people built the wall for which Wall Street is named).

as well.⁶³ For example, Rhode Island's large percentage of enslaved people contributed significantly to its economy in the 1700s.⁶⁴ Enslaved people in the colonies performed different kinds of labor that allowed local economies to grow, such as working the busy ports, performing household and garden labor, and performing farm labor like raising cattle and growing grain.⁶⁵ The amount of wealth that enslaved people created for these industries is not known, but there is a consensus that the economic importance was significant and larger than the value produced solely from forced labor.⁶⁶

Even after many states in the North became "free states," where Black people were paid for their labor and could own property, discrimination and violence against Black people were still very present in Northern communities.⁶⁷ There were more than 100 mob attacks on Northern Black communities in the 1800s, many of which resulted in the loss and destruction of Black-owned property.⁶⁸ Two of these attacks were committed in Providence where the "[W]hite . . . residents of Providence who provoked the two attacks were not punished[,] and Black victims were not compensated for their loss of property."⁶⁹

63. See Joanne Pope Melish, *Rhode Island, Slavery, and the Slave Trade*, ENCOMPASS, <https://library.providence.edu/encompass/rhode-island-slavery-and-the-slave-trade/rhode-island-slavery-and-the-slave-trade/> [<https://perma.cc/GP7Q-387B>] (last visited Jan. 19, 2024) (explaining how Northern states were involved in and contributed to the enslavement economy).

64. See *id.* ("[E]nslaved . . . laborers . . . in Rhode Island made a substantial contribution to the colony's economy . . . as the enslaved population grew after 1700. While Rhode Island did not have the largest . . . number of enslaved people in New England, it had the largest percentage of Africans, nearly all of them enslaved, among its residents . . .").

65. See *id.* (explaining that "enslaved people in Rhode Island . . . performed the skilled and unskilled labor that enabled busy ports to operate efficiently and economically[,] . . . perform[ed] garden and household labor[,] and performed farm labor like "raising sheep, cattle, and horses").

66. See *Fin. Insts. & Slavery Hearing*, *supra* note 55, at 8 ("[I]f we do not yet know the exact figures, we do know that the total importance of slavery and slavery-related industries in the United States in the 19th Century was definitely greater than just the value produced by the labor of enslaved people alone.") (statement of Sven Beckert, Laird Bell Professor of History, Harvard University).

67. See Melish, *supra* note 63 ("[U]nable to find regular employment, free people of color in . . . Rhode Island towns were increasingly rounded up in small groups and interrogated by Town Councils about . . . whether they were legally entitled to live in the town . . . or whether they 'belonged' in another town where they had been born . . . or enslaved.").

68. See *id.* (citing a few examples of the "more than a hundred mob attacks on communities of color in the North in the antebellum period.").

69. *Id.*

III. THE WEALTH GAP ORIGINATING FROM SLAVERY CONTINUES TO IMPACT AMERICA TODAY

This section explores the progression from the financial institution of slavery to practices formed after the abolition of slavery that have created and sustained the large wealth gap between Black and White Americans.⁷⁰ The section starts by explaining the racial wealth gap and its repercussions before discussing some practices that perpetuate the gap, such as racial redlining.

A. *The Racial Wealth Gap*

The United States' wealth stems in large part from slavery. Professor Mehrsa Baradaran explains this relationship in her book *The Color of Money*:

Slavery, “America’s original sin,” according to James Madison, created the foundation of modern American capitalism. It was slavery and the “blood drawn with the lash” that opened the arteries of capital and commerce that led to U.S. economic dominance worldwide. The effects of the institution of slavery on American commerce were monumental—3.2 million [enslaved people] were worth \$1.3 billion in market value, almost equal to the entire gross national product.⁷¹

The wealth gap between Black and White Americans has persisted since the abolition of legal slavery and continues to widen today.⁷² There are different ways to quantify the racial wealth gap; those

70. See Ricardo Mimbela & Katie Duarte, *Visualizing the Racial Wealth Gap*, AM. C.L. UNION (Aug. 10, 2023) <https://www.aclu.org/news/racial-justice/visualizing-the-racial-wealth-gap> [<https://perma.cc/34M3-YDJE>] (illustrating the racial wealth gap using examples like disparities in homeownership, median income, and mortgage loans).

71. MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* 10 (2017).

72. See Doug Irving, *What Would it Take to Close America’s Black-White Wealth Gap?*, RAND BLOG (May 9, 2023), <https://www.rand.org/pubs/articles/2023/what-would-it-take-to-close-americas-black-white-wealth-gap.html> [<https://perma.cc/Y6SJ-FKLH>] (“RAND’s study looked to the wealth gap as the present-day manifestation of that history of lost income and lost opportunity. It found that the gap has been widening year after year, for at least the past 30 years.”).

quantifiable differences are visible in homeownership, mortgage loans, and median income.⁷³

As of 2020, the “median Black household in America has around \$24,000 in savings, investments, home equity, and other elements of wealth. The median White household [has] around \$189,000, a disparity that has worsened in recent decades.”⁷⁴ Centuries of systemic discrimination and legal barriers have contributed to this disparity.⁷⁵ The effects include less economic security, on average, for Black Americans and less of an ability to build generational wealth.⁷⁶

Systemic discrimination has persisted into modern society in surprising ways—one being through the use of artificial intelligence (“AI”).⁷⁷ Some large consumer finance companies have started using AI to build tools meant to assist consumers with matters like refinancing their mortgages or processing their insurance claims.⁷⁸ Some of these companies (like Wells Fargo and State Farm) have already experienced litigation claiming that AI consumer lending tools discriminate against Black Americans and other marginalized groups as a result of biased input data used to train AI tools.⁷⁹

The racial income gap has also persisted and increased by nearly \$10,000 from 1970 to 2018.⁸⁰ Importantly, there is a large difference

73. See Mimbela & Duarte, *supra* note 70 (discussing these facets of the racial wealth gap).

74. Irving, *supra* note 72.

75. See Mimbela & Duarte, *supra* note 70 (“These disparities are the consequence of ongoing discrimination, structural inequality, and biases across our institutions.”).

76. See *id.* (“Systemic inequities and barriers keep people of color from achieving economic security through employment, education, and homeownership, resulting in racial disparities in wealth and income.”).

77. See *id.* (“[The disparities] continue to emerge in new forms of technology—including artificial intelligence and algorithmic risk assessment tools—that influence nearly every facet of life.”).

78. See Web Arnold, *Analysis: What Lenders Should Know About AI and Algorithmic Bias*, BLOOMBERG NEWS (Apr. 25, 2023, 4:00 PM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-what-lenders-should-know-about-ai-and-algorithmic-bias> [<https://perma.cc/VSQ9-BT8C>] (explaining how consumer finance companies have started utilizing AI to increase efficiency of their services).

79. See *id.* (reporting on suits brought by borrowers alleging discriminatory lending practices, including cases from California and Illinois against Wells Fargo and State Farm, respectively).

80. See Mimbela & Duarte, *supra* note 70 (explaining that the gap of \$23,700 in 1970 (the median income for a Black household was \$30,400 compared to \$54,100 for a White household) grew to a gap of \$33,000 in 2018 (the median income for a Black family of three was \$51,600 compared to \$84,600 for a White family of the same size)).

when using the median values versus the average values.⁸¹ When looking at the *average* wealth gap of around \$840,000, researchers found that it would take around \$15 trillion to eliminate the gap in the United States.⁸² These income and wealth disparities can have significant impacts on different areas of life, such as the correlation of wealth between parents and children, the probability of children enrolling in and completing college, and subsequent lifetime earnings from employment.⁸³ “These findings call attention to the generational benefits of wealth accumulation and the harms that come from its absence: family wealth boosts future wealth potential, and low-wealth families struggle to progress without it.”⁸⁴

Low-wealth families are less likely to own homes, further contributing to the wealth gap. Homeownership is a major way to build wealth in America.⁸⁵ From 1976 to 2022, the gap between White and Black families’ homeownership actually grew by five percentage points.⁸⁶ This is partly because Black applicants are almost twice as likely to be denied for a mortgage compared to their White counterparts.⁸⁷ A 2022 report showed that “the national gap between Black and [W]hite homeownership rates in 2020 was worse than at any point in the [twentieth] century, including the decades preceding anti-

81. See Irving, *supra* note 72 (“In questions of wealth—and especially wealth inequality—that person at the highest end of the distribution is a big part of the story. To better capture those extremes, the researchers also ran their models using the average, not the median . . .”).

