SLAVERY AS A TAKINGS CLAUSE VIOLATION

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INTRODUCTION

This Article argues that slavery was a violation of the Takings Clause of the United States Constitution. Slaves, like all people, possessed a property right of self-ownership. When the government appropriated that property, through laws establishing slavery, the rightful owners of the property—the slaves—suffered uncompensated physical, regulatory, and derivative takings. Victims of slavery, like victims of other impermissible takings, are constitutionally entitled to just compensation under the Takings Clause. This Article concludes by examining some potential judicial and legislative consequences of treating slavery as a Takings Clause violation.

The history of Blacks[1] in America is inextricably intertwined with the institution of slavery. Slavery existed in the colonies for over a

1. Throughout this Article I will use the term "Black" rather than "black" or "African-American." *Cf.* Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) ("I shall use 'African-American' and 'Black' interchangeably. When using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun.").

century, and for an additional century in the United States.[2] After its abolition, slavery was replaced by a network of racially oppressive laws and legally supported segregation, which allowed and facilitated the infliction of further indignity upon Blacks.[3]

Since the abolition of slavery, former slaves have sought compensation for the harms they suffered.[4] Modern scholars and advocates have argued in increasing numbers that descendants of slaves should receive reparations.[5] Politicians have proposed

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2. *See* AFRICANAONLINE, SLAVERY TIMELINE (providing a comprehensive timeline of the history of the institution of slavery and Black history), *at* http://www.africanaonline.com/slavery_timeline.htm (last visited Sept. 4, 2003) (on file with the American University Law Review).

3. *See* DERRICK BELL, RACE, RACISM AND AMERICAN LAW 21-80, 155-90, 571-606 (4th ed. 2000); Joe R. Feagin & Eileen O'Brien, *The Long Overdue Reparations for African Americans*, *in* WHEN SORRY ISN'T ENOUGH 417, 418-19 (Roy L. Brooks ed., 1999).

4. Attempts to secure compensation began immediately following emancipation. *See* RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 240-41 (1999) (giving an example of a letter from a former slave asking for compensation from his former slaveowner and discussing how slaveowners "stole" labor and "robbed the future" of slave descendents); *Does America Owe a Debt to the Descendants of Its Slaves?*, HARPER'S MAG., Nov. 2000, *reprinted in* SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS 79, 101-02 (Raymond A. Winbush ed., 2003) [hereinafter SHOULD AMERICA PAY?] (citing a letter from a freed slave to his master asking for back wages); *id.* at 102-03 (providing timeline of reparations attempts); *see also* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-77 68-70, 158-61 (1988) (discussing attempts by the Freedman's Bureau to secure reparations); Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 498-99 (2002) (discussing congressional proposals to redistribute property to freed slaves after the Civil War); F. Michael Higginbotham, *A Dream Revived: The Rise of the Black Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 447, 450 (2002) (noting that while support for reparations began during the Civil War, President Andrew Johnson vetoed reparations bills). Among these early reparation attempts were Sherman's proposed "forty acres and a mule," the Southern Homestead Act passed in 1866, further proposed legislation in 1867, and a $68 million reparations suit filed in 1915. *See infra* notes 247-248 (discussing the "forty acres and a mule" proposal). For a discussion of these early attempts, see ROBINSON, *supra*, at 206-07, and SHOULD AMERICA PAY?, *supra*, at 103.

5. One of the first modern legal scholars to argue for reparations was Professor Boris Bittker of the Yale University Law School. Professor Bittker, long ambivalent about the concept of slave reparations, wrote his groundbreaking book after his reparations research convinced him that it wasn't a "crazy, far-fetched idea." *See* BORIS BITTKER, THE CASE FOR BLACK REPARATIONS (Beacon Press 2003) (1973).

Several recent law review articles have advocated for reparations. *See generally* Tuneen E. Chisolm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 687-89 (1999) (arguing that reparations would bridge the wealth inequality between Blacks and whites); Alberto B. Lopez, *Focusing the Reparations Debate Beyond 1865*, 69 TENN. L. REV. 653 (1995) (suggesting that the reparations movement could be strengthened by reliance on episodes of racial violence, other than the Civil War, that have plagued our nation's history); Rhonda V. Magee, Note, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863 (1993) (arguing that a wealth redistribution is necessary in order to achieve racial equality); Vincene Verdun, *If the Shoe Fits, Wear It:*

legislation on the matter[6] and activists have demonstrated in favor of reparations.[7] To date, however, all attempts to secure legislative or

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An Analysis of Reparations to African Americans, 67 TUL. L. REV. 597 (1993) (stating that slavery contributed to "the chain of poverty and powerlessness that is epidemic in the African-American community" and that a solution must be created that corrects these problems); Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998) (advocating for reparations and suggesting that reparations avoid the problems associated with affirmative action); Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 HARV. L. REV. 1689 (2002) (arguing that the divisive nature of the reparations debate can be lessened if reparations are viewed as an means to repair the racial divide in America rather than individual compensatory awards).

The topic was also discussed recently at a symposium at the New York University School of Law. *See* Symposium, *A Dream Deferred: Comparative and Practical Considerations for the Black Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 447 (2002) (attempting to "fill the gap" between the theoretical aspects of the reparations movements and its practical and concrete considerations).

A wave of books on the subject have been published recently, among the most prominent being Randall Robinson's book *The Debt*. *See* ROBINSON, *supra* note 4 (tracing the history of slavery and advocating for some form of compensation to Blacks as a result of slavery's effects); *see also* SHOULD AMERICA PAY?, *supra* note 4 (presenting a collection of essays, articles, and historical documents that explore the many facets of the reparations debate).

One writer has suggested that society is currently in the fifth of "[f]ive major waves of political activism [that] have promoted the idea of reparations for African Americans since the emancipation of slaves." Chisolm, *supra*, at 683. Another suggests that society is in "Stage III" of the reparations movement. Raymond A. Winbush, *Introduction*, *in* SHOULD AMERICA PAY?, *supra* note 4, at xi, xii. Whatever the nomenclature, scholars agree that the current impetus for reparations has been fueled in part by the publicized successes of other reparation suits, such as suits against the United States by Japanese Americans who were interned during World War II and suits against European governments by Jewish and other victims of the Holocaust. *See, e.g.*, ROBINSON, *supra* note 4, at 204-24 (discussing the similarities between slaves and Jews during the holocaust in order to advance the argument that slaves are entitled to similar compensation); Brophy, *supra* note 4, at 499 (arguing that one factor that led to a discussion about reparation for slavery is the reparations of other groups, including "Native Americans, Holocaust victims, Japanese Americans interned during World War II, [and] South Africans"); Chisolm, *supra* note 5, at 714-15 (linking Black reparations debate to Japanese American reparations claims); Verdun, *supra*, at 646-55 (suggesting that the United States should admit its wrongful behavior in slavery by giving reparations, just as it admitted that it was wrong in treating Japanese Americans unfairly during World War II); Winbush, *supra*, at xii (presenting a table of payments made to Holocaust survivors).

6. Representative John Conyers (D. Mich.) first introduced a bill in 1989 that would have established a commission to study the effects of slavery and recommend appropriate remedies. The bill died in committee, and has been reintroduced (and repeatedly killed) every Congress since then. *See* H.R. 3745, 101st Cong. (1989); H.R. 1684, 102d Cong. (1991); H.R. 40, 103d Cong. (1993); H.R. 891, 104th Cong. (1995); H.R. 40, 105th Cong. (1997); H.R. 40, 106th Cong. (1999); H.R. 40, 107th Cong. (2001); H.R. 40, 108th Cong. (2003). Representative Conyers has stated, "I have re-introduced H.R. 40 every Congress since 1989, and will continue to do so until it's passed into law." John Conyers, Jr., *Major Issues—Reparations: The Commission to Study Reparations Proposals for African Americans Act*, *at* http://www.house.gov/conyers/news_reparations.htm (last visited Oct. 2, 2003) (on file with the American University Law Review).

In 1993, the Organization of African Unity (comprised of African governments) adopted a resolution asking the United States for reparations. ROBINSON, *supra* note 4, at 218-22. *See also* Tamar Lewin, *Calls for Slavery Restitution Getting Louder*, N.Y.

judicial redress have foundered. Congress has not been willing to pass reparations legislation[8] and courts have dismissed tort-based claims based on statutes of limitations and sovereign immunity grounds.[9]

Unexplored thus far is the alternative of bringing claims under the Takings Clause of the United States Constitution. The Takings Clause governs property owners' rights to just compensation when the government takes their property, stating that "nor shall private property be taken for public use, without just compensation."[10] The clause has spawned volumes of legal writing[11] and a considerable

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TIMES, June 4, 2001, at A1 (chronicling the momentum of the reparations movement and its significant political and legal events).

In 1997, then-President Clinton made statements suggesting that he was considering a national apology for slavery. However, the idea was eventually dropped. *See* Steven A. Holmes, *Idea of Apologizing for Slavery Loses Steam, at Least for Now*, N.Y. TIMES, Aug. 6, 1997, at A15 (discussing that President Clinton put aside the idea of a national apology to African Americans after listening to the opinions of advisory commission on race relations); *cf.* Brophy, *supra* note 4, at 500-01 (suggesting that the proposed apology for slavery arose due to society entering an "age of apology").

7. *See* Chris L. Jenkins & Hamil R. Harris, *Descendants of Slaves Rally for Reparations*, WASH. POST, Aug. 18, 2002, at C1 (reporting on the nations first mass rally for reparations, attended by thousands of protesters); Courtland Milloy, *Cash Alone Can Never Right Slavery's Wrongs*, WASH. POST, Aug. 18, 2002, at C1 (reporting on the reparations rally in Washington, DC, and suggesting that the current goal of the reparation movement is not money, but rather the "the educating of America about slavery"); Conrad W. Worrill, *The Millions for Reparations Rally: A Grand Success* (noting that more than 50,000 people attended the Washington, DC rally), *at* http://www.nbufront.org/html/BushTelegraph/WorrillsWorld/02_08_23_GrandSuccess.html (last visited Oct. 2, 2003) (on file with the American University Law Review).

8. *See* ROBINSON, *supra* note 4 (noting that federal reparations legislation has never made it out of committee, and therefore has never garnered serious debate).

9. *See* discussion *infra* Part IV.B.1-2 (discussing the different defenses that are available in takings claims).

10. U.S. CONST. amend. V.

11. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (arguing that the Takings Clause raises doubt as to the constitutionality of many modern governmental programs, such as zoning, rent control, workers' compensation laws and progressive taxation); WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995) (suggesting that the public should rely on the free market, rather than the judicial system, to protect from uncompensated takings); Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001) (presenting a framework under which givings, or governmental distributions of property, should be analyzed); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1964) (discussing the utility and fairness of the court-drawn line between compensable and non-compensable governmental takings); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (arguing that the political process should resolve the limits of the government's taking power and compensation for takings should be required only when the political process is not likely to consider property claims fairly).

amount of case law.[12] To go along with ordinary takings, scholars have examined areas such as regulatory takings,[13] zoning,[14] derivative takings,[15] and variations such as usings[16] or givings.[17] Some scholars have gone so far as to suggest that slave owners might have deserved compensation for the government taking—emancipation—of their slaves.[18] It is surprising, then, that the formidable guns of takings

12. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994) (holding that a condition to the granting of a redevelopment permit constituted a Takings Clause violation because the condition was not reasonably related to the proposed development); Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003 (1992) (finding that a landowner was due compensation under the Takings Clause where a regulation rendered his land useless); Nollan v. Cal. Coastal Council, 483 U.S. 825 (1987) (requiring the state to compensate the appellant because the imposed building permit condition constituted a taking); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (holding that the application of New York's Landmarks Law, which prevented the development of Grand Cent. Terminal, did not constitute a taking of appellants' property); Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) (holding that property may be regulated, but that should such regulation go too far, it will be recognized as a taking); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) (affirming the governmental taking of private property, and its conveyance to a private company when its purposes is to promote the public health and welfare).