82. See *id.* (“The median wealth gap in America . . . is around \$164,000. The average wealth gap? Around \$840,000. Using that as the measure, the researchers found it would take \$7.5 trillion to halve the wealth gap, and \$15 trillion to eliminate it.”).

83. See Harris & Wertz, *supra* note 7 (“[T]here is a strong correlation between the wealth of parents and their children Empirical evidence also shows that gains in household wealth increase the probability that children enroll in and graduate from college, which increases their lifetime earnings from employment.”).

84. *Id.*

85. See Mimbela & Duarte, *supra* note 70 (“Homeownership has been one of the most effective ways that Americans build wealth, which can be passed down from generation to generation.”).

86. See *id.* (“In 1976, the gap between Black and [W]hite homeownership was 25 percent (44 percent of Black families owned a home, compared to 69 percent of [W]hite families). In 2022, the gap grew to 30 percent (45 percent of Black families owned a home, compared to 75 percent of [W]hite families).”).

87. See *id.* (“When applying for mortgage loans, Black applicants were 1.8 times more likely to be denied for a mortgage than [W]hite applicants . . .”).

discrimination laws of the 1960s.”⁸⁸ This widening gap in homeownership might exacerbate the racial wealth gap.⁸⁹

This gap presents concerns for Black Americans in terms of economic security and access to the multitude of benefits that wealth accumulation brings, but it can also be harmful for people at the top of the wealth distribution and the American economy as a whole.⁹⁰ The increase of income inequality slows down demand growth which in turn slows down the economy.⁹¹ A fairly even distribution of wealth is beneficial for sustaining a healthy economy; the widening racial wealth gap hinders this goal and perpetuates inequities faced by Black Americans.⁹²

B. *How the Racial Wealth Gap Grew and Why it is Still Growing*

The existence of the racial wealth gap is well established, and the role that the government and financial institutions played in widening the gap is becoming more known.⁹³ Among other scholars,

88. Jamie Smith Hopkins, *Home Lending Remains Unequal*, CTR. FOR PUB. INTEGRITY (Jan. 18, 2022), <https://publicintegrity.org/housing/home-mortgage-lending-remains-unequal/> [<https://perma.cc/5Y4X-N728>].

89. *See id.* (“The decline in [B]lack homeownership threatens to exacerbate racial inequality for decades to come . . .” (quoting *Reducing the Racial Homeownership Gap*, URB. INST. HOUS. FIN. POL’Y CTR., <https://www.urban.org/policy-centers/housing-finance-policy-center/projects/reducing-racial-homeownership-gap> [<https://perma.cc/S35W-WDAQ>] (last visited Feb. 1, 2024))).

90. *See* Nick Noel, et al., *The Economic Impact of Closing the Racial Wealth Gap*, MCKINSEY INST. FOR BLACK ECON. MOBILITY (Aug. 13, 2019) (explaining that the widening racial wealth gap “limits [B]lack citizens’ economic power and prospects”); *see also* JOSH BIVENS, *INEQUALITY IS SLOWING U.S. ECONOMIC GROWTH*, ECON. POL’Y INST. 1 (Dec. 12, 2017), <https://www.epi.org/publication/secular-stagnation/> [<https://perma.cc/7S3C-4L4Q>] (“Given that the U.S. economy has seen a larger concentration of income at the top of the distribution than have other advanced countries, the effect of inequality on the pace of aggregate demand growth (and hence interest rates) is likely larger as well.”).

91. *See* JOSH BIVENS, *INEQUALITY IS SLOWING U.S. ECONOMIC GROWTH*, ECON. POL’Y INST. 1 (Dec. 12, 2017), <https://www.epi.org/publication/secular-stagnation/> [<https://perma.cc/7S3C-4L4Q>] (“[The Economic Policy Institute] estimates that rising inequality has slowed growth in aggregate demand by 2 to 4 percentage points of GDP annually in recent years.”).

92. *See* Harris & Wertz, *supra* note 7 (“The fundamental importance of wealth for economic security and general wellbeing makes the large disparities in wealth by race a serious concern for the economic health of families and the U.S. economy as a whole.”).

93. *See* KRISTEN BROADY ET. AL., *AN ANALYSIS OF FINANCIAL INSTITUTIONS IN BLACK-MAJORITY COMMUNITIES: BLACK BORROWERS AND DEPOSITORS FACE CONSIDERABLE CHALLENGES IN ACCESSING BANKING SERVICES*, BROOKINGS INST. (Nov. 2, 2021), <https://www.brookings.edu/articles/an-analysis-of-financial-institutions-in-black-majority-communities-black-borrowers-and-depositors-face-considerable-challenges-in-accessing->

Richard Rothstein explains in his book, *The Color of Law*, that the concentrations of Black communities in geographical areas with less access to resources and wealth (which are part of many contributing factors to the wealth gap) have been long attributed to “perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears.”⁹⁴ However, there is a very real traceable role that the federal government played in the perpetuation of the *de jure* segregation that detrimentally impacts the Black community.⁹⁵

During the Reconstruction period after the Civil War, Congress passed three constitutional amendments: the Thirteenth Amendment abolished slavery;⁹⁶ the Fourteenth Amendment guaranteed due process and equal protection under the law;⁹⁷ and the Fifteenth Amendment granted all males the ability to vote by prohibiting voter discrimination based on race, color, or previous condition of servitude.⁹⁸ Congress also tried to create a Reconstruction of the Union.⁹⁹ The Reconstruction included attempts to fully include Black people as citizens through federal and state action.¹⁰⁰ In the former Confederacy, there was major resistance to the Reconstruction effort.¹⁰¹ Black Americans faced many obstacles when they tried to act on their new legal rights.¹⁰² One way that Southern states, specifically Mississippi and South Carolina, resisted the freedom of formerly enslaved people was through sets of

banking-services/ [https://perma.cc/RAP2-PLUZ] (explaining that the federal government and banks have perpetuated Black citizens’ lack of access to financial services).

94. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* XII (2018).

95. *See id.* at XIV (“[R]acially explicit government policies to segregate our metropolitan areas are not vestiges, were neither subtle nor intangible, and were sufficiently controlling to construct the *de jure* segregation that is now with us in neighborhoods and hence in schools.”).

96. U.S. CONST. amend. XIII.

97. U.S. CONST. amend. XIV.

98. U.S. CONST. amend. XV.

99. *Reconstruction*, HIST. CHANNEL (Apr. 24, 2023), <https://www.history.com/topics/american-civil-war/reconstruction> [https://perma.cc/A5JW-8BPT] (“Reconstruction . . . was the effort to reintegrate Southern states from the Confederacy and 4 million newly-freed people into the United States.”).

100. *Id.*

101. *See id.* (“After 1867, an increasing number of southern [W]hites turned to violence in response to the revolutionary changes of Radical Reconstruction. The Ku Klux Klan and other [W]hite supremacist organizations targeted local Republican leaders, [W]hite and [B]lack, and other African Americans who challenged [W]hite authority.”).

102. *Id.*

laws, commonly referred to as the “Black Codes.”¹⁰³ These laws are seen by many as acting on a “loophole” in the Thirteenth Amendment.¹⁰⁴ They were passed under the guise of awarding recently freed people rights, but they attempted to uphold the societal and legal position of Black people during slavery.¹⁰⁵ The Black Codes were successful in essentially returning many recently freed people back into enslavement.¹⁰⁶

Shortfalls of the government’s attempts to atone for slavery continued well into the twentieth century. In 1933, the Great Depression caused a housing crisis in the United States.¹⁰⁷ To mitigate the problems, the federal government implemented programs to help prevent mortgage foreclosures, like the Home Owner’s Loan Corporation (“HOLC”) and the Federal Housing Administration

103. See *Black Codes (1865)*, NAT’L. CONST. CENTER, <https://constitutioncenter.org/the-constitution/historic-document-library/detail/mississippi-south-carolina-black-codes-1865> [<https://perma.cc/H85M-D8MM>] (last visited Feb. 2, 2024) (summarizing series of laws passed throughout the South in the wake of emancipation).

104. See U.S. CONST. amend. XIII, § 1 (stating that slavery and involuntary servitude shall not exist in the United States “except as a punishment for crime.”); see also *Mississippi Black Code, 1865*, AM. YAWP READER, <https://www.americanyawp.com/reader/reconstruction/mississippi-black-code-1865/> [<https://perma.cc/G3MC-ZNVN>] (last visited Dec. 31, 2023) (providing Mississippi Black Code provisions that imposed restrictions on recently freed Black people and made it easier to imprison Black people and White people who associated with them); see also Bob Hennelly, *U.S. Slavery Endures – Close the 13th Amendment Loophole*, INSIDER NJ (Jun. 16, 2023, 4:48 PM), <https://www.insidernj.com/u-s-slavery-endures-close-the-13th-amendment-loophole/> [<https://perma.cc/RD89-EHES>] (“In 1865, even as Congress was enacting the 13th amendment to the Constitution to abolish slavery, it created a loophole that it would remain legal as punishment ‘within the United States, or any place subject to their jurisdiction.’”).

105. See *Black Codes (1865)*, *supra* note 103 (“Although often professing to respect the equality and civil rights of the newly emancipated, in reality most of the Black Codes were specifically designed to curtail the economic, political, and social freedom of African Americans.”).

106. See *id.* (explaining that because of the loophole in the Thirteenth Amendment, many Southern states enacted laws against vagrancy and loitering); see also Nadra Kareem Nittle, *How the Black Codes Limited African American Progress After the Civil War*, HIST. CHANNEL (Aug. 4, 2023), <https://www.history.com/news/black-codes-reconstruction-slavery> [<https://perma.cc/W2VS-TAKU>] (“The black codes effectively continued enslavement for African Americans by restricting their rights and exploiting their labor.”).

107. See generally Gary Richardson, *The Great Depression*, FED. RSRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/great-depression> [<https://perma.cc/73WC-SQHP>] (describing the Great Depression that America experienced in the early 1900s).

(“FHA”).¹⁰⁸ These programs contributed to the development of racial redlining.¹⁰⁹

“Redlining” is a significant contributor to the racial wealth gap.¹¹⁰ It is “the discriminatory practice of denying services (typically financial) to residents of certain areas based on their race or ethnicity.”¹¹¹ These areas and neighborhoods typically have high numbers of racial minorities.¹¹² Redlining usually involves denials of applications for credit cards, insurance policies, and home mortgage loans to Black Americans.¹¹³ “County by county data” from 1933 “showed a distinct pattern of ‘redlining’ in center-city counties while loan activity thrived in suburban counties.”¹¹⁴

As HOLC and the FHA evolved, the federal government added qualifications for who could benefit from them.¹¹⁵ The “loan worthiness” of neighborhoods was ranked with “color-coded maps”.¹¹⁶ Neighborhoods were ranked in terms of their perceived riskiness, and the ones deemed as risky and “not worthy of inclusion in homeownership and lending programs” were marked off in red.¹¹⁷ Most of the “risky” ones were neighborhoods that had majority Black residents.¹¹⁸ The post-World War II implementation of the G.I. Bill also excluded many Black Americans through discriminatory practices that

108. See BROADY ET AL., *supra* note 93 (“[I]n response to the housing market problems brought on by the Great Depression, the HOLC . . . and FHA [were created].”).

109. *Id.*

110. Adam Hayes, *What is Redlining? Definition, Legality, and Effects*, INVESTOPEDIA (Jan. 12, 2023), <https://www.investopedia.com/terms/r/redlining.asp> [<https://perma.cc/32M2-9EXU>] (“Due to discriminatory lending practices, homeownership and wealth in redlined communities is much lower than in non-minority communities.”).

111. *Id.*

112. *Id.*

113. See BROADY ET AL., *supra* note 93 (explaining how Black applicants were more likely to be denied for financial services).

114. Charles L. Nier III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 626 (1999).

115. See Candance Jackson, *What Is Redlining?*, N.Y. TIMES (Aug. 17, 2021), <https://www.nytimes.com/2021/08/17/realestate/what-is-redlining.html> [<https://perma.cc/L4PR-DKXG>] (“As these programs evolved, the government added parameters for appraising and vetting properties and homeowners who would qualify.”).

116. *Id.*

117. *Id.*

118. *Id.*

ensured Black citizens would have less chance for wealth accumulation.¹¹⁹

While these practices are not the only reasons for the racial wealth gap between Black and White Americans, they provide some context for how the discrimination stemming from slavery continued and contributed to the continuance of racial oppression.

IV. REPARATIONS FOR AMERICAN ENSLAVEMENT

This Part explores the idea of reparations for American enslavement. It discusses the main arguments brought for and against reparations, as well as some rationales for each position. It also discusses reparations plans the United States has implemented for other large-scale injustices against marginalized groups. Lastly, it considers comparisons between past United States reparations plans and the inclusion of harms caused by financial institutions in a potential reparations plan for Black Americans in California.

A. *Reparations Through Federal Legislation—H.R. 40*

Black Americans have endured many injustices over the United States' history. Some debated questions are (1) whether Black Americans should receive reparations for the harms committed against them or against their ancestors; (2) what reparations would look like; and (3) who would pay for reparations.

Proponents of reparations argue that something must be done to lessen the racial wealth gap that persists because of slavery and anti-Black policies after slavery.¹²⁰ The first opportunity the United States had to make amends was naturally right after the Civil War. Union leaders “concluded that each Black family should receive [forty acres of

119. See Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (intending to facilitate an appropriate readjustment of veterans into civilian society and to guarantee certain benefits for serving in the War); see also Erin Blakemore, *How the GI Bill's Promise Was Denied to a Million Black WWII Veterans*, HIST. CHANNEL (June 21, 2023), <https://www.history.com/news/gi-bill-black-wwii-veterans-benefits> [<https://perma.cc/Z5EC-GFJM>] (“While GI Bill’s language did not specifically exclude African-American veterans from its benefits, it was structured in a way that ultimately shut doors for the 1.2 million Black veterans who had bravely served their country during World War II, in segregated ranks.”).

120. See RAY & PERRY, *supra* note 4, at 2–3 (“The case for reparations can be made on economic, social, and moral grounds.”).

land]” and that “400,000 acres of confiscated Confederate land” should be allocated to Black families.¹²¹ Some families were also to receive “mules left over from the war”; this is where the term “40 acres and a mule” originated.¹²²

However, following President Lincoln’s assassination, President Andrew Johnson reversed the legislation, and the land was returned to the former slaveowners.¹²³ In some areas, like Washington D.C., former “slave owners were actually paid reparations for their ‘lost property’—the formerly enslaved.”¹²⁴ In more recent years, efforts have been made to revisit the idea of reparations for Black Americans. One example that has persisted since 1989 is the “Commission to Study and Develop Reparation Proposals for African Americans Act”, more commonly referred to as “H.R. 40”.¹²⁵

H.R. 40 was first introduced by Congressman John Conyers, Jr., of Michigan in 1989, and it is still intended “to study reparations for [Black] Americans as repayment for centuries of slavery, segregation, and racial injustice.”¹²⁶ The bill’s preamble explained that its purpose is to “address the fundamental injustice of slavery in the United States and to establish a commission to study and consider a national apology and proposal for reparations for; (1) the institution of slavery; (2) its subsequent de jure and de facto racial and economic discrimination against Black Americans; and (3) the impact of these forces on living Black Americans.”¹²⁷ Recommendations for potential reparations plans would be made to Congress after this research.¹²⁸ The bill has been reintroduced every year since 1989 and has grown from having just twenty-four co-sponsors initially to eighty-eight cosponsors in 2023.¹²⁹

To carry out its goal to create a federal commission, H.R. 40 specifically states that the commission must:

121. *Id.* at 3; *see also* Special Field Order No. 15 (Jan. 16, 1865) (outlining General William T. Sherman’s wartime order to allot land to freed Black families).

122. RAY & PERRY, *supra* note 4, at 3.

123. *Id.*

124. *Id.*

125. Commission to Study and Develop Reparation Proposals for African Americans Act, H.R. 40, 118th Cong. (2023).

126. Irving, *supra* note 72.

127. Commission to Study and Develop Reparation Proposals for African Americans Act, H.R. 40, 118th Cong. (2023).

128. *Id.*

129. Irving, *supra* note 72.

Compile documentary evidence of slavery in the United States; (2) study the role of the federal and state governments in supporting the institution of slavery; (3) analyze discriminatory laws and policies against freed African slaves and their descendants; and (4) recommend ways the United States may recognize and remedy the effects of slavery and discrimination on African Americans, including through a formal apology and compensation.¹³⁰

The commission would report its findings and recommendations to Congress after performing its research.¹³¹ On June 19th, 2019, a congressional hearing was conducted by the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties to discuss the bill.¹³² Most of the speakers at the hearing were in support of the bill, but there was also testimony from a panel of Black speakers in opposition to the bill.¹³³ Importantly, reparations plans are not a foreign concept to the United States. The following subsections discuss reparation reports and reparations plans that have already been enacted by the United States and other countries.