13. *See generally* FISCHEL, *supra* note 11 (discussing the doctrine of regulatory takings and advancing an economic means by which to determine when a regulation becomes a taking that requires just compensation).

14. *See, e.g.*, EPSTEIN, *supra* note 11, at 263-72 (discussing and giving examples of how land use regulation can constitute a taking that requires compensation).

15. *See* Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 290-96 (2001) (arguing that uncompensated derivative takings are both inefficient and unfair; inefficient because the government is encouraged to exercise its eminent domain power even when doing so reduces net social welfare and unfair because it does not evenly distribute the cost of public burdens).

16. *See generally* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993) (suggesting that the Constitution's Public Use Clause be construed as the basis for a "jurisprudence of usings").

17. *See generally* Bell & Parchomovsky, *supra* note 15 (advocating the taxation of givings, which are governmental advantages bestowed upon individual private parties).

18. This idea was apparently first raised by James Madison. In a letter to abolitionist Robert Evans, Madison wrote that slaves "could not be constitutionally taken away without just compensation." Letter from James Madison to Robert Evans (June 15, 1819), *in* 8 THE WRITINGS OF JAMES MADISON 439-47 (1910). *See* Treanor, *supra* note 11, at 839 (discussing Madison's letter and its importance to determining an original understanding of the Takings Clause); *see also id.* at 851 (commenting further on Madison's belief that slaveholders were a group particularly threatened by unjust majoritarian expropriation of property); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS—THE COLONIAL PERIOD 136 (1978) (noting the unsuccessful proposal by Gouverneur Morris that the New York Constitution abolish slavery as soon as possible, "consistent with . . . the private property of individuals"); *id.* at 94-95 (noting arguments raised in Massachusetts that the Constitution should not be read to conflict with existing property rights in slaves).

The view that slaveowners deserved compensation after their slaves were freed was also argued by senators who opposed emancipation. *See* Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 444 n.41 (1989) (citing a statement in the Congressional Record by an opponent of emancipation that

scholarship have never trained on one of the greatest uncompensated takings in American history: the enslavement of millions of Africans for nearly half the nation's history, the government-sanctioned taking of their property rights of self-ownership, and the subsequent impoverishment of their descendants.[19] This Article begins the discussion of slavery as a Takings Clause violation.[20]

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uncompensated emancipation would violate the Takings Clause). For a modern discussion of the position that abolition of slavery was theft from slave owners, see, for example, YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS 105-13 (2d ed. 1997); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 72 (2000) ("[T]he Thirteenth Amendment itself expropriated legal 'property'—that is, slaves—without compensation."); Sanford Levinson, *The David C. Baum Memorial Lecture: Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*, 2001 U. ILL. L. REV. 1135, 1149 (2001) (suggesting that the provision in the Fourteenth Amendment limiting liability to slaveowners was necessary or else "a careful lawyer imbued with respect for the Takings Clause of the Fifth Amendment might suggest that the United States would indeed have a duty to compensate at least some slave owners for the loss of their property"); Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 24-28 (2000) (arguing that emancipation of slaves was one of a limited number of "extraordinary, even revolutionary, disruptions of property rights" in the country's history).

19. The only likely rival for the dubious honor of "greatest uncompensated taking on American history" would be the genocide and land seizure perpetuated against Native Americans. *Cf.* Rose, *supra* note 18, at 30-37 (arguing that the taking of land from Native Americans, like the emancipation of slaves, was also an "extraordinary" taking).

Two other major takings targeted at minority groups—the government seizure of Mormon property in the late nineteenth century, and the World War II era confiscation of property belonging to Americans of Japanese ancestry—were smaller in magnitude and involved fewer victims. *See generally* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 363-68 (1987) (discussing government oppression, including the confiscation of property, of Americans of Japanese ancestry); Nathan B. Oman, Book Review, *The Story of a Forgotten Battle: Reviewing the Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America*, 2002 BYU L. REV. 745, 750-51 (2002) (discussing government harassment of Mormons, including the taking of Mormon church property).

20. There does not appear to be any other treatment of this subject, either in articles, books, or non-legal publications. Only a few other sources even obliquely hint at the idea. For example, Harper's Magazine conducted an interview with four attorneys on legal theories of reparations, and one potential theory which was mentioned in passing (and quickly dismissed) was a potential suit under the Takings Clause for recovery of the "forty acres and a mule" promised to freed slaves after emancipation. *See Does America Owe a Debt to the Descendants of Its Slaves?*, *supra* note 4, at 83 (suggesting that voiding of the forty-acres promise by President Andrew Johnson could be compensable under the Takings Clause); *see also infra* notes 242-243 and accompanying text (discussing the "40 acres and a mule" proposal).

Reparations scholars have also suggested that slave descendants might have takings claims if the government improperly extinguished any vested tort claims for reparations they possessed. *See* Jon M. Van Dyke, *Reparations for the Descendants of African Slaves*, *in* SHOULD AMERICA PAY?, *supra* note 4, at 57, 61-62 (stating that slave descendants' "claim for reparations based on the slave experience [is] a property claim, protected by the Fifth Amendment of the United States Constitution"). The argument that slaves would have a takings claim if the government extinguished their

The first step in arguing that slavery was a Takings Clause violation is to establish that slaves, like other people, had a property interest in their persons—a property right of self-ownership. Part I of this Article examines the sources and characteristics of that property right. The second step is to examine the institution of slavery to determine whether it can be reconceptualized as a taking of the self-ownership property rights of slaves. Part II of this Article discusses the different ways slavery can be conceived as a taking.

Potential constitutional endorsement of slavery is a serious obstacle to viewing slavery as a taking. This problem is addressed in Part III, which concludes that any constitutional acceptance of slavery is not fatal to takings claims, especially given the strong parallels between the purpose of the Takings Clause and the facts of the slavery taking. Thus, Parts I through III establish that slavery should be considered a Takings Clause violation. Slavery contains the basic requirements for a takings violation, and any problems arising from characteristics unique to slavery are not fatal. Part IV then describes the prima facie takings case.

After making the case that slavery is a Takings Clause violation, Part V discusses potential effects of this conclusion in both judicial and legislative forums. Advocates bringing a takings claim in court could avoid some of the problems that have bedeviled traditional reparations suits, such as government sovereign immunity.[21] Conservative courts, which have been receptive to takings claims over the past century, may prove more amenable to these property-based claims for compensation than they have been towards tort-based reparations claims. In addition, the takings argument provides added support to convince legislators to provide compensation to descendants of slaves. Finally, Part VI summarizes what takings claims add to the reparations debate, and shows why there is much to be

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tort compensation claims is of course substantively different than the argument that slavery itself was a Takings Clause violation.

Carol Rose also hints at the potential taking, but leaves it unexplored, in her discussion suggesting that emancipation was a taking:

> Unquestionably, the institution of slavery depended on a prior expropriation—that is, of the slaves' bodies from themselves—a fact that certainly acted as a justification for emancipation. Nevertheless, once the institution of slavery was established, slaves represented a substantial capital investment for their owners, who could and did argue that uncompensated emancipation was an unconstitutional taking of their property.

Rose, *supra* note 18, at 24-25. Although recognizing in passing the taking of slaves' rights involved, Rose does not explore this taking in any greater detail.

21. *See* discussion *infra* Part IV.B.2 (discussing how the sovereign immunity defense does not apply to takings claims).

gained from recognizing that slavery, in addition to its many other characteristics, was also a national violation of the Takings Clause.

I. SLAVES POSSESSED A PROPERTY RIGHT OF SELF-OWNERSHIP

The first step in showing a Takings Clause violation is to establish the existence of the property right involved: self-ownership. Section A of this part examines the right's origin, Section B discusses the characteristics of that right, and Section C considers whether the right of self-ownership is a constitutionally protected property right.

A. A Conceptual Foundation

Philosophers have long discussed the idea that bodily integrity may be an independent property right. Some scholars have called the idea of a self-ownership right "possessive individualism."[22] While possessive individualism includes several slightly different strands of thought, the underlying idea is that each individual is "the proprietor of his own person or capacities, owing nothing to society for them."[23] This argument was made by John Locke, who famously stated:

> Though the earth, and all inferior creatures be common to all men, yet *every man has a property in his own person.* This nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. . . . For this labour being

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22. *See* CRAWFORD B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962) (suggesting that problems associated with modern liberal-democratic theory have their roots in a seventeenth century notion of possessive individualism, which suggests that a person is "essentially the proprietor of his own person or capacities" and owes nothing to the larger social whole); *see also* JOSEPH H. CARENS, DEMOCRACY AND POSSESSIVE INDIVIDUALISM: THE INTELLECTUAL LEGACY OF C. B. MACPHERSON (1993) (responding and critiquing the concept of possessive individualism as defined and analyzed by MacPherson); JULES TOWNSHEND, C. B. MACPHERSON AND THE PROBLEM OF LIBERAL DEMOCRACY (2000) (synthesizing and defending the philosophical and political critiques of MacPherson's democratic theory of possessive individualism and advocating for the incorporation of his principal into modern social theory).

Possessive individualism draws from Hobbes as well as Locke. MACPHERSON, *supra*, at 3-4. Possessive individualism has influenced modern property law discussion. For example, some scholars have used it to justify the existence of intellectual property law. One commentator writes that "the concept of 'authorship' and the term 'author' had acquired special weight by 1710 through their association with the theme of 'possessive individualism' in general social thought. John Locke's version of individualism at least implicitly identified the individual's proprietorship over himself as a function of 'authorship.'" Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 469-70 (1991) (internal citations omitted).

23. MACPHERSON, *supra* note 22, at 3.

> the unquestionable property of the labourer, no man but he can have a right to what that is once joined to . . . .[24]

This statement is consistent with other arguments made throughout Locke's writings.[25] One of Locke's similar statements is that a man's property includes his "Life, Liberty and Estate."[26] By including life and liberty as elements of property, Locke in turn incorporates his expansive conceptions of those terms into the idea of property.[27] And for Locke, a primary purpose for the very existence of government was the protection of this fundamental interest in property, which, if defined as used earlier in the same treatise, includes self-ownership.[28] The right of self-ownership is

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24. JOHN LOCKE, TWO TREATISES ON GOVERNMENT 128 (Mark Goldie ed., Everyman 1993) (1690) (emphasis added). *See generally* Jeffrey S. Koehlinger, *Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 IND. L.J. 723, 758-59 (1990).

25. *See, e.g.*, JOHN LOCKE, A LETTER CONCERNING TOLERATION 26 (James H. Tully ed., William Popple trans., 1983) (1689) (arguing that civil interests include "Life, Liberty, Health, and Indolency of Body"); LOCKE, *supra* note 24, at 204 (defining property as that "which men have in their persons as well as goods").

Extension of Lockean principles to cover slaves is probably not something Locke envisioned. *See* William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1768-70 (1996) (discussing Locke's authorship of the pro-slavery Carolina constitution); cf. LOCKE, *supra* note 24, at 125-27 (discussing property ownership in a servant's labor); MACPHERSON, *supra* note 22, at 215-17 (discussing Locke's conception of labor of servants). However, Locke did make several fierce critiques of slavery, including a rhetorical denunciation that begins the first Treatise on Government. *See* LOCKE, *supra* note 24, at 5 ("Slavery is so vile and miserable an estate of man, and so directly opposite to the generous temper and courage of our nation; that 'tis hardly to be conceived, that an Englishman, much less a gentleman, should plead for it.").

26. LOCKE, *supra* note 24, at 157.

27. For example, Locke's writings on liberty state that man has "a liberty to dispose, and order, as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is; and therein not to be subject to the arbitrary will of another, but freely follow his own." *Id.* at 142.