B. Reparations for Native Americans

Those indigenous to the United States (hereafter, “Native Americans”) have been discriminated against since before the founding

130. Commission to Study and Develop Reparation Proposals for African Americans Act, H.R. 40, 118th Cong. (2023).

131. *Id.*

132. *See H.R. 40 and the Path to Restorative Justice: Hearing on H.R. 40 Before the Subcomm. on the Const., C.R., and C.L. of the Comm. on the Judiciary H. of Rep.*, 116th Cong. (2019) (discussing the H.R. 40 bill and its advantages and disadvantages).

133. *See id.* at 49–50 (statement of Coleman Hughes, Writer, Quilette) (“What we should do is pay reparations to Black Americans who actually grew up under Jim Crow and were directly harmed by second class citizenship . . . It is not contingent on ancestry. It never expires, and it can’t be paid off . . . H.R. 40 is a moral and political mistake.”); *see also id.* at 54 (statement of Burgess Owens, Speaker and Writer) (“The reparations movement conveniently forgets the 150 years of legal, social and economic progress attained by millions of American minorities. It also minimizes the sacrifice that hundreds of thousands of [W]hite Americans and a Republican president made laying down their lives to eradicate slavery.”).

of the nation and well after it.¹³⁴ Many formal injustices were committed against them by the nation's founders, some of these including forming land treaties while not honoring them and actively pushing Native Americans off of their land through legalized action like "Indian Removal Act."¹³⁵

After World War II, Congress recognized the harm and created the Indian Claims Commission ("Commission"), which was meant to award only monetary compensation to Native American tribes for their lost territory and property if they could prove their claims to the property.¹³⁶ The Commission ended up awarding monetary compensation to several tribes.¹³⁷ The compensation was awarded to groups that allocated the money among their respective members.¹³⁸ For the tribes that had reservations, "the money was often earmarked for tribal projects", but importantly, scholars note that "most of the money was put in trust accounts held by the United States government, which has been accused of mismanagement over the years."¹³⁹ There does not appear to be evidence of the federal government commanding private institutions to participate in reparations for Native Americans in any way.¹⁴⁰

134. See Genevieve Kaplan, *A Legacy of Negligence: The Historical Mistreatment of Indigenous Peoples in the United States*, BERKELEY PUB. POL'Y J. (Apr. 20, 2022), <https://bppj.berkeley.edu/2022/04/20/a-legacy-of-negligence-the-historical-mistreatment-of-indigenous-peoples-in-the-united-states/> [<https://perma.cc/RTB7-696F>] ("Native Americans face adversity in American society and have throughout history; [sic] yet continue to suffer when solutions are available.").

135. *Id.*

136. U.S. INDIAN CLAIMS COMM'N, FINAL REPORT, H.R. DOC. 96-383 96th Cong. 2nd Sess., 1980, H. R. Doc. 96-383.; David J. Wishart, *Indian Claims Commission*, ENCYC. OF THE GREAT PLAINS, <http://plainshumanities.unl.edu/encyclopedia/doc/egp.law.021> [<https://perma.cc/2G9E-HEZ3>] ("The Indian Claims Commission . . . actually functioned as a court that heard arguments of two adversaries—the Native American claimants and the United States as a defendant—and then passed judgment.").

137. See Wishart, *supra* note 136 ("The largest award of \$35 million went to the Kiowas, Apaches, and Comanches in 1974 . . . Other sizable awards included \$15 million in 1965 to the Cheyennes and Arapahos for lands in northeastern Colorado . . . and over \$10 million in 1954 to the Crows for their homelands in Wyoming and Montana.").

138. See MICHAEL LIEDER & JAKE PAGE, *WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES* 83–88 1ST ED. (1997) (explaining how the Commission awarded and allocated monetary compensation to Native American tribes).

139. Erin Blakemore, *How the GI Bill's Promise Was Denied to a Million Black WWII Veterans*, HIST. CHANNEL (June 21, 2023), <https://www.history.com/news/gi-bill-black-wwii-veterans-benefits> [<https://perma.cc/Z5EC-GFJM>].

140. See Press Release, Bureau of Indian Affairs, U.S. Dep't of the Interior, Indian Claims Commission Granted More than \$45 Million During 1969 (Apr. 6, 1970), <https://www.bia.gov/as-ia/opa/online-press-release/indian-claims-commission-granted->

C. *Reparations for Victims of Japanese American Internment During World War II*

The United States awarded reparations to Japanese Americans who were subjected to imprisonment in internment camps after the Japanese attack on Pearl Harbor in 1941.¹⁴¹ After the attack, many American citizens started fearing Japanese Americans and demanding that the government act, which contributed to the federal government creating the internment camps.¹⁴² “Virtually all Japanese Americans were forced to leave their homes and property and live in camps for most of the war.”¹⁴³ Forcing innocent Japanese Americans into internment camps violated their constitutional rights, but the government attempted to justify the measure by expressing that national security called for it.¹⁴⁴ Signed on February 19, 1942, Executive Order 9066 gave the military the authority to relocate Japanese Americans to the camps, where they were subjected to very poor conditions for most of the rest of the war.¹⁴⁵

Reparations were due to Japanese Americans, and the government complied. The Japanese American Evacuation Claims Act provided compensation to Japanese American citizens “for losses of real and personal property”, and after years of campaigning, the Civil Liberties Act was signed.¹⁴⁶ This act issued an apology to the victims

more-45-million-during-1969 [<https://perma.cc/AJ2F-4W8N>] (describing that reparations were exercised by the Indian Claims Commission which was established by Congress, but not mentioning any harms that resulted outside of the federal government’s negligence).

141. See *Pearl Harbor Attack, December 7, 1941*, NAT’L WWII MUSEUM, <https://www.nationalww2museum.org/war/topics/pearl-harbor-december-7-1941> [<https://perma.cc/KU4M-YBXJ>] (last visited Feb. 1, 2024) (describing the conflict between Japan and America that led to the Japanese attack on Pearl Harbor, a U.S. naval base near Honolulu, Hawaii); see also *Japanese American Incarceration*, NAT’L WWII MUSEUM, <https://www.nationalww2museum.org/war/articles/japanese-american-incarceration> [<https://perma.cc/4E4Q-HDRD>] (last visited Feb. 1, 2024) (explaining the atrocities faced by Japanese Americans in internment camps).

142. See *Japanese American Incarceration*, *supra* note 141 (explaining the atrocities faced by Japanese Americans in the incarceration).

143. *Id.*

144. *Id.*

145. See *id.* (“Families were given only a few days to dispose of their property and report to temporary ‘assembly centers,’ where they were held until the larger relocation centers were ready to receive them. Living conditions in these makeshift camps were terrible.”).

146. See *Japanese Americans*, NAT’L ARCHIVES, <https://www.archives.gov/research/japanese-americans/redress> [<https://perma.cc/WPK9-QMT2>] (last visited Feb. 2, 2024) (“Approximately 26,550 claims totaling \$142,000 were filed. The program was administered by the Justice Department, which set a \$100,000,000 limit on the total claims.

and paid each one \$20,000.¹⁴⁷ Specific provisions of the act addressed setting up a public education fund to prevent such an atrocity from happening again in the future.¹⁴⁸ Like the reparations delivered to Native Americans, there is no evidence of any private institutions commanded by the federal government to pay reparations.¹⁴⁹

D. *The California Reparations Report*

Several cities and states have considered reparative action for the harm caused by slavery, and some have been successful in their ongoing implementations.¹⁵⁰ The outline of H.R. 40 and of California's Reparations Report mirror each other, and California's detailed report could be used as guidance for what the H.R. 40 commission could study if given the opportunity.

The California Reparations Report summarizes the harms caused by slavery and the lingering negative effects of the institution of slavery on descendants of enslaved people in the United States.¹⁵¹ It provides examples of government actions that have harmed Black Americans over America's history.¹⁵² It recommends appropriate remedies in consideration of the task force's findings, including:

Over \$36,974,240 was awarded."); Civil Liberties Act, Pub. L. No. 100-383, 102 Stat. 903, 903-916 (1988).

147. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903, 903-916 (1988).

148. *Id.*

149. See *Redress and Reparations for Japanese American Incarceration*, NAT'L WWII MUSEUM (Aug. 13, 2021), <https://www.nationalww2museum.org/war/articles/redress-and-reparations-japanese-american-incarceration>. [<https://perma.cc/6RMU-U24Y>] (explaining that the federal government apologized and attempted to compensate for its oppression of Japanese Americans but mentioning no commanding of private institutions to act).