Similarly, there is some overlap between the idea of self-ownership in one's property right, and bodily integrity as a life right. One commentator has written, "if life means what it did when the Framers drafted the Constitution, bodily integrity is part and parcel of the concept." Sheldon Gelman, "*Life" and "Liberty": Their Original Meaning, Historical Antecedents, and Current Significance in the Debate over Abortion Rights*, 78 MINN. L. REV. 585, 588 (1994). That author argues that the Framers believed that life, rather than liberty, was "the most basic right"; and "this life include[d] more than mere biological existence; it also encompasses physical integrity, health and indolency of body, and even a minimum quality of life." *Id.* (internal citations and quotations omitted).

28. Locke wrote that "[t]he great and chief end therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property." LOCKE, *supra* note 24, at 178. In *Watson v. Branch County Bank*, one commentator, regarding this passage, wrote:

> John Locke defined "property" to include the sum of the individual's legally cognizable attributes, "that is, his Life, Liberty and Estate." When he wrote, "The great and chief end . . . of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property," Locke was referring to this broad conception of property.

subject to certain limitations in Lockean theory; for example, one's property right in oneself is not alienable.[29]

The Framers of the Constitution were acutely aware of Locke's writings, and Locke's ideas influenced them in drafting the Constitution and its amendments.[30] Statements made by James Madison seem to indicate that he espoused this idea of a property interest in one's own body. He argued that property "embraces everything to which a man may attach a value and have a right."[31] While Locke was not the only philosopher or writer to influence the Framers,[32] there is little reason to doubt his influence; his strong ideas on self-ownership are not contradicted by other major influential figures of the time.[33] In fact, a similar statement was made by Chief Justice John Marshall, who wrote:

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380 F. Supp. 945, 968 n.19 (W.D. Mich. 1974), *rev'd on other grounds*, Watson v. Branch County Bank, 516 F.2d 902 (6th Cir. 1975) (internal citations omitted).

29. Locke's statement that "every Man has a Property in his own Person. This no Body has any Right to but himself" can be read to support the inalienability of self-ownership. LOCKE, *supra* note 24, at 305-06.

30. *See, e.g.*, LAURENCE TRIBE & MICHAEL DORF, ON READING THE CONSTITUTION 70-72 (1991) (asserting that Locke's theories on natural rights provided a basis for the Framers' views on private property); Joseph Becker, *Procrustean Jurisprudence: An Austrian School Economic Critique of the Separation and Regulation of Liberties in the Twentieth Century United States*, 15 N. ILL. U. L. REV. 671, 679 (1995) (noting that Jeffersonian and Lockean natural law theory greatly influenced the Framers of the Constitution); Koehlinger, *supra* note 24, at 731-35 (asserting that Locke's liberal traditions inspired the prominent leaders of the United States during its early history).

31. James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, *in* 14 THE PAPERS OF JAMES MADISON 266-68 (1983); Becker, *supra* note 30, at 679 (noting that Madison's views on property extended to such things as one's opinions and beliefs).

32. Gordon S. Wood has suggested that the Framers, though steeped in a Lockean conception of property, were moving beyond that conception by the 1780s. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 219 (1998). If true, this would make less compelling the notion that the Framers meant to enact a Lockean conception of property into the Takings Clause. However, Wood argues that this conception was widely held prior to the framing; thus, if the Framers had wished to exclude a Lockean concept of property, they might have been expected to do so explicitly.

William Treanor has also argued that Locke had less of an influence on the Framers than Epstein and others have suggested, positing, "Epstein's equation of Lockean ideology with the political thought behind the Takings Clause is incorrect. While it would be wrong to say that Locke had no influence on the founding generation, it is equally incorrect to describe Lockean liberalism as the ideology of the framing." Treanor, *supra* note 11, at 824.

33. For example, Jeremy Bentham's idea that property relies on the stability engendered by the protection of investment-backed expectations dovetails well with the existence of property rights of self-ownership. JEREMY BENTHAM, THE THEORY OF LEGISLATION 111-13 (C.K. Ogden ed., 1931) (1802) ("The idea of property consists in an established expectation; in the persuasion of being able to draw such and such advantage from the thing possessed . . . .").

In addition, self-ownership seems implicit in Bentham's account of how self-interest gives rise to societal regimes of property protection. This idea is in turn drawn from Hume's theory on property, which was based on security. DAVID HUME,

> That every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission.[34]

To be clear, these statements express an ideal of self-ownership, which some of the Framers, due to racial prejudices, may not have felt extended to Blacks or slaves. For example, Marshall owned slaves[35] and Locke drafted the pro-slavery Carolina constitution.[36] However, despite any prejudices, what these writers actually articulated was an ideal of self-ownership that, when examined free from racist ideas, seems to apply equally to Blacks, including slaves.

Numerous legal commentators and philosophers have similarly advocated the recognition of some form of self-ownership.[37] Margaret Radin writes, "the body is quintessentially personal property because it is literally constitutive of one's personhood."[38] Others have suggested expanding the principle; famously, Charles Reich suggested granting property protection to government benefits.[39]

A TREATISE OF HUMAN NATURE 542 (Ernest C. Mosser ed., Penguin Books 1969) (1739) ("Our property is nothing but those goods, whose constant possession is establish'd by the laws of society; that is, by the laws of justice.").

34. The Antelope, 23 U.S. (10 Wheat.) 66, 120 (1825). *But cf.* Guyora Binder, *The Slavery of Emancipation*, 17 CARDOZO L. REV. 2063, 2068 n.28 (1996) (suggesting that Marshall slightly overstated Locke's argument).

Despite his eloquent language, Marshall sanctioned the slave trade in *The Antelope*, based on a belief that positive law overruled the natural law principle. *See* 23 U.S. at 120 ("That [slavery] is contrary to the law of nature will scarcely be denied."); *see also* Binder, *supra*, at 2077-81 (discussing Marshall's opinion as an example of "the interpenetration of the critique and legitimation of slavery in antebellum American culture").

35. Samuel R. Olken, *Chief Justice John Marshall in Historical Perspective*, 31 J. MARSHALL L. REV. 137, 160 (1997).

36. *See* Wiecek, *supra* note 25, at 1768-70.

37. *See* Carole Pateman, *Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts*, 10 J. POL. PHIL. 20, 22-27 (2002) (noting numerous statements by diverse philosophers accepting a principle of self-ownership); *see also* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 53-60 (1995) (arguing that as a system is "vastly inferior to a position of self-ownership."); THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860, at 32-33 (1996); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 171-72 (1974); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 177-83 (1990).

38. Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 966 (1981) [hereinafter Radin, *Property and Personhood*]. Radin suggests that the tort of assault is based on this property interest: "Interference with my body is interference with my personal property." *Id.*

39. *See* Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965) (relating social welfare to self-ownership and discussing how to protect that welfare); Charles Reich, *The New Property*, 73 YALE L.J. 733, 786-87 (1964) (arguing that government benefits must be considered a property right in order to protect the individual from totally discretionary government power). These two articles by Reich were cited by Justice Brennan in his opinion in *Goldberg v. Kelly*, which held that removal of welfare rights was subject to constitutional constraints. 397 U.S. 254, 265 n.8 (1970) (citing Reich's articles as

Self-ownership can be viewed as simply ownership of one's physical body and bodily integrity.[40] Legal scholars widely accept this minimum definition of self-ownership.[41] A more expansive definition would view self-ownership as ownership of one's liberty—less about direct ownership of one's body, and more about ownership of the ability to make choices.[42] In that sense, the right of self-ownership can be seen as related to the constitutional rights of privacy and of familial integrity.[43] Under either a limited or an expanded right of self-ownership, slaves were the owners of that right.[44]

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support for the proposition that "[i]t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'"). If government benefits are a property right, then ownership of one's body—a more important interest—should be considered a property right as well.

40. Wesley Newcomb Hohfeld stated that bodily integrity was a type of *in rem* property right. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1918), *reprinted in* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 85 (Walter Wheeler Cook ed., 1964). Hohfeld also felt that individual liberty, and even rights of consortium and personal privacy, could be conceived as *in rem* property rights. *Id.*; *see also* Thomas Merrill & Henry Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 782 (2001) (noting that Hohfeld believed that *in rem* rights related to both tangibles and intangibles).

41. *See, e.g.*, BARZEL, *supra* note 18, at 113 ("The current prohibition of slavery implies that each individual is the owner of the capital asset embedded in himself or herself."); EPSTEIN, *supra* note 11, at vii (theorizing that property law encompasses rights that people have both in themselves and in external things). *Cf.* Radin, *Property and Personhood*, *supra* note 38, at 965 (suggesting that Lockean analysis shows self-ownership in the physical body); Margaret Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1905 (1987) [hereinafter Radin, *Market-Inalienability*] (arguing that a person cannot have free will if they are subject to commodification). *But see* Michelle Bourianoff Bray, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 220 (1990) (arguing that there is currently no defined legal position regarding property rights in the human body).

42. Self-ownership can also be seen as a right to one's morality—that decisions a person makes will reflect her choices. *See* EPSTEIN, *supra* note 37, at 53 (equating self-ownership with autonomy); Radin, *Market-Inalienability*, *supra* note 41, at 1885-86 (discussing self-ownership as individual control). In this sense, self-ownership is not unlike the ownership of one's own soul. *See generally* RICHARD SWINBURNE, EVOLUTION OF THE SOUL (1997) (discussing concept of the soul in modern civilization).

Self-ownership is also, in a sense, ownership of one's identity, including one's racial identity. *Cf.* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1724-37 (1993) (critiquing the proposition that "American law has recognized a property interest in whiteness").

43. *See generally* Moore v. City of E. Cleveland, 431 U.S. 494, 506 (1977) (finding that an ordinance that limited occupancy of a dwelling unit to members of a single family, but defined family to exclude grandchildren, intruded on family sanctity and was unconstitutional on due process grounds); Roe v. Wade, 410 U.S. 113, 166 (1973) (holding that state anti-abortion laws violated plaintiff's right to personal liberty); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (finding an implicit right to privacy in the penumbra to the Bill of Rights to the Constitution that includes that right to use birth control); *see also id.* at 502 (White, J., concurring) (underscoring that the Fourteenth Amendment includes the right to marry and raise a family). *But cf.* Gerber v. Hickman, 291 F.3d 617, 620-23 (9th Cir. 2002) (en banc) (holding that prisoners do not have a right to procreate).

44. *But cf.* Binder, *supra* note 34, at 2093-94 (suggesting that self-ownership is a

B. Characteristics of the Self-Ownership Right

The property right of self-ownership has two salient characteristics: it is universal and it is inalienable. These characteristics result in an unusual treatment of the self-ownership right under property law. This Section examines these characteristics and how they relate to the treatment of slavery under the takings clause.

1. Universality

Self-ownership is universal because it derives from the self, and all people have a self. Philosophers who discuss the existence of self-ownership agree on its universality.[45] The universality of self-ownership is a natural derivative of the principle of equality: All people, being equal, have self-ownership.[46] The acceptance of this principle by the Framers is suggested in the Declaration of Independence, which states, "all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness."[47] The universality of self-ownership has a long philosophical history.[48] As applied to the discussion of slavery, the universality of self-ownership means that every slave possessed this property right.

2. Inalienability

The property right of self-ownership is inalienable. That is, unlike many other property rights that may be freely traded, bought, sold, or otherwise commodified, the right of self-ownership can never be

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spectrum and denying that enslavement fully encompassed that spectrum).

45. *See* MACPHERSON, *supra* note 22, at 231-35 (noting that an essential part of Locke's individualism is the notion that every person is "the absolute proprietor" of his or her own person); Pateman, *supra* note 37, at 22-27 (noting that self-ownership is a standard term that is widely accepted and needs no further explanation).