150. See Asheville City Council Resolution No. 20-128, "Resolution Supporting Community Reparations for Black Asheville" (acknowledging systemic racism present in its community, as well as nationally, and directing the City Manager to establish a process to develop short-, medium- and long-term recommendations to specifically address the creation of generational wealth and to boost economic mobility and opportunity in the Black community); see also CHI. CODE § 2-92-585 (2004) (requiring companies doing business with Chicago disclose their past involvement with slavery).

151. See CAL. REPARATIONS REP., *supra* note 58, at 2 ("The African American story in the United States is marked by repeated failed promises to right the wrongs of the past . . . [This report] seeks to change this story with incontrovertible evidence of the harms requiring reparations and meaningful recommendations designed to redress them.").

152. See *id.* at 3 (describing multiple ways the federal government has failed Black Americans through institutional inequities).

(1) how any form of compensation to Black Americans, with a special consideration for African Americans who are descendants of persons enslaved in the United States, should be calculated; (2) what form of compensation should be awarded, through what instrumentalities, and who should be eligible for such compensation; and (3) whether any other forms of rehabilitation or restitution to African descendants are warranted and what form and scope those measures should take.¹⁵³

The Report also discusses how the banking industry contributed to slavery.¹⁵⁴ It explains how the early national banking system played a large role in funding and perpetuating the slave trade.¹⁵⁵ For example, “in the years 1831 to 1832, the Second Bank of the United States, the private bank that the United States used to handle all of the federal government’s banking needs, gave five percent of all its loans to just one slave trading company in New Orleans.”¹⁵⁶

The task force estimated that the amount of harm California caused against Black people totals \$1 million per eligible person.¹⁵⁷ The Report explains how experts suggest that eligibility for this sum be “based on lineage, determined by an individual being a Black descendant of a chattel enslaved person or a descendant of a free Black person living in the United States prior to the end of the [nineteenth] century.”¹⁵⁸ The formula that calculated the \$1 million “includes dollars lost because of race-based health disparities, mass incarceration, housing discrimination, unjust land seizure[,] and other harms that have had major impacts on Black Californians.”¹⁵⁹ Ultimately, the California

153. *Id.* at 4.

154. *See id.* at 95–105 (explaining how slavery boosted the American economy and how the banking industry contributed to and profited from it).

155. *See id.* at 103 (discussing how the banking center of the United States contributed to slavery by using human collateral as well as other forms of financing to support the slave trade).

156. *Id.* at 105.

157. Emi Tuyetnhi Tran & Curtis Bunn, *California’s Reparations Report Excludes Payment Plan but is Full of Program Proposals*, NBC NEWS (June 29, 2023, 3:48 PM), <https://www.nbcnews.com/news/nbcblk/california-reparations-task-foce-read-final-report-rca91452> [https://perma.cc/HF4L-7YGL].

158. CAL. REPARATIONS REP., *supra* note 58, at 606.

159. Tran & Bunn, *supra* note 157.

Legislature will make the choice for who, if anyone, is eligible to receive payments.¹⁶⁰

The California reparations plan proposes a similar structure to the past U.S. reparations plans for Native Americans and Japanese Americans in how it seeks to task specific agencies with the roles of processing claims and administering potential payments.¹⁶¹ A notable obstacle here is that the relatively more distant harm of slavery is harder to trace to claimants than the harms of Japanese Internment for example, which can be more directly traced to victims.¹⁶² However, a response to this sentiment is that just because the United States failed in awarding reparations to direct victims of slavery when it should have, this should not negate any responsibility of the nation now.¹⁶³

E. Germany's Reparations Plan

The United States can also look to Germany when considering how H.R. 40 could look in practice. Germany has taken significant steps towards compensating Holocaust victims and their heirs for the horrors brought against Jewish and other victims.¹⁶⁴ The German restitution measures made “substantial financial contributions to victims’ funds and survivors’ pensions.”¹⁶⁵ From 1945 to 2018, the German government “paid \$86.8 billion in restitution and compensation to Holocaust victims and their heirs.”¹⁶⁶

In 1952, the Luxembourg Agreement was signed created as well, requiring Germany to pay reparations to Israel for the material damage caused by injustices forced on the Jewish people during World

160. *See id.* (“It will be up to the California Legislature to collect data, propose firm reparations amounts, and determine who is eligible to receive those payments.”).

161. *See supra* Part IV.B–C.

162. *See supra* Part IV.C.

163. *See* Cristy Lytal, *The Complex Case for Reparations as H.R. 40 Advances*, USC SOL PRICE SCH. OF PUB. POL’Y (June 18, 2021), <https://priceschool.usc.edu/news/usc-price-faculty-consider-the-complex-case-for-reparations/> [https://perma.cc/2GLQ-RGH7] (explaining that experts push back against administrability concerns by emphasizing that H.R. 40 is a bill just meant to study reparations and that the fact that calculating reparations is a complex and challenging endeavor is one of the good reasons to undertake a study of reparations).

164. U.S. DEPT. OF STATE, THE JUST ACT REPORT 73 (2020) (“Germany has taken commendable steps to confront its role as the perpetrator of the Holocaust and to ensure that Holocaust victims and their heirs receive restitution and/or compensation.”).

165. *Id.*

166. *Id.*

War II.¹⁶⁷ The Luxembourg Agreement had two protocols that required Germany to enact laws to “pay individual compensation to ‘former German citizens, refugees, and stateless persons’ for harms suffered during the [Holocaust],” and to pay the Conference on Jewish Material Claims against Germany approximately \$107 million¹⁶⁸ for the “relief, rehabilitation, and resettlement of Jewish victims of Nazi persecution.”¹⁶⁹ The categories of harm that were eligible for compensation included compensation for life;¹⁷⁰ health; damages to freedom; property, assets, and discriminatory taxes; damages to career or economic advancement; and loss of life or pension insurance.¹⁷¹

The reparations programs did not only grant payments for loss of health, freedom, and more to Jewish survivors who suffered imprisonment and forced labor; some also granted eligibility for payment to the survivors’ heirs.¹⁷² In the early 1990’s, the Post-Reunification German Property Restitution program allowed for payments to the heirs of Jewish persecuted individuals and organizations for loss of property.¹⁷³ In 2000, the German Foundation for “Remembrance, Responsibility, and Future” allowed for certain heirs of survivors who endured forced labor to benefit from the “future fund” or from humanitarian programs.¹⁷⁴ In the aftermath of World War II and following the Luxembourg Agreement, Germany passed the Federal Compensation Act, which “provided compensation for physical injury and damage to health, restrictions on personal freedom, harm to economic and professional growth, and damage to personal property.”¹⁷⁵

167. *Id.* at 73–74.

168. *See id.* at 73 (“The agreement with the Claims Conference provided for payment of [Deutsche Mark] DM 450 million (approximately \$107 million based on 1952 exchange rates)”); CAL. REPARATIONS REP., *supra* note 58, at 526.

169. CAL. REPARATIONS REP., *supra* note 58, at 526.

170. *Id.* at 529 (“Under this category, widows, children, and dependent relatives could apply for an annuity for wrongful death, based on the amount paid to families of civil servants.”)

171. *Id.*

172. *See Summary of Major Holocaust Compensation Programs*, CLAIMS CONFERENCE 2, 6, 8 (Sept. 11, 2000), <https://www.claimscon.org/forms/allocations/Summary%20of%20Major%20Holocaust%20Compensation%20Programs.pdf> [<https://perma.cc/9FVS-695J>] (providing a summary of the range of compensation programs created to atone for the Holocaust).

173. *Id.* at 6.

174. *Id.* at 8.

175. U.S. DEPT. OF STATE, *supra* note 164.

These examples portray reparations programs that could be studied by the commission proposed by H.R. 40.¹⁷⁶ The discussed programs could provide potential models for how reparations could work if the bill should be enacted. Although Germany's reparations plan was tracking more recent harms than H.R. 40 would be tracking when performing calculations on quantifiable harm, it still provides a potential framework that could assist the implementation of H.R. 40 or similar legislation.¹⁷⁷ As noted earlier, the past federal reparations plans for Native Americans and Japanese Americans did not implicate any private institutions or force them to participate in reparations.¹⁷⁸ So, commanding financial institutions to participate in reparations would be largely without precedent in the United States government. However, it is also known that much of the harm caused to Native Americans and Japanese Americans was directly through the actions of the federal government.¹⁷⁹

When looking to the harm caused to Black Americans, much of it was endorsed by government action, but there was also a large portion of it that was perpetuated by private institutions.¹⁸⁰ Unlike other marginalized groups, the oppression of Black Americans is not only rooted in the institution of slavery; it was also fundamental to the accumulation of the nation's wealth.¹⁸¹ Supreme Court Justice Powell wrote in his opinion for the landmark case, *Regents of University of California v. Bakke*, that the discrimination against Black people in this country "presents an amorphous concept of injury that may be ageless in its reach into the past."¹⁸² If the federal government undertook the task of targeting specific areas of quantifiable discrimination, perhaps the concept of injury would become less amorphous and proper remedies could be awarded. Though the answer is unclear, reparations in the context of financial institutions are worth considering.

176. *See supra* Part IV.B.

177. *See supra* Part IV.

178. *See supra* Part IV.B–C.

179. *See supra* Part IV.B–C.

180. *See supra* Part II.

181. *See supra* Part II.A.

182. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (holding that universities could consider race as a factor in admissions decisions and that the benefits of diversity in education constituted a compelling interest, but also that societal discrimination does not constitute a compelling interest).

V. FINANCIAL INSTITUTIONS AND REPARATIONS

This Part discusses the case to be made for financial institution involvement in reparations for Black Americans. It explains some rationales for proponents and opponents of bank reparations (ethical individualism, the corporate law rationale, and unjust enrichment). Next, it explores ways that financial institutions have been and could be assessed for their responsibility for the use of human collateral and their perpetuation of the racial wealth gap. Then, it compares these potential methods to past United States reparations plans. Lastly, it discusses an effort that has already been made, both commanded by a local government and voluntarily made by a financial institution attempting to compensate for the role it played in the financial oppression of Black Americans.

A. Bank Involvement in Reparations for Black Americans

In the Pew Research Center's 2021 survey, the 30% of Americans who favored reparations were also asked about "the institutions and individuals who bear responsibility for repayment."¹⁸³ They were presented with four options: the U.S. federal government, businesses and banks that profited from slavery, colleges and universities that benefited from slavery, and descendants of families who engaged in the slave trade.¹⁸⁴ 75% of reparations supporters said the "federal government has all or most of the responsibility to repay descendants of enslaved people."¹⁸⁵ 65% said "businesses and banks that profited from slavery have all or most of the responsibility."¹⁸⁶ 53% said the "same about colleges and universities that benefited from slavery", and 44% said that "descendants of families who engaged in the slave trade" hold responsibility to pay.¹⁸⁷

183. Kiana Cox & Khadijah Edwards, *Reparations for Slavery*, PEW RSCH. CTR. (Aug. 30, 2022), <https://www.pewresearch.org/race-ethnicity/2022/08/30/black-americans-views-on-reparations-for-slavery/> [<https://perma.cc/C8SZ-2ABQ>].

184. Carrie Blazina & Kiana Cox, *Black and White Americans Are Far Apart in Their Views of Reparations for Slavery*, PEW RSCH. CTR. (Nov. 28, 2022), <https://www.pewresearch.org/short-reads/2022/11/28/black-and-white-americans-are-far-apart-in-their-views-of-reparations-for-slavery/> [<https://perma.cc/P7PM-UUM4>].

185. *Id.*

186. *Id.*

187. *Id.*

Proponents of financial institutions paying back reparations argue that “[b]anks have been underwriters of American racism — no industry has played a bigger or more enduring role in Black oppression, exploitation, and exclusion.”¹⁸⁸ The rest of this section explores the ethical individualism, unjust enrichment, and corporate law-based rationales for why financial institutions should or should not be responsible for reparations.¹⁸⁹

When considering blameworthiness or accountability for a harm, ethical individualism provides that “someone who is innocent of a violation cannot be held responsible for it.”¹⁹⁰ This is also reflected in American tort law. Even if properly established that a harm has occurred, there must be causation linking the harm to a wrongdoer.¹⁹¹ When applied to reparations for Black Americans, virtually no one denies that many harms have been committed against them over the course of American history. However, those who adopt ethical individualism largely believe that no person alive today should be held responsible for the institution of slavery or for other forms of legal racial oppression.¹⁹²

This theory can be argued by opponents of government reparations and of financial institution reparations. For the government: why should innocent American taxpayers be forced to pay reparations for something they carry “no direct responsibility” for?¹⁹³ “Those who were directly responsible, the slaveowners of previous centuries, are dead.”¹⁹⁴ Thus, this form of ethical individualism allows Americans to essentially neglect past injustices because it does not recognize a duty

188. Tallulah Fontaine, Opinion, *Banks Should Face History and Pay Reparations*, N.Y. TIMES 2 (June 26, 2020), <https://www.nytimes.com/2020/06/26/opinion/sunday/banks-reparations-racism-inequality.html> [<https://perma.cc/R6CN-N627>].

189. See *infra* Part V.A.

190. Susan S. Kuo & Benjamin Means, *A Corporate Law Rationale for Reparations*, 62 B.C. L. REV. 799, 807 (2021).

191. See *Introduction to Tort Law*, CONG. RSCH. SERV. (May 26, 2023), <https://sgp.fas.org/crs/misc/IF11291.pdf> [<https://perma.cc/W96C-W524>] (explaining that in order to be held liable for an intentional tort or for negligence there must be a causal link between the injury and the breach of a defendant’s duty of care).

192. See Kuo & Means, *supra* note 190, at 807 (“Opponents of reparations for African Americans deny the existence of any such relationship and contend that those alive today cannot be held responsible for slavery, Jim Crow laws, or any other form of racial oppression.”).

193. See *id.* at 805 (“[I]t would be wrong to place a financial burden on taxpayers who have no direct responsibility for slavery, Jim Crow laws, or other injustices”).

194. *Id.* at 801.

for anyone to compensate for the harm nor does it recognize that anyone today needs to be compensated.¹⁹⁵ For example, “a congressional resolution both apologized ‘on behalf of the people of the United States, for the wrongs committed against [African Americans]’ . . . and added a prominent disclaimer that ‘[n]othing in this resolution . . . authorizes or supports any claim against the United States.’”¹⁹⁶

For financial institutions, a similar argument is invoked for current leaders and shareholders of financial institutions: why should shareholders of financial institutions that benefitted from slavery have to pay for wrongful acts of the institutions’ past leaders?¹⁹⁷ Ethical individualism takes issue with burdening many blameless people based on collective responsibility and attempting to compensate for harms committed by people who passed away several years ago.¹⁹⁸

The corporate law rationale and the theory of unjust enrichment provide responses to both concerns. The corporate law rationale takes the focus away from individual blame. It follows that since a for-profit financial institution¹⁹⁹ can be a “legal person, separate and distinct from its owners”, paying reparations does not have to hinge on the guilt of its shareholders or owners.²⁰⁰ As for group responsibility, a financial institution’s owners do not all have to agree with or even be involved in the decisions that govern the institution; that does not mean they are not still potentially liable owners.²⁰¹ To base an organization’s blame on

195. *See id.* (“[E]thical individualism allows Americans to express their regret for past wrongs without acknowledging any obligation to pay for them.”).

196. *Id.*; S. Cong. Res. 26, 111th Cong. (2009).

197. *See* Kuo & Means, *supra* note 190, at 809 (explaining that the ethical-individualism argument has “power because it forces proponents of reparations to ‘explain why non wrongdoers—usually taxpayers or shareholders—should pay reparations.’”).

198. *See id.* at 809 (“[T]he ethical-individualism objection appears to combine two related concerns: (1) that reparations would impose financial penalties on a wide swath of blameless individuals based on a theory of group responsibility; and (2) that the injuries to be remedied occurred long ago and are not the responsibility of those now living.”).

199. *See* National Information Center, *All Institution Types Defined*, FED. FIN. INST. EXAMINATION COUNCIL <https://www.ffiec.gov/nicpubweb/content/help/institution%20type%20description.htm> [<https://perma.cc/V87Q-KVAP>] (last modified Aug. 4, 2023) (defining different kinds of financial institutions, including commercial banks which are owned by stockholders and operate for a profit).

200. *See* Kuo & Means, *supra* note 190, at 802 (“Just as a corporation is distinct from its shareholders . . . the [U.S.] is a legal person separate and apart from its citizens. Seeking reparations from the [U.S.] does not turn on the guilt of its citizens any more than prosecuting a corporation turns on the guilt of its shareholders.”).