46. *See* Radin, *Property and Personhood*, *supra* note 38, at 965-66 (exploring the notion that if one owns one's body, then everyone has self-ownership rights).

47. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Similarly, Article 1 of the Universal Declaration of Human Rights states: "All human beings are born free and equal in dignity and rights." G.A. Res. 217A (III), art. I, U.N. Doc. A/810 (1948), *available at* http://www.unhchr.ch/udhr/ (on file with the American University Law Review).

48. *See* LOCKE, *supra* note 24, at 287-88 (noting that "every man" possesses self-ownership); MACPHERSON, *supra* note 22, at 229-35; Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 Ind. L.J. 803, 807-09 (2001). To the extent that self-ownership includes a right to make choices, a right to enjoy the benefits of one's good choices and the consequences of harmful choices, it is akin to the soul, which has traditionally been of universal character. *See generally* ETIENNE GILSON & THOMAS LANGEN, MODERN PHILOSOPHY: DESCARTES TO KANT 62-72 (1963) [hereinafter MODERN PHILOSOPHY] (describing Cartesian conception of the universality of the soul).

severed from its source, the person.[49] Inalienability of personhood is important because the alternative, commodification, can have deleterious effects.[50] Commodification of the self, according to Radin, "undermines personal identity by conceiving of personal attributes, relationships, and philosophical and moral commitments as monetizable and alienable from the self" and does "violence to our deepest understanding of what it is to be human."[51] Such depersonalization is avoided through the use of an inalienability rule,[52] the use of which is consistent with the philosophical

49. Margaret Radin writes that inalienability depends upon "the notion of alienation as a separation of something—an entitlement, right, or attribute—from its holder." Radin, *Market-Inalienability*, *supra* note 41, at 1852. *See* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw. U. L. Rev. 480, 491 (noting that *Bailey v. Alabama*, 219 U.S. 219 (1911), held that thirteenth amendment personal liberty rights are inalienable).

Not all scholars accept the idea of inalienability of personhood. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-12 (1972) (arguing that personhood is alienable as evidenced by society's valuation of personal attributes and moral commitments, among other things); *see also* Richard Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 971-72 (1985) (suggesting that alienation should only be restrained where required by harmful externalities). If self-ownership is to be considered alienable, as these scholars have suggested, then the taking of self-ownership should be a compensable taking like the taking of other alienable property.

50. Commodification is a process of assigning an economic value to an item. Radin argues that personhood, or self-ownership, should not be subject to commodification. Radin, *Market-Inalienability*, *supra* note 41, at 1905-15.

51. Radin, *Market-Inalienability*, *supra* note 39, at 1905-06. Another writer notes:

> Complete alienability over one's body, however, may negatively affect personhood. An individual's integrity is affected negatively by being discussed in market rhetoric as a fungible commodity, because such terminology ignores the unique qualities and differences between individuals. For example, many commentators object to pornography because it reifies and commodifies women. Women become sex objects, rather than sexual individuals, who have a monetary value based on their appearance or sexual repertoire. Similarly, recognizing body parts as fully alienable property would encourage the perception of body parts as interchangeable commodities and undermine the recognition of the human body as the physical embodiment of the personality.

Bray, *supra* note 41, at 241 (citations omitted).

Recent debates have touched on the issue of payment for another's reproductive ability. Another debate has emerged over controversial offers to pay crack addicts, who are mostly Black, to be sterilized. *See* Cecilia M. Vega, *Sterilization Offer to Addicts Reopens Ethics Issue*, N.Y. TIMES, Jan. 6, 2003, at B1 (describing the ethical concerns about paying men and women for sterilization).

52. Radin, *Market-Inalienability*, *supra* note 41, at 1905-15 (proposing that personal identity is undermined when one views personal attributes such as politics, work, religion, sex, and moral commitments as commodified objects rather than integral components of oneself); *see also* Bray, *supra* note 41, at 241 (proffering that the law should recognize the noncommodification of the human body and adopt approaches that will protect the personal significance of potential property such as reproductive or sexual services).

foundations of the concept of self-ownership.[53] This approach avoids dangers such as economic coercion that may arise from alienability.[54]

The inalienable nature of the self-ownership property right is not the same as a person's property right in removed body parts, which some courts have deemed to be alienable property. *Moore v. Regents of the University of California*[55] held that deceptive removal of fluids and spleen from a patient was not conversion.[56] The *Moore* majority found that the plaintiff's claim failed because no "ownership or right of possession" was interfered with, despite the taking of his body parts without his informed consent.[57] Similarly, courts have been divided on the alienability of reproductive matter.[58]

Scholars have debated the importance and application of alienability.[59] Notwithstanding the differing views on alienability of body parts or reproductive material, it seems clear that the right of self-ownership over one's contiguous body is not affected. A person's

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53. *See supra* Part I.A (demonstrating that Locke's idea of self-ownership included inalienability).

54. *See* Bray, *supra* note 41, at 242 (asserting that an exchange of monetary compensation for body parts will unduly compel individuals to sell their bodies, thus further dividing society into classes based on wealth).

55. 793 P.2d 479 (Cal. 1990).

56. *Id.* at 488-89.

57. *Id.*

58. In a series of decisions pertaining to a probate case, the California appeals court noted that frozen sperm was not normal personal property. Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993) (holding that the probate court had jurisdiction over the decedent's frozen sperm because decedent's interest in the sperm gave rise to a property interest), *rev'd*, 59 Cal. Rptr. 2d 222 (Cal. Ct. App. 1996) (holding that the plaintiff was entitled to her husband's frozen sperm after his death). For background on the case, see Keith Sealing, *Teaching Fundamental Learning Techniques with* Moore v. Regents of the University of California, 46 ST. LOUIS U. L.J. 755, 770-72 (2002). However, in an unusual disposition, the court found that the sperm was property only as to the decedent's girlfriend, since only she could use it. *Hecht*, 59 Cal. Rptr. 2d at 227.

In another case dealing with reproductive material, a court refused to enforce a contract granting a divorced wife custody and use of viable frozen pre-embryos, finding that standard property and contract rules did not apply where a man might become a parent against his will. A.Z. v. B.Z., 725 N.E.2d 1051, 1057 (Mass. 2000). Finally, there is some debate in whether a self-ownership right includes the right to end one's own life. *See* Roger Friedman, *It's My Body and I'll Die if I Want To: A Property-Based Argument in Support of Assisted Suicide*, 12 J. CONTEMP. HEALTH L. & POL'Y 183 (1995). These and the many other cases and articles on the topic are interesting and reflect the difficulty courts have experienced in dealing with these complicated issues. However, these cases are neither controlling nor particularly applicable in the context of slaves' self-ownership rights.

59. For example, the holding in *Moore* has been widely criticized. *See, e.g.*, Bray, *supra* note 41, at 238-39 (arguing that *Moore* is bad policy because it failed to "affirmatively delineate individuals' interest in their bodies"); Jennifer Lavoie, Note, *Ownership of Human Tissue: Life After* Moore v. Regents of the University of California, 75 VA. L. REV. 1363 (1989) (arguing that the *Moore* decision to treat human tissues as property and subject to the tort of conversion was problematic in that it violates established regulations, case law, and legislation).

property right of self-ownership is qualitatively different than rights to body parts or reproductive material.[60]

The inalienability of the right of self-ownership distinguishes it from other property rights in ways that are highly relevant when analyzing slavery. For example, one potential obstacle for bringing a takings claim—the possibility of third-party ownership—is rendered moot because of the inalienable nature of the right of self ownership.

Another potential obstacle for bringing a takings claim—the possibility of third-party ownership—is also rendered moot because of the inalienable nature of the right of self-ownership. That is, if self-ownership were a type of normally alienable property, it might be necessary to inquire whether slaves themselves held ownership of this property or whether it had been previously transferred to third parties such as kings or rulers.[61] The inalienable nature of self-ownership obviates the need for any such inquiry.

Importantly, inalienability does not preclude compensation for wrongful takings. While the Takings Clause may seem designed to compensate the loss of alienable property, it does not distinguish

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60. The *Moore* court based its holding on the fact that the cells were no longer part of Moore's person:

> Since Moore clearly did not expect to retain possession of his cells *following their removal*, to sue for their conversion he must have retained an ownership interest in them. But there are several reasons to doubt that he did retain any such interest. First, no reported judicial decision supports Moore's claim, either directly or by close analogy. Second, California statutory law drastically limits any continuing interest of a patient in excised cells. Third, the subject matters of the Regents' patent—the patented cell line and the products derived from it—cannot be Moore's property.

Moore, 793 P.2d at 488-89 (internal citations omitted) (emphasis added). Without such a limitation, extension of *Moore* might pose a problem for the entire theory of self-ownership. After all, if the government can take a spleen without compensation, then why not a kidney, a leg, a heart, or even an entire body? This kind of slippery-slope parade of horrors was invoked by a *Moore* dissenter, who compared the taking of Moore's organs to slavery. *Id.* at 515 (Mosk, J., dissenting). *See also* Radin, *Property and Personhood*, *supra* note 38, at 966 (arguing that it is "appropriate to call parts of the body property only after they have been removed from the system").

61. As unpleasant as such a possibility sounds today, it could certainly be a legal possibility. Legal history shows the existence of this structure. For example, under Roman law, families were under the almost complete dominion of the head of the family, typically the patriarch. The head of the family had power over the children, including selling them into slavery to satisfy his debts. *See generally* Lisa S. Morin, *Roman Family Law and Traditions* (describing the Roman patriarch's rights and total control over the family), *available at* http://bama.ua.edu/~morin002 (last visited Oct. 2, 2003) (on file with the American University Law Review). Similarly, slaves' original property rights may have resided in a family head, a head-of-state, or other third party.

In addition to recognizing an inalienable right of self-ownership, there are other ways to avoid third-party ownership problems. For instance, if the right of self-ownership was considered alienable, its original owner would of course be the slave himself. Under such a scenario, it might be possible to trace a chain of title and show a taking.

between alienable and inalienable property. Nothing in the nature of inalienability prevents property owners whose property was wrongfully taken from seeking redress. If anything, compensation is *more* appropriate for the greater harm of taking inalienable property. Given society's decision, as embodied in the Takings Clause, to regularly compensate for takings of entitlement protected by a property rule, compensation should be granted *a fortiori* for takings of entitlements protected by the stronger inalienability rule. In such cases, compensation does not compromise the underlying entitlement, but rather constitutes recognition of a wrong.[62] Such one-time compensation is unlikely to lead to commodification or future markets in self-ownership, and thus is consistent with characterizing personhood as inalienable.

C. Self-Ownership as Constitutionally Protected Property

The Supreme Court has emphasized that all takings claimants must show that they possessed a constitutionally protected property interest, an exercise complicated by the lack of a definition within the Constitution for the term "property."[63] To further complicate matters, the Court has been inconsistent on how constitutional property is to be defined. On the one hand, the Court stated that, "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."[64] Such language suggests that state law would

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62. *See* Matsuda, *supra* note 19, at 394-95 (discussing the appropriateness of monetary reparation for wrongdoing). The government should not have the power to turn people into slaves, but given that it did, it should at the very least acknowledge the wrong by paying compensation. In this instance, compensation is a punishment meant to express outrage at the act, not a statement that the act can be easily "paid for" in cash. *Cf. id.* at 395 (suggesting that monetary reparations cannot make up for past wrongs, but rather have a symbolic function in recognizing the harm). Such punishment, like punitive damages, may appropriately be greatly in excess of the actual harm caused, in order to signal the state's belief that the behavior must be prevented. The harm of slavery is clearly the enslavement itself, not the mere failure to compensate. *See* Anthony J. Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y.U. ANN. SURV. AM. L. 651, 657 (2003) ("What was wrong about slavery . . . was not . . . that they were not paid. What was wrong about chattel slavery is rooted in the ideology of racial oppression.").

63. *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 888 (2000) (noting that before the Court entertains whether a property interest has been taken, it first analyzes whether a claimant has a cognizable interest in such property); *id.* at 891 & n.20 (citing commentators suggesting that the meaning of "property" in the takings context is not well defined); EPSTEIN, *supra* note 11, at 22 (suggesting how to define property since it is not defined in the Constitution).

64. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) (holding that state law failed to substantiate that a college professor had a protected interest in continued

determine whether a property right existed.[65] On the other hand, the Court has also suggested that a federal standard exists, writing that "[t]he hallmark of a constitutionally protected property interest is the right to exclude others."[66]

Although the Court has been less than clear on how the two standards interact,[67] self-ownership is protected under either standard. As property over which the owner has the right to exclude others, self-ownership is protected under the federal standard. Under the state law approach a more complicated analysis seems to be required.[68] However, given the broad philosophical support for self-ownership discussed above, self-ownership could be considered one of the common law "background principles of property law" which are assumed to be constitutionally protected property interests under state law.[69]

II. RECONCEPTUALIZING SLAVERY AS A TAKING

Part I established the existence of a constitutionally protected property right of self-ownership. This Part examines whether slavery can accurately be called a taking of that property right. Section A contains preliminary inquiries on whether slavery was a property institution and on whether the same government exists today as existed at the time of the taking. Section B addresses how slavery fits into the different branches of takings law: physical takings,

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employment with his employer, and as such, the employer did not violate the professor's due process rights by not giving reasons for their decision not to re-hire him); *see also* Phillips v. Wash. Legal Found., 524 U.S. 156, 163-68 (1998) (noting that the Constitution does not create property interests, but instead protects such interests that are created by an independent source such as state law).

65. *See* FISCHEL, *supra* note 11, at 66 (arguing that, under Takings Clause analysis, state law sources establish what constitutes a cognizable property interest).

66. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999).

67. *See* Merrill, *supra* note 63, at 895-915 (discussing the incongruity of these different standards).

68. A state-by-state analysis of property law would be quite complicated and is beyond the scope of this Article. Among the complicating factors are that numerous states did not exist at the adoption of the Takings Clause; each state has its own takings clause, adopted at different times, and including different protections; and each state has different case law on takings.

In addition to the parsing of various state laws required to establish legal standards, any *allocation* of slaves to different states would be a terribly complicated project. For example, slaves often moved in interstate commerce and thus were subject at times to the laws of one state, and at times to the laws of another; some states which were created from parts of other states or other nations; some states existed as federal territories.

69. *Phillips*, 524 U.S. at 168. It seems unlikely that any state law specifically proscribed the recognition of slaves' self-ownership.

regulatory takings, and the theoretical areas of derivative takings and givings.

A. Preliminary Inquiries

There are two areas of preliminary inquiry. The first is whether slavery was an institution of property at all, or simply a system of contracts; and the second is whether the government entity that existed during slavery can be considered the same government entity as exists today.

1. Determining whether slavery constituted an institution of property or contract

Takings compensation is only available for interference with property. No taking would lie if slavery was a system of contracts[70] or other laws.[71] This Section analyzes whether slavery is properly considered a property institution.

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70. Even if slavery was viewed as an institution of contract, there might be reasons why the Takings Clause would trigger. Commentators have suggested that *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which held that a condition requiring property owners to grant the public an easement across their beachfront property constituted a compensable taking, was actually a case involving a bargain and exchange. The Supreme Court took exception to the "terms of [the] trade" and mandated compensation because "the 'bargain' between the coastal commission and Nollan was so one-sided as to be unconscionable." FISCHEL, *supra* note 11, at 58. The same can be said of slavery; if indeed slavery involved a contract between owners and slaves, the bargain involved was also "so one-sided as to be unconscionable" and would thus merit takings compensation. *Id.* Epstein makes a similar point in analyzing whether or not freedom of contract ought to allow one to enter into a contract of slavery. *See* RICHARD EPSTEIN, FORBIDDEN GROUNDS 20 n.6 (1992) (stating that the idea of allowing self-sale into slavery is a "very hard question" since such sales would likely be "tainted with incompetence, fraud, and duress"); NOZICK, *supra* note 37, at 331 (allowing for "voluntary" slavery entered into by contract).

71. There is some evidence that at least some slaves had their legal status changed through operation of the criminal law. For instance, many Blacks were sentenced to slavery in Africa and sold to traders as punishment for criminal offenses. *See* ADU BOAHEN ET AL., TOPICS IN WEST AFRICAN HISTORY 108-10 (2d ed. 1986); *cf.* David Galenson, *Indentured Servitude*, *in* DICTIONARY OF AFRO-AMERICAN SLAVERY 351 (Randall M. Miller & John David Smith eds., 1988) (stating that more than 300,000 convicts were sentenced to transportation to America and sold as indentured servants). However, in the case of slaves, often this "criminal" punishment was completely arbitrary, with new crimes punished retroactively in proportion to a slave trader's needs. *Id.* This suggests that many "criminal" cases would not pass muster in the American legal system, where generally, in the absence of the violation of a known criminal law, there is no punishment. This is the criminal law maxim of *nula poena sine lege*. *See* Beharry v. Reno, 183 F. Supp. 2d 584, 590 (E.D.N.Y. 2002) (discussing the history of the legal maxim *nula poena sine lege* that recognizes that states may only punish people for committing a crime if a statute authorizes such punishment before the crime is committed).

a. Similarities to indenture and peonage

One might be tempted to characterize slavery as a system of contract because slavery has historically been connected with indenture, and indentured servants entered into their indentures through contracts.[72] Additional evidence of slavery as a contract regime might be adduced from the legal treatment of peonage, which replaced slavery in many areas after emancipation and has been termed "de facto slavery."[73] Legally, peonage, which commentators find so similar to slavery, was treated as a contract regime.[74]

Slavery, however, differed from both indenture and peonage in a very important respect. Slavery was a system of *in rem* rights—that is, vaguely defined rights enforceable against a large body of undetermined parties—and such rights have traditionally been associated with property.[75] In contrast, peonage and indenture involved *in personam* rights—more precisely, defined rights enforceable against specific parties—and those kinds of rights have traditionally been associated with contract.[76] For example, a contract between A and B might create a right for A to be paid one hundred dollars for B to receive specified goods. These precisely defined rights against specified parties are typical *in personam* rights, which are normally associated with contracts. If B owns property, she may have a right of quiet enjoyment, enforceable against any party. That vaguely defined right, enforceable against an indeterminate number of parties, is a typical *in rem* right.[77]

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72. *See* Wiecek, *supra* note 25, at 1715-25 (1996) (discussing indenture); *see also* Galenson, *supra* note 71, at 351 (noting that large numbers of white immigrants used indenture as a means of financing transatlantic passage, signing contracts to work for planters for a set number of years in exchange for those planters paying their fare).

73. *See* Aziz Z. Huq, Note, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351, 354-55 (2001) (examining the history and statutory authorization of peonage as a system of coerced labor). Some commentators have even suggested that peonage was worse than chattel slavery. *See* 1 I WAS BORN A SLAVE xxvii (Yuval Taylor ed., 1999) (noting that peonage was "in some ways even worse" than slavery, since masters had no capital invested in peons and thus could mistreat them "without monetary loss").

74. *See* Huq, *supra* note 73, at 379-84 (stating that federal courts defined peonage narrowly to require "indebtedness" resulting from a contractual agreement).

75. *See* HOHFELD, *supra* note 40, at 70-74 (describing *in rem* rights as enforceable against the world); *see also* Merrill & Smith, *supra* note 40, at 776-79 (noting that *in rem* rights are associated with property rights).

76. *See* HOHFELD, *supra* note 40, at 70-74 (describing *in personam* rights as those rights that either reside in or are available against a single person); *see also* Merrill & Smith, *supra* note 40, at 776-79 (noting that *in personam* rights are associated with contract rights).

77. *See* Merrill & Smith, *supra* note 40, at 776-79.

Indentured servants obligated themselves to serve a particular master for a specific length of time.[78] The master's rights, defined and controlled by the indenture and enforceable only by the master, were *in personam*. While slavery granted some *in personam* rights to slave owners, unlike indenture, it had a significant *in rem* component. Specifically, slavery created numerous *in rem* rules—rights that the community possessed against slaves. Depending on the jurisdiction, slaves were subject to legal prohibitions on owning property, making contracts, inheriting property, marrying, voting, or obtaining an education.[79] Such restrictions were *in rem* because they could be enforced by the community, and not just by specific individual rightholders.[80] Slavery's reliance on *in rem* rights demonstrates that it was a property institution, unlike the contract-based indenture system.[81]

Peonage is similarly distinct from slavery. As one commentator notes, peonage "approximated slavery in substance, if not in legal form."[82] Peons, like indentured servants (and unlike slaves) were subject to specific contractual obligations to a certain employer, who was defined through a relationship of debt.[83] The rights granted were *in personam* with respect to that employer, not *in rem* rights enforceable by other members of the community.

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78. *See* Galenson, *supra* note 71, at 352-54 (noting that indentured servants were bound to obey their master, who determined their work, living conditions, treatment, and punishment for a contractually specified length of time that usually ranged from four to ten or more years).

79. *See, e.g.*, KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH 208 (1956) (recounting that slaves were not to be educated, even by their masters, but rather were to be manual laborers under the supervision of white men); Katherine Hunt Federle, *Children, Curfews, and the Constitution*, 73 WASH. U. L.Q. 1315, 1340-43 (discussing slave codes that "prohibited slaves from marrying, possessing firearms, learning to read and write, and suing their owners"); Wiecek, *supra* note 25, at 1767-68 (discussing New York laws that prohibited, *inter alia*, slaves from leaving the plantation without a pass).

80. One commentator refers to these restrictions on slave behavior as "public rights," similar in nature to an exercise of the police power. Thomas D. Russell, *A New Image of the Slave Auction: An Empirical Look at the Role of Law in Slave Sales and a Conceptual Reevaluation of Slave Property*, 18 CARDOZO L. REV. 473, 490-91 (1996). "Viewed conceptually, slave property was not just a relationship between one individual and a slave . . . Instead, slave property was also the legal relationship among a number of non-slave individuals." *Id.* at 480.

81. This conclusion dovetails with the statement by Hohfeld, perhaps the premier scholar on the division between *in rem* and *in personam* rights, that the right to bodily integrity was an *in rem* property right. *See* HOHFELD, *supra* note 40.

In addition, indentures were traditionally given in exchange for consideration, while slavery was not. *See supra* note 72 (noting that indentures were generally given in exchange for payment of the servant's transportation to America). *But cf.* Galenson, *supra* note 71 (noting that some indentures were imposed as part of a criminal sentence).

82. Huq, *supra* note 73, at 359.

83. *Id.* at 379-80.

Analysis of the laws of slavery also shows that they were derived from English common law of property.[84] The conclusion that slavery was a property institution is supported by the treatment of slaves as property in government transactions. For example, slaves were auctioned in probate sales, which was standard treatment of a decedent's property, not his contracts.[85]

b. Self-purchase and voting

Two thorny issues remain which might weigh against classification of slavery as a property institution: the existence of self-purchase, which is allowing "property" to buy itself back; and the partial counting of slaves for representation purposes. A small number of slave owners allowed some of their slaves to save money towards self-purchase. Slaves often earned this money by working for third parties on weekends.[86]

Self-purchase is certainly unusual in a property regime. However, the phenomenon may have simply been an attempt to ameliorate high supervision costs by giving slaves greater economic incentive to work.[87] There are also suggestions that the device was used to control

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84. MORRIS, *supra* note 37, at 37-39, 104-07.