201. *See* *What Happens when Shareholders Can’t Agree?*, LONGMORES SOLICS. (June 10, 2022), <https://www.longmores.law/articles/what-happens-when-shareholders-cant-agree/>

each individual's blame would result in "practical impunity as long as some members were not involved in any particular endeavor."²⁰² For example, when U.S. attorneys decide whether to bring a case of criminal liability against a corporation, they do not place much emphasis on individual blame *unless* it is feasible to bring direct claims against the individuals whose actions formed the basis for the corporation's liability.²⁰³

Ethical individualism's second concern of the untimeliness of reparations likely carries more weight.²⁰⁴ One combating stance against untimeliness is that racial oppression caused by financial institutions does not only exist in the distant past.²⁰⁵ There are still many practices in effect at financial institutions that contribute to the racial wealth gap and negatively impact Black Americans due to the continuance of systemic racism.²⁰⁶ Another response to this concern is that institutions

[<https://perma.cc/9JMT-PVD5>] ("Shareholders are those who own the business, but this does not necessarily mean they will have a say over every aspect of how the company is run.").

202. Kuo & Means, *supra* note 190, at 809.

203. See U.S. Dep't of Just., Just. Manual, § 9-28.010; § 9-28.210 (2023), <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.010> [<https://perma.cc/7A2A-7PBE>] (last visited Jan. 2, 2024) (explaining the foundational principles of corporate prosecution); see also *id.* § 9-28.300 (explaining that the Department of Justice's guidelines key factors to be considered of the corporation or institution include the pervasiveness of wrongdoing, history of similar misconduct, timely and voluntary disclosure of wrongdoing, any remedial actions or efforts to pay restitution, and collateral consequences, including whether there is disproportionate harm to shareholders arising from the prosecution).

204. See Kuo & Means, *supra* note 190, at 809 ("[T]he injuries to be remedied occurred long ago and are not the responsibility of those now living.").

205. See Aaron Glantz & Emmanuel Martinez, *For People of Color, Banks are Shutting the Door to Homeownership*, REVEAL NEWS (Feb. 15, 2018), <https://revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/> [<https://perma.cc/2VPU-D6JY>] (arguing that modern-day redlining persists and contributes to the homeownership gap between White and Black Americans); see also *Complaint, Alfred Pope v. Wells Fargo Bank*, 2022 WL 17342299 (N.D. Cal.) (No. 4:22-cv-01793-KAW) ("Wells Fargo's online refinancing calculator, an algorithmic tool that requires factor inputs like ZIP code, education, and area code—all identifiers that the Consumer Financial Protection Bureau has identified as proxies for race—discriminates against minority applicants seeking to refinance their mortgages."); see also *Complaint, Jacqueline Huskey v. State Farm Fire & Casualty Co.*, 2023 WL 5848164 (N.D. Ill.) (No. 1:22-cv-07014) ("State Farm's use of automated claims processing methods and machine-learning algorithms discriminates against Black policyholders by treating their claims with greater suspicion than claims of their White counterparts.").

206. See KRISTEN BROADY ET. AL., *supra* note 93 ("[A]t a local level, there are stark contrasts in access to credit for African Americans: Interest rates on business loans, bank branch density, local banking concentration in the residential mortgage market, and the

are capable of existing with a “morally relevant identity for many generations and can be held accountable for their actions in previous generations.”²⁰⁷ However, unjust enrichment arguably provides the most compelling response by undercutting blame entirely and instead focusing on who currently benefits from the past injustices.²⁰⁸ Unjust enrichment rests on the premise that “[a] person who is unjustly enriched at the expense of another is subject to liability in restitution.”²⁰⁹ When applied in the reparations context, there are many unjustly enriched financial institutions who are potentially accountable.²¹⁰ Thus, even if no one who can be held responsible for slavery is still alive, those who might be regarded as unjustly enriched could theoretically be held responsible if their enrichment could be proven.²¹¹ Indeed, cases have been tried against financial institutions for their continued blameworthiness as well as for unjust enrichment. The next section considers one such case as an attempt to hold financial institutions accountable for being unjustly enriched by slavery and the Jim Crow era.

B. How Financial Institutions Could be Assessed for Reparations

In 2004, the U.S. Court of Appeals for the Seventh Circuit considered nine consolidated suits filed by descendants of enslaved people seeking “monetary relief under both federal and state law for harms stemming from the enslavement of [B]lack people in America.”²¹² The multiple defendants named in the case included JP

growth of local businesses are markedly different in majority Black neighborhoods.”); *see also supra* Part III.B.

207. *See* David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. REV. 1375, 1385 (2004) (“[I]nstitutions . . . can be held accountable and are capable of existing for many generations”).

208. Kuo & Means, *supra* note 190, at 814; *see* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. L. INST. 2011) (“A person who is unjustly enriched at the expense of another is subject to liability in restitution.”).

209. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. L. INST. 2011).

210. *See supra* Part II; *see infra* Part V.B.

211. *See* Lyons, *supra* note 207, at 1382 (“The class of unjustly enriched, and therefore potentially accountable, third parties can be much wider than the class of wrongdoers.”); *see also* Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. REV. 1443, 1444 (2004) (noting that a limitation of the unjust enrichment approach is that it ignores the harm suffered by victims and “lacks the moral force necessary to resolve a controversial public dispute about moral rights and obligations among segments of society.”).

212. *In re Afr.-Am. Slave Descendants Litig.*, 471 F.3d 754, 756 (7th Cir. 2006).

Morgan Chase Bank, FleetBoston Financial Corporation (which later merged with Bank of America), and the Lehman Brothers.²¹³ The defendants included companies and successors to companies that “provided services, such as transportation, finance, and insurance, to slaveowners.”²¹⁴ The case mentions the predecessor of one institution defendant discussed further below, JP Morgan Chase Bank, and how it engaged in the practice of using enslaved people as collateral on a large scale.²¹⁵ The legal claims brought against the defendants included violations of a federal statute, 42 U.S.C. § 1982, “which provides that all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by [W]hite citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”²¹⁶ It also included claims of being forced back into slavery as late as the twentieth century.²¹⁷ In the initial district court case, civil rights lawyers brought “a claim for reparations rooted in the historic injustices and the immorality of the institution of human chattel slavery in the United States.”²¹⁸ They also proposed through unjust enrichment theory that restitution—the transferring of the wrongdoer’s gain to the victim—could be a potential route for damages.²¹⁹

The district court case held that the plaintiffs lacked standing, and the Seventh Circuit agreed.²²⁰ It reasoned that linking specific injuries to their ancestors would, in all likelihood, be impossible because it would require “connecting the particular slavery transactions

213. *In re Afr.-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1039 (N.D. Ill. 2004).

214. *In re Afr.-Am. Slave Descendants Litig.*, 471 F.3d at 757.

215. *See id.* (“[The bank] accepted 13,000 enslaved people as collateral on loans and ended up owning 1,250 of them when borrowers defaulted . . .”).

216. *In re Afr.-Am. Slave Descendants Litig.*, 471 F.3d at 757 (quoting 42 U.S.C. § 1982).

217. *See In re Afr.-Am. Slave Descendants Litig.*, 471 F.3d at 761 (“Cain Wall, Sr. claims that ‘during the time that [he] was enslaved’ — which he contends extended into the 1960s . . . ‘[s]ome of the defendants had reason to know of the enslavement of Wall and yet failed to take steps to eliminate the same.’”).

218. *In re Afr.-Am. Slave Descendants Litig.*, 304 F. Supp. 2d at 1033 (N.D. Ill. 2004); Kuo & Means, *supra* note 190, at 823.

219. *In re Afr.-Am. Slave Descendants Litig.*, 304 F. Supp. 2d at 1056 (N.D. Ill. 2004) (“Plaintiffs seek, among other things . . . restitution in the value of Plaintiffs’ ancestors’ slave labor and Defendants’ corresponding unjust enrichment.”).