85. The auction of slaves showed that they were treated as property for the purposes of legal title, which, from a positivist perspective, effectively ends the question. *See infra* notes 240-241 and accompanying text (discussing slave sales at probate auctions).

86. *See* John Cimprich, *Self-Purchase*, *in* DICTIONARY OF AFRO-AMERICAN SLAVERY, *supra* note 71, at 662 (stating that, while slaves technically worked solely for their master's benefit, workdays ended at dusk and did not include Sundays, so industrious slaves could gain earnings from working overtime, performing odd jobs, and producing domestic and agricultural goods during their free time).

87. *See* BARZEL, *supra* note 18, at 108-09 (finding that because a forced slave is deprived of his or her entire net present value, owners faced a constant problem in productivity because of the incentive to underwork). Barzel states that he does not mean to imply endorsement of the racist critique that slaves were naturally indolent, but rather, to suggest that slaves lacked the economic incentives that motivate other workers to perform at higher levels. *Id.* at 107-11. A paid laborer can gain extra wages for additional work, and thus has an incentive to work the number of hours that is most economically efficient. However, slaves who are not allowed the opportunity to self-purchase gain nothing for additional work, and so their incentive is to work at the minimum required level. *Id.* at 109. *See also* Binder, *supra* note 34, at 2087-88 (discussing self-purchase for the owner's economic benefit).

This argument is probably incomplete. For example, masters and overseers often punished slaves that they viewed as under-performing. In fact, oftentimes slaves would overproduce to share their production with other slaves unable to meet production requirements. However, it suggests one reason why self-purchase might have existed; namely, "[i]n pursuit of their own self-interest, owners permitted slaves to own and accumulate." BARZEL, *supra* note 18, at 110. Barzel concludes that the attempt "to lower the cost of supervision then included granting slaves the right to part of the output or of their own time. The slaves, though legally their masters' property, were able to accumulate wealth and occasionally to buy their own contracts." *Id.* at 113.

and divide blacks.[88] Regardless of the veracity of these assertions, the restrictions on self-purchase indicate that it was less than a full property right. Slaves had extremely limited protection for their self-purchase savings.[89] Even slaves who were able to self-purchase did not have full access to the right of self-ownership. While slave owners released property rights, the community did not; *in rem* rights were not changed. In addition, even "freed" slaves were only free in limited jurisdictions and could be captured and enslaved in other jurisdictions.[90] They were subject to onerous taxes designed to reduce the free Black population, and if unable to pay, they could be sold again into slavery.[91] The limited scope of self-purchase is thus consistent with viewing slavery as a property institution.

The counting of slaves for purposes of representation is also somewhat problematic. Gouverneur Morris, a delegate at the Constitutional Convention, stated "Upon what principle is it that slaves shall be computed in the representation? Are they men? Then make them Citizens & let them vote. Are they property? Why then is no other property included?"[92] This critique points out that the Southern states were willing to play fast and loose with the legal status of slaves, insisting on treating them as property except when they saw an advantage in doing otherwise. The unusual treatment of slaves in the Three-Fifths Clause was the result of a political compromise.[93]

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88. *See* IRA BERLIN, SLAVES WITHOUT MASTERS 149 (1974) (describing how slaveowners used the promise of freedom to motive slaves to work harder and to be more subservient); *see also* Binder, *supra* note 34, at 2089 (noting that, although many slaveowners disliked free Blacks, the ability to set slaves free was an important tool that slaveowners could use to their benefit).

89. *See* Jenny Bourne Wahl, *Legal Constraints on Slave masters: The Problem of Social Cost,*41 AM. J. LEGAL HIST. 1, 13 n.4 (1997) (discussing restrictions on contracts for self-purchase); *cf.* Binder, *supra* note 34, at 2088 (finding that owners had some economic incentive not to renege, so that they could sell manumission to other slaves).

90. *Cf.* Scott v. Sandford, 60 U.S. 393, 452-54 (1856) (finding that a slave does not become free when the owner moves to a free state).

91. *See* Kevin Outterson, *Slave Taxes*, *in* SHOULD AMERICA PAY?, *supra* note 4, at 135, 141 (stating how early in the eighteenth century the taxation differed little between whites and slaves, but that immediately before the Revolution the use of special taxes on free Blacks for discriminatory purposes began and quickly grew).

92. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 222 (Max Farrand ed., 1911). A similar statement was made by delegate Elbridge Gerry of Massachusetts. Arguing that "Blacks are property," he demanded to know why Blacks' representation should be increased because of the number of slaves. *See* Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 437 (1999) (discussing the process that lead to the acceptance of the Three-Fifths Clause).

93. *See* Finkelman, *supra* note 92, at 446-48 (noting that Northern legislators' acceptance of the Three-Fifths Clause "was the beginning of a major compromise between the deep South and the commercially oriented states of the North").

However, it does not change the fact that slaves were, as a general matter, treated as property.[94]

In sum, the existence of self-ownership and the practice of counting slaves for representation are a bit unusual given slaves' status as legal property; they do not change the categorization of slavery as a property system.[95]

2. "Same government" requirement

A second element required for takings compensation is that the taking be made by the government against whom the action is brought.[96] This element is most easily shown for takings incident to slavery between 1808 and 1865. For acts during that time period, there is an easily traceable line of authority connecting to modern federal and state governments.[97]

A greater problem arises in that many slave laws were enacted by prior government entities. The origin of slavery in the colonies can be traced to the seventeenth century, though the dates vary for different colonies.[98] While many of the colonies were then

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94. Of course, the slaves themselves were not granted representation, but were simply used to calculate the representation of others; just as property requirements determined the electorate. Property requirements for voting were a common part of the political system set up at the founding of the nation. *See, e.g.*, BELL, *supra* note 3, at 580-85 (discussing how property restrictions were used after the Civil War in order to limit the rights of Blacks); *see also* Sean Wilentz, *Property and Power: Suffrage Reform in the United States, 1787-1860, in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY: ESSAYS ON THE HISTORY OF VOTING AND VOTING RIGHTS IN AMERICA 31-33 (Donald W. Rogers & Christine Scriabine eds., 1992) (demonstrating how property restrictions served a class-based function, giving more power to the propertied, theoretically to prevent the poor from confiscating their property). For an example of a rejection of these ideas by modern courts see *Kramer v. Union Free Sch. Dist. No. 15.* 395 U.S. 621, 622 (1969) (overturning a property restriction statute that limited individuals who were eligible to vote in school district elections to property owners and parents, holding that such a property restriction violated the Equal Protection Clause of the Fourteenth Amendment).

95. As one commentator notes, "when push came to shove, the slave as property clearly had priority over the slave as a person." Russell, *supra* note 80, at 488 (internal quotations omitted).

96. This requirement derives from the language of the Takings Clause itself. *See* U.S. CONST. amend. V; *see also* Epstein, *supra* note 11, at 19-20.

97. As suggested below, the passage of time should not immunize these governments from takings liability. *See* discussion *infra* Part IV.B.1 (addressing statutes of limitation issues).

98. Virginia imported its first slaves in 1619. MORRIS, supra note 37, at 3-4. Between 1630 and 1660, Virginia courts began changing the sentences of Black indentured servants. For crimes that would earn a whipping and additional years for white indentured servants, Black indentured servants had their indenture extended for life. Paul Finkelman, *Law, in* DICTIONARY OF AFRO-AMERICAN SLAVERY, *supra* note 71, at 394. More restrictive laws were passed in the 1660s, and a statute was passed in 1670 that provided that non-Christian African servants "shall be slaves for their lives," while non-Christian Native American servants could gain their freedom after a discreet time period. HIGGINBOTHAM, *supra* note 18, at 37. In 1680, Virginia formally

possessions of England, slavery in some states can be traced to settlers from other nations: Spain in Florida; Holland in New York and New Jersey; and France in Louisiana and in the vast Louisiana Territory, which was later divided into numerous states.[99]

This raises the question of whether the United States can be held responsible for acts performed before its inception. An argument

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passed a slave code that established extensive restrictions on Blacks and was later used as a model by other legislatures. *Id.* at 39.

Maryland converted Black indentured servants into slaves in 1639, and removed their right to be free as Christians in 1644. Elbert B. Smith, *Slavery in Maryland*, *in* DICTIONARY OF AFRO-AMERICAN SLAVERY, *supra* note 71, at 440; *see also* Wiecek, *supra* note 25, at 1761 (arguing that the rights of Blacks declined gradually between 1634 and 1664).

North Carolina and South Carolina began as a single colony of Carolina. Wiecek, supra note 25, at 1768; HIGGINBOTHAM, *supra* note 18, at 153. The colony's proprietors issued the Fundamental Constitution of Carolina, authored by John Locke in 1669-1670; this document explicitly provided for slavery. Wiecek, *supra* note 25, at 1768-70; HIGGINBOTHAM, *supra* note 18, at 151-52; Jeffrey J. Crow, *Slavery in North Carolina*, *in* DICTIONARY OF AFRO-AMERICAN SLAVERY, *supra* note 71, at 537. North Carolina's first slave code was enacted in 1715. *Id.* at 539. The South Carolina legislature first attempted to pass a slave law in 1690, but that law was struck down. HIGGINBOTHAM, *supra* note 18, at 169. The first comprehensive slave code was passed in 1712. *Id.*

Georgia was late to adopt slavery—it was even prohibited during its early history. HIGGINBOTHAM, *supra* note 18, at 216-17; Wiecek, *supra* note 25, at 1771-73. However, the prohibition was laxly enforced. HIGGINBOTHAM, *supra* note 18, at 227-37. In any event, the prohibition of slavery proved economically unfeasible, and the legislature adopted a slave code in 1750. *Id.* at 216-17; Wiecek, *supra* note 25, at 1772.

In 1641, Massachusetts adopted legislation—the first such legislation—allowing for slavery. Wiecek, *supra* note 25, at 1742-44. Later legislation further strengthened the institution, although it was never particularly important in Massachusetts. *Id.* at 1744-46; *see also* HIGGINBOTHAM, *supra* note 18, at 84 (noting the passage of laws equating Blacks with property). Connecticut also began the use of slaves around this time. Wiecek, *supra* note 25, at 1743-44.

Rhode Island never adopted legislation allowing slavery, and in fact appears to have been legally bound by a 1652 proclamation of Providence and Warwick (predating the colony's 1663 charter) banning slavery. HIGGINBOTHAM, *supra* note 18, at 459 n.3; Wiecek, *supra* note 25, at 1746-47. The ban was never enforced, and Rhode Island imported large numbers of slaves by the eighteenth century. *Id.*

New York began as a Dutch colony and was part of the slave trade by 1626. HIGGINBOTHAM, *supra* note 18, at 101; Wiecek, *supra* note 25, at 1763-64. English conquest changed legal rules, but maintained the institution of slavery. Wiecek, *supra* note 25, at 1764-68. In fact, the Duke of York, with a financial interest in the Royal African Company, actively encouraged the slave trade. HIGGINBOTHAM, *supra* note 18, at 114. New York adopted laws in 1665, a year after its annexation by the English, that recognized and extensively regulated slavery. *Id.* at 115.

Present-day New Jersey covers the area originally governed under more than one colonial government. The Dutch portion originally followed the same law as New York. *Id.* at 101. While a Quaker portion resisted slavery for some time, the entire united colony adopted a slave code in 1713. Wiecek, *supra* note 25, at 1771.

Pennsylvania and Delaware were a single colony until 1701. Slavery existed under the Duke of York's laws prior to the division of the colonies. HIGGINBOTHAM, *supra* note 18, at 270; *see also id.* at 267-99 (discussing slavery in the Pennsylvania and Delaware area). After the colonies were divided, slave codes were established in Delaware in 1721 and Pennsylvania in 1725. Wiecek, *supra* note 25, at 1771.

99. *See* Wiecek, *supra* note 25, at 1773-90.

could be made that any debt to slaves for the confiscation of their self-ownership would adhere to the original European powers that controlled the colonies at the time laws allowing slavery were passed. The stronger argument, however, is that the United States assumed those obligations when the colonies won their independence. Great Britain, upon signing the Treaty of Paris with United States, released all of "propriety and territorial rights" of the United States.[100] As Chief Justice Marshall noted, "[b]y this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these States."[101] The United States was treated as a successor state to the colonies, not unlike a corporate successor, and inherited both assets and liabilities.[102]

Even though the United States may be deemed to have succeeded to the colonies' liabilities, potential federalism problems exist that could arguably prevent the federal government from being held liable. The federal government did not enact the laws creating slavery. Rather, they were enacted by a number of state governments and their precursors.[103] The Takings Clause, like other portions of the Bill of Rights, originally applied only to the federal government.[104]

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100. Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, Sept. 3, 1783, U.S.-Gr. Brit., art. I, 8 Stat. 80, 81.

101. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 584 (1823).

102. *Cf.* Paul R. Williams, *The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?*, 23 DENV. J. INT'L L. & POL'Y 1, 11-17 (1994) (discussing the legal effect of numerous state secessions and separations outside the United States); *see also* Brief of Amici Curiae of the States of Montana et al., in Support of Petitioners, Nevada v. Hicks, 533 U.S. 353 (2001) (No. 99-1994) (discussing which attributes of sovereignty were passed from Britain to the United States at independence). Presumably, the same would apply to colonies, which were inherited from France, Holland, and Spain, due to treaties with those countries. This obligation would apply only to slave laws in the area that later became the United States. For example, if a person was enslaved in a French colony in Africa, and subsequently transported to a French colony in Louisiana, the United States would be responsible for the enslaving act in Louisiana, not the one in Africa. The original enslavement in Africa is not "binding." Because the slave's self-ownership is inalienable, he is continuously re-enslaved by the laws allowing slavery, and since this re-enslavement is never valid, it is always repeated again the next day.

The case for successor liability is especially strong where, as in this case, the liabilities spring from actions that have contributed to the creation of the inherited assets. Laws allowing slavery enhanced the colonial economies, through commerce, agriculture, and taxation, as set out, *supra* notes 231-245.

103. *See supra* note 98 (chronicling the passage of laws allowing slavery in different colonies).

104. The Bill of Rights was gradually incorporated against the states through the Fourteenth Amendment. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 215-30 (1998); FISCHEL, *supra* note 11, at 65 (stating that, for most of the 1800s, federal courts applied the Bill of Rights against the federal government and not the states). "If citizens wanted to prevent state legislative infringements on property, they had to word their own constitutions accordingly." *Id.* Interestingly, the Takings Clause was the first part of the Bill of Rights to be incorporated. *Id.* at 66.

The partial overlap between state and federal takings clauses mitigates the federalism problem.[105] Many states had individual takings clauses, under which they might be liable for compensation.[106] In addition, the federal government participated in slavery by protecting the slave trade and enforcing claims on slave ownership between states.[107] Slavery in the District of Columbia was directly subject to federal regulations.[108] Federal laws were indispensable in effectuating the taking; the federal government's exercise of its commerce power allowed the states to continue the taking of slaves' self-ownership property rights. Slavery was dependent on a system of contracts that were enforced through the Contracts Clause of the Constitution.[109] Thus, the federal government's participation in slavery makes it liable for compensation.

B. Existence of a Taking: The Types of Takings Involved

Section A concluded that slavery was a system of property and that the current government of the United States is implicitly responsible for such system. Takings jurisprudence recognizes the categories of physical takings and regulatory takings. This Section examines how slavery fits within those categories, and how it might fit within other theoretical categories.

1. Physical takings

Physical takings involve the appropriation of title to property or the confiscation of one or more of the "sticks" from the "bundle of sticks" that comprise the property owner's interest.[110] For example, government imposition of an easement or a right of passage will trigger the Takings Clause.[111] Although title may remain with the owner, the government has removed valuable sticks from the bundle.[112]

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105. *See id.* at 65-66.
106. *See* Fischel, *supra* note 11, at 65-66.
107. Paul Finkelman, Essay, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J. L. & HUMAN. 413, 437-44 (2001) (discussing federal involvement in slavery).
108. *See* Henry S. Robinson, *Slavery in the District of Columbia*, *in* DICTIONARY OF AFRO-AMERICAN SLAVERY, *supra* note 71, at 192-93.
109. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts"); *see* Alfred Brophy, Note, *Let Us Go Back and Stand Upon the Constitution: Federal-State Relations in* Scott v. Sandford, 90 COLUM. L. REV. 192, 221 (1990) (stating that the Contracts Clause might be used to maintain slavery once it had been established in a territory, even if the territory later became a free state).
110. *See, e.g.*, United States v. Craft, 535 U.S. 274, 278 (2002) (describing the common idiom "bundle of sticks" as a collection of individual rights which, in certain combinations, constitute property).
111. *Id.* at 296 n.5.
112. *Id.* *But cf.* Merrill, *supra* note 63, at 906 (noting that dividing a bundle of

It is unlikely that actual title to a slave's property right of self-ownership was transferred to the government, especially given the inalienable nature of that property right. What is certain is that nearly all of the sticks from the bundle—for example, liberty, family integrity, and enjoyment of labor—were confiscated. That confiscation resulted in a physical taking, that is, removal of effective title to property.

2. Regulatory takings

Slavery also fits easily within the regulatory takings framework. The regulatory takings doctrine allows compensation for regulations that deprive an owner of a substantial amount of property value.[113] These types of takings were first recognized in *Pennsylvania Coal Co. v. Mahon*,[114] in which Justice Holmes stated, "if regulation goes too far it will be recognized as a taking."[115] The idea has remained largely unchanged since its inception. One commentator recently summarized the doctrine; "there are some regulatory schemes so close in spirit to eminent domain that they must be regarded as takings."[116] The Supreme Court has eschewed any categorical rule in the area, instead finding that the test for a regulation which "goes too far" is to be factual and ad hoc.[117]

A requisite for all compensable regulatory takings is a regulation that affects property interests.[118] In the case of slavery, the requirement of a regulation is met. The origin of slavery in the colonies began with legislation passed mostly in the seventeenth century.[119] The adoption of slavery was an affirmative step taken by the colonies since slavery was virtually non-existent in England.[120]

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property rights into several "discreet assets" could limit the viability of further "conceptual severance" of the rights associated with those assets).

113. *See generally* FISCHEL, *supra* note 11 (exploring regulatory takings from both an economic and a legal point of view).

114. 260 U.S. 393 (1922).

115. *Id.* at 415.

116. FISCHEL, *supra* note 11, at 59.

117. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 (2002) (concluding that the courts should resist the temptation to adopt *per se* rules in cases involving partial regulatory takings, choosing instead to examine a number of factors rather than a simple mathematically precise formula).

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

119. *See supra* note 98.

120. *See* Wiecek, *supra* note 25, at 1715-25 (discussing the lack of slavery in English tradition); *see also* DAVID LYONS, UNFINISHED BUSINESS: RACIAL JUNCTURES IN U.S. HISTORY AND THEIR LEGACY 6 (Boston Univ. Sch. of Law Working Paper Series, Working Paper No. 02-06, 2002) (stating that the legal institution of chattel slavery did not exist through most of the seventeenth century, but was constructed during

The colonies passed statutes that created slavery as an institution and allowed for the children of female slaves to be born into slave status.[121] This move was a conscious decision by political leaders who understood the alternatives and sought to benefit from slavery.[122]

After slavery was adopted, governments became actively involved in its regulation, taxation, and execution. Government actors conducted a large percentage of slave auctions, allowing neutral devices such as probate and the seizure of debtors' assets to become part of the slave trade.[123] State governments passed regulations facilitating the recapture of escaped slaves.[124] There is even a Fugitive Slave Clause enshrined in the Constitution.[125] Along with the laws originally establishing slavery, fugitive slave laws and slave trade regulations show a pattern of regulation linked to the taking of slaves' self-ownership.[126] The express language of the Fugitive Slave Clause—that slaves from each state were held "under the Laws thereof"—

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the later decades of the seventeenth century by those who ruled the colony of Virginia), *available at* http://www.bu.edu/law/faculty/papers/pdf_files/LyonsD061702.pdf (on file with the American University Law Review).

121. *See supra* note 98 (discussing the adoption of laws allowing slavery in the colonies).

122. Colonial leaders sought to achieve political benefits by racializing slavery; by forcing slaves to the bottom of the color-coded social system, they accorded greater privilege and opportunity to those on the second tier. *See* LYONS, *supra* note 120, at 15.

123. *See infra* notes 231-245 and accompanying text (discussing government involvement in and benefits from the slave market).

124. *See* MORRIS, *supra* note 37, at 340-46 (discussing fugitive slave laws).

125. U.S. CONST. art. IV, § 2, cl. 3 ("No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due").

126. In addition to analyzing regulations that established slavery, and confiscated slaves' self-ownership, under a standard regulatory takings analysis it is also possible to characterize them as laws creating easements. This easement did not destroy the property interest of the slaves (their bodies) because to do so would be counterproductive; rather, it granted to others (owners) the right to use that property interest. Forced easements are compensable under the Takings Clause. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (authorizing compensation in a case involving a television cable easement); Griggs v. Allegheny County, 369 U.S. 84, 89-90 (1962) (finding that homeowners were owed just compensation as a result of an over-flight easement); United States v. Causby, 328 U.S. 256, 262-63 (1946) (compensating landowners for damages to property resulting from an over-flight easement). *See generally* FISCHEL, *supra* note 11, at 57-59 (noting cases whereby easements as takings called for appropriate compensation).

Alternatively, slavery could be considered a system of zoning. Slaves' self-ownership was improperly "zoned" to be takeable by others. Zoning regulations that are overly intrusive are also compensable. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1011-12 (1992) (holding that some deprivations of use are compensable under the Takings Clause).

underscores that slavery was a creature of law and regulation, imposed over a baseline of freedom for all persons.[127]

The regulatory framework established by governments to facilitate slavery meets the requirement of regulatory action by the government. This regulation is also one that "goes too far" under the tests proposed by *Mahon*[128] and *Penn Central Transportation Co. v. New York City*.[129] The regulation destroys all value that the original property holder had in the property, rendering self-ownership worthless by transferring ownership rights to other parties. The severity of the regulation is tantamount to "obliteration of value" of the property and removes "all economically beneficial uses" for it.[130] Slavery thus meets the definition of a regulatory taking.

3. Alternative takings theories: Derivative takings and givings

In addition to the comparatively well-settled areas of physical takings and regulatory takings, scholars have argued for the compensation other types of takings, such as derivative takings and givings.

The idea behind derivative takings is that an original taking, while compensable to the owner of that property, may cause additional harm to third parties.[131] A derivative taking results from either a physical taking or a regulatory taking and occurs when the original taking reduces the value of surrounding property.[132] Several scholars argue that such consequential damages should be compensable under the Takings Clause, that their exclusion from the losses awarded in takings cases is not defensible, and that their inclusion would force the state to consider and to bear the full costs of its

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127. *See* Binder, *supra* note 34, at 2077-78 ("Anglo-American jurisprudence . . . assumed that slavery violated natural law and could only be established by positive law.").

128. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922) (describing the contours of the regulatory taking doctrine and restating the general rule that while property may be regulated by the government, regulations that go "too far" will be deemed a compensable taking).

129. *See* 438 U.S. 104, 123-28 (1978) (noting the factors that guide a determination of whether a particular regulation constitutes a taking to include the economic impact of the regulation and the character of the government action).