220. *In re Afr.-Am. Slave Descendants Litig.*, 471 F.3d 754 at 759 (“[W]e think that the district court was correct . . . that the plaintiffs lack standing to sue. It would be impossible by the methods of litigation to connect the defendants’ alleged misconduct with the financial and emotional harm that the plaintiffs claim to have suffered as a result of that conduct.”).

in which the defendants were involved to harm to particular [enslaved people].”²²¹ The Seventh Circuit also noted that the problems of measuring and tracing cannot be solved with restitution because unjust enrichment still presupposes an injury, and “there is no way in which to determine what if any injury the defendants inflicted on the members of the plaintiff classes.”²²² Additionally, both courts reasoned that reparations claims against the defendant corporations were barred by the applicable statutes of limitations.²²³

The Seventh Circuit argued that framing the issue of reparations through an individual monetary basis will virtually always fail at this point because it is not possible to show exactly how the wages that an enslaved “ancestor would have earned as a free laborer [could] have influenced the wealth of [their] remote descendant[.]”²²⁴ It mentioned that economists have studied these issues, but that the studies are of the “aggregate effects, not of the effects of particular acts, affecting particular individuals.”²²⁵ Unless there was somehow a suit brought on behalf of every single descendant of enslaved Black people in America and the statutes of limitations were allowed to be tolled more than a century, it would be difficult to obtain relief through the courts.²²⁶ This likely rings true for more recent harms, like the Jim Crow laws, as well because the issue of linking specific harms to specific plaintiffs would still be present. The district court and Seventh Circuit further concluded that the consolidated complaint put forth a generalized grievance better suited to resolution by the legislature than by a court and that reparations are a “political question.”²²⁷

221. *Id.* at 762.

222. *Id.* at 760.

223. *Id.* at 762 (“But in any event, suits complaining about injuries that occurred more than a century and a half ago have been barred for a long time by the applicable state statutes of limitations.”); See *In re Afr.-Am. Slave Descendants Litig.*, 304 F. Supp. 2d at 1070 (“If cognizable claims ever existed, those claims were owned by former slaves themselves, and became time-barred when the statutes of limitations expired in the nineteenth century.”).

224. *In re Afr.-Am. Slave Descendants Litig.*, 471 F.3d 754 at 760.

225. *Id.*

226. See *id.* at 762. (“[S]uits complaining about injuries that occurred more than a century . . . ago have been barred for a long time by the applicable state statutes of limitations . . . tolling doctrines can extend the time to sue well beyond the period of limitations—but not to a century and more beyond.”).

227. *In re Afr.-Am. Slave Descendants Litig.*, 304 F. Supp. 2d at 1054 (“The political question doctrine restricts judicial review that might interfere with other branches of the federal government . . . Even in cases where the federal court has subject matter jurisdiction,

That conclusion brings this Note back to H.R. 40, which would establish a commission to study and develop reparation proposals for African Americans.²²⁸ Ways that financial institutions could be assessed for their responsibility include retracing their origins to see what connections to slavery or post- Civil War racial oppression can be found.²²⁹ For more recent offenses, financial institutions could be assessed based on their contributions to racial redlining in conjunction with the HOLC maps, which provide the most “comprehensive documentation of discriminatory lending practices.”²³⁰ Some suggestions for how financial institutions can repay for the harms done (that avoid dealing with specific monetary calculations of harm) include cancelling debt for Black customers, providing interest-free mortgages to Black home buyers, eliminating banking fees for Black customers, and providing interest-free loans to Black-owned businesses.²³¹ Suggestions like these could be studied and explored further through the adoption of H.R. 40. Because there is already much research showing how American financial institutions have benefitted from slavery and contributed to the racial wealth gap long after the Civil War,²³² it is worth studying financial institutions’ roles in the oppression of Black Americans on the national scale in a centralized commission.

If H.R. 40 were to be adopted in the future, language including financial institutions could be added to what the commission would be tasked with researching. For example, § 2 of H.R. 40 states that “[t]he purpose of this Act is to establish a commission to study and develop Reparations proposals for African Americans as a result of . . . the direct benefits to societal institutions, public and private, including higher

it could choose not to exercise its jurisdiction to avoid interfering with decisions previously made by the Executive or Legislative branches”); *contra* Benjamin Ewing & Douglas A. Kysar, Prods and Pleas: Limited Government in an Era of Unlimited Harm, 121 YALE L. J. 350, 384 (2011) (“[T]he court could as easily have addressed the issues of remoteness and attenuation through doctrines such as duty and proximate causation, thereby managing its institutional capacity without unnecessarily and undesirably abdicating its responsibility to uphold and apply tort law’s normative principles.”).

228. *See supra* IV.A.

229. *See infra* Part V.C. (showing JP Morgan’s mandated retracing of its history revealed its predecessor firms’ involvement with human collateral).

230. Tracy Jan, *Redlining was banned 50 years ago. It’s Still Hurting Minorities Today.*, WASH. POST (Mar. 28, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/> [https://perma.cc/Z7QW-87TG]

231. Fontaine, *supra* note 188.

232. *See supra* Part II & Part III.

education, corporations, religious, and associational.²³³ This section should include financial institutions as well because of the tremendous impact that they have had on the Black community.²³⁴ § 2 also states one of the results as “the role of Northern complicity in the Southern based institution of slavery”.²³⁵ This should not only say Northern complicity, but something along the lines of “the Northern contribution to the Southern based institution of slavery”, because the North economically benefitted from and contributed to slavery more than is generally known or accepted.²³⁶

C. *What Some Financial Institutions Have Done to Provide Restitution for Black Americans*

The leading example of a bank apologizing for its ties to slavery and attempting to atone for it is JP Morgan Chase Bank.²³⁷ JP Morgan was required to research and determine links it might have to slavery by a 2003 ordinance passed in Chicago.²³⁸ The Citizens Bank of Louisiana (discussed as a significant user of human collateral earlier in this Note) is a predecessor bank of JP Morgan Chase.²³⁹ In 2005, JP Morgan Chase wrote an apology because two banks that it then owned, Louisiana-based Citizens’ Bank and Canal Bank, had “accepted approximately 13,000 enslaved individuals as collateral and that the

233. Commission to Study and Develop Reparation Proposals for African Americans Act, H.R. 40, 118th Cong., § 2 (b)(6) (2019).

234. *See supra* Part II & Part III.

235. Commission to Study and Develop Reparation Proposals for African Americans Act, H.R. 40, 118th Cong., § 2 (b)(5) (2019).

236. *See supra* Part II.B.

237. *See JP Morgan Discloses Past Links to Slavery*, WASH. POST (Jan. 21, 2005), <https://www.washingtonpost.com/archive/business/2005/01/21/jp-morgan-discloses-past-links-to-slavery/904ca93a-a6fa-4e8f-aece-be767c76591d/> [<https://perma.cc/ZM4H-7RXX>] (announcing that nation’s second largest bank disclosed its ties to slavery and set up scholarship and internship program in attempts to reconcile its history).

238. *See id.* “[T]he bank undertook the study after Chicago passed an ordinance in 2003 requiring companies that do business with the city to research their history to determine any links to [enslavement].”)

239. *JP Morgan Chase – Statistics and Facts*, STATISTA RSCH DEP’T. (Mar. 16, 2023), <https://www.statista.com/topics/10395/jpmorgan-chase/#topicOverview> [<https://perma.cc/L7FE-ADZP>] (noting that JP Morgan Chase is the “largest bank in the world, built on a foundation of more than 1,200 predecessor institutions and reaching a value of around \$393 billion in 2022.”).

banks came to own approximately 1,250 enslaved individuals as a result of defaults.”²⁴⁰

Along with the formal apology, J.P. Morgan Chase announced a program called “Smart Start Louisiana”, which would provide “\$5 million over five years for full-tuition undergraduate scholarships for Black students from Louisiana to attend college in their home state.”²⁴¹ They also stated that the scholarship recipients would be able to intern with the bank during the summer and that the internships would hopefully amount to full-time offers after the students graduated.²⁴² What JP Morgan Chase vowed to do is just one good example of ways that financial institutions can research their past links to slavery, apologize to the community for any links, and attempt to atone for the harm done.

VI. CONCLUSION

The horrors of slavery continue to plague our country in deep-rooted ways that federal legislation likely has the power to significantly remedy.²⁴³ The passage of H.R. 40 or something similar to it will likely not happen for several more years, given its history.²⁴⁴ However, financial institutions with links to slavery should consider reparative action for Black Americans with or without the command of the federal government. This is because the banking industry is a significant contributor to the nation’s racial wealth gap.²⁴⁵ As financial institutions continue to reckon with their ties to enslavement, they should research and be transparent about their companies’ past relationships with slavery; recognize the hardships that American descendants of enslaved people have endured because of their companies’ historical practices; and, most importantly, exercise the reparations options available to them.

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240. *JP Morgan Discloses Past Links to Slavery*, *supra* note 237.

241. *Id.*

242. *Id.*

243. *See supra* Part II–III.

244. *See supra* Part IV.

245. *See supra* Part V.

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