130. *See Lucas*, 505 U.S. at 1010, 1019 (holding that where a state seeks to sustain a regulation that deprives land of "all economically beneficial use," it may resist compensation only if the inquiry into the nature of the owner's estate showed that the proscribed use was not part of the owner's title to begin with).

131. *See* Bell & Parchomovsky, *supra* note 15, at 280 (observing that, although the government compensates owners of property subject to the original taking, equally-harmed owners of surrounding property are not compensated for their diminished property values).

132. *Id.* at 280-81.

actions.[133] Consequently, a state would be encouraged to use its eminent domain power only when such use will enhance social utility.[134] Proponents further argue that a policy of not compensating derivative takings cannot be justified on either efficiency grounds or fairness grounds.[135] Courts, however, have consistently rejected derivative takings claims.[136]

In the case of slavery, the derivative harm is plain—slavery has led to institutionalized racism in society, a continuing harm to slave descendants.[137] The comparative disadvantages of racial minorities, including Blacks, are well documented. According to recent census figures, 22% of Blacks lived in poverty in 2000, compared with 9.4% of whites.[138] Disadvantages also appear in education statistics, where

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133. *See, e.g.*, EPSTEIN, *supra* note 11, at 52 (arguing that the Takings Clause was meant to protect the owner of the item taken, not the item itself, and as such consequential damages should be recoverable).

134. Bell & Parchomovsky, *supra* note 15, at 282-83 (suggesting a takings compensation program that would promote truthful takings claims against the government, prevent overpayment by the government for its takings, and, as such, result in an economically efficient takings regime).

135. *See id.* at 290-93 (stating that without a policy of compensation, the government may act inefficiently by failing to consider total net costs, or unfairly by failing to consider whether the costs of its actions disproportionately burden certain members of the public). *But see* Treanor, *supra* note 11, at 859 (commenting that under the original understanding of the Takings Clause, the government did not owe compensation for property not physically taken, no matter how severely its actions affected the value of the property).

136. *See* EPSTEIN, *supra* note 11, at 52 (noting that courts uniformly deny consequential damages in eminent domain cases on the theory that the government did not take the consequentially lost items). The most well-known case is *United States v. Causby*, 328 U.S. 256 (1946), in which the Supreme Court awarded damages to homeowners whose property lay directly below the air routes of military jets, but not to other property owners who suffered nearly identical damage but were not directly overflown by the government planes. *Id.* at 260-62.

137. *See* KEITH N. HYLTON, SLAVERY AND TORT LAW 30 (Boston Univ. Sch. of Law Working Paper Series, Working Paper No. 03-02, 2003) (arguing that slavery led to racism by giving racist beliefs an economic component), *available at* http://www.bu.edu/law/faculty/papers/pdf_files/HyltonK012803.pdf (on file with the American University Law Review); *see also* LYONS, *supra* note 120, at 41-43 (suggesting that the social programs enacted in the 1900s failed to correct the legacy of inequalities resulting from 350 years of slavery and Jim Crow laws). This harm also stems in part from the politically-motivated failure to meet the promises of Reconstruction. *See id.* at 26-30 (stating that the Hayes-Tilden Agreement of 1877, which handed the presidential election to the Republicans in exchange for an end to the federal government's oversight of freed Black's rights, ended Reconstruction and led to the exclusion of Blacks from political participation).

Note that racism also affects other minority groups. The question of whether other minority groups could seek Takings Clause compensation, based on the taking of slaves' self-ownership or on other takings, is beyond the scope of this Article.

138. U.S. BUREAU OF THE CENSUS, HISTORICAL POVERTY TABLES, TABLE 5: PERCENT OF PEOPLE IN POVERTY, BY DEFINITION OF INCOME AND SELECTED CHARACTERISTICS: 2000, *at* http://www.census.gov/hhes/poverty/poverty00/table5.html (last visited Oct. 2, 2003) (on file with the American University Law Review).

The table contains different figures for different definitions of poverty. Other definitions vary somewhat in the numbers they produce, but consistently place Blacks

74.9% of adult Blacks have a high-school diploma or more, compared with 86.2% of whites; 13.3% have a college bachelor's degree or more, compared with 26.2% of whites.[139] Black per capita income in 1998 was just above half of white per capita income, a ratio that has remained largely unchanged for at least thirty years.[140] Black median family income in 1998 was $29,404; white median family income was $49,023.[141] The number of Blacks below the poverty level has decreased during the past three decades as a percentage of the Black population, from 33.5% in 1970 to 23.6% in 1998, while the number of whites below the poverty level held fast at about 10% throughout that time.[142] Black males had an incarceration rate in 1999 eight times higher than white males.[143] Department of Justice statistics show that in 1997 Blacks as a whole had a 16.2% chance of going to prison in their lifetime, compared with a 2.5% chance for whites.[144] Among homicide defendants, the chances that a Black defendant will be charged with a capital crime and receive the death penalty continue to rise.[145] According to Department of Justice figures from

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at a significantly higher level of poverty than whites. For example, when poverty is defined as income less taxes plus capital gains or losses without EIC, 10.5% of whites are under the poverty level, compared to 24.0% of Blacks. *Id.* Similarly, when poverty is defined as income less taxes plus capital gains or losses with EIC, 9.1% of whites are below the poverty level, compared to 21.1% of Blacks. *Id.* *See also* Complaint and Jury Trial Demand ¶ 18, Farmer-Paellmann v. FleetBoston Fin. Corp., No. CV-02-1862 (E.D.N.Y. Mar. 26, 2002) (citing a census report showing that in 1998 in the United States, 26% of Blacks lived in poverty compared to 8% of whites), *available at* http://www.nyed.uscourts.gov/02cv1862cmp.pdf (on file with the American University Law Review); CHUCK COLLINS & FELICE YESKEL, ECONOMIC APARTHEID IN AMERICA: A PRIMER ON ECONOMIC INEQUALITY AND INSECURITY 43-46 (2000) (demonstrating that income inequality has widened more drastically among Blacks than among whites).

139. U.S. BUREAU OF THE CENSUS, TABLE 7: EDUCATIONAL ATTAINMENT OF PERSONS 25 YEARS OLD AND OVER, BY SEX, REGION, AND RACE: MARCH 1997, *at* http://www.census.gov/population/socdemo/race/black/tabs97/tab07.txt (last visited Oct. 2, 2003) (on file with the American University Law Review). The *Farmer-Paellmann* suit lists slightly different figures for 1998, finding that 14.7% of African Americans had four-year college degrees, compared with 25% of whites. Complaint and Jury Trial Demand ¶ 18, *Farmer-Paellmann* (No. CV-02-1862).

140. *See* THE NEW YORK TIMES 2001 ALMANAC 319 (John W. Wright ed., 2001) (listing Black per capita income in 1998 as $12,957, and white per capita income in 1998 as $21,394).

141. *Id.*

142. *Id.* (containing percentages for whites below the poverty line ranging between 9.8% and 11.4% for the years between 1970 and 1999).

143. *See id.* at 310 (noting incarceration rates, in prisoners per 100,000 resident population, of 3,408 for Black males and 417 for white males).

144. *Id.* at 312. The statistics for males are more dramatic—Black males have a 28.5% chance of going to prison, while white males have a 4.4% chance. *Id.*

145. *See* Bernard A. Williams, *Guilty Until Proven Innocent: The Tragedy of Habeas Capital Appeals*, 18 J.L. & POL. 773, 779, 782 (2002) (summarizing evidence that the death penalty is disproportionately applied to Blacks and finding that states with larger Black populations are under more political pressure to seek the death

2000, Black women were fifteen percent more likely than white women to be victims of crimes of violence other than murder; Black men were thirty-six percent more likely than white men.[146]

As one lawsuit succinctly sums up the gloomy picture, Blacks "lag behind whites according to every social yardstick: literacy, life expectancy, income, and education."[147] These disparities can be linked to the legacy of slavery.[148] Since the time of slavery, society has reinforced a presumption that Blacks are inferior, unintelligent, or criminal.[149] They are a modern manifestation of an invidious right created by society through slavery, the right of "white privilege."[150] As

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penalty). Of the people on death row today, forty-three percent are Black and over one-half are people of color. *Id.* at 779 n.33.

146. U.S. DEPARTMENT OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2000 STATISTICAL TABLES, Table 6 (2002) (finding rates for crimes of violence, per 1,000 persons age 12 and over, to be 28.5% for Black women, 22.7% for white women, 43.4% for Black men, and 31.8% for white men), *at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus0001.pdf (last visited Oct. 2, 2003) (on file with the American University Law Review); *see also* LISA D. BASTAIN & BRUCE M. TAYLOR, U.S. DEPARTMENT OF JUSTICE, YOUNG BLACK MALE VICTIMS (1994) (finding that young Black males have approximately a 150% greater chance of being a victim of violent crime than young white males), *available at* www.ojp.usdoj.gov/bjs/pub/pdf/ygbkml.pdf (on file with the American University Law Review).

147. Complaint and Jury Trial Demand ¶ 19, *Farmer-Paellmann* (No. CV-02-1862).

148. *See, e.g.*, ROBINSON, *supra* note 4, at 74 (stating that slavery and its aftereffects, including the disparate position in which newly freed slaves found themselves in the years following slavery, made it unrealistic that future generations of Blacks and whites would find themselves on equal footing); JAMES Q. WILSON, THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES 126-29 (2002) (suggesting that problems in and expectations among the African American family unit can be attributed to slavery); Van Dyke, *supra* note 20, at 61-62 (discussing some of the continuing effects of slavery); *see also* WILLIAM JULIUS WILSON, THE BRIDGE OVER THE RACIAL DIVIDE: RISING INEQUALITY AND COALITION POLITICS 12-23, 33-39 (1999) (analyzing the role of race and racism in economic inequality); Chisolm, *supra* note 5, at 687-89 (indicating that statistical inequalities between Blacks and whites relate to past patterns of discrimination).

149. Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2063-70 (1993) (discussing how slavery led to societal associations of crime with Blacks).

150. *See* PEGGY MCINTOSH, WHITE PRIVILEGE AND MALE PRIVILEGE: A PERSONAL ACCOUNT OF COMING TO SEE CORRESPONDENCES THROUGH WORK IN WOMEN'S STUDIES 10-11 (Wellesley Coll. Ctr. for Research on Women, Working Paper No. 189, 1988) (describing white privilege as "conditions of daily experience" which afford advantages to whites); Robert Jensen, *White Privilege Shapes the United States*, BALT. SUN, July 19, 1998 at 1C (acknowledging the existence of white privilege as an unearned privilege experienced by all white people to varying extents); *see also* Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1659-60, 1664 (1999) (discussing white privilege and the influential effect of white perspectives on the law and legal academia).

The existence of white privilege serves as a justification for reparations even in cases of later immigrants or other non-slaveowners. *See* Molly Secours, *Riding the Reparations Bandwagon*, *in* SHOULD AMERICA PAY?, *supra* note 4, at 286, 287-88 (finding that benefits of white privilege are conferred on all white individuals, regardless of whether or not their families previously owned slaves); Van Dyke, *supra* note 20, at 72-73 (stating that white people, in general, incur substantial benefits from the existence of white privilege).

such, these disparities are derivative harms stemming from the original taking. If one believes that it is proper to compensate derivative takings, then slavery looks compensable.[151]

A related argument based on derivative harms is that although original takings victims are no longer alive, their heirs may pursue the original victims' claims because the government deprived the original victims of the right to bring the claim. The heirs may appropriately bring such claims because the original taking affects their own social and educational opportunities.[152] Although the passage of time and the imperfect connections between slaves and their heirs, or in some cases the lack of any connection to slave ancestors, somewhat weaken the argument that modern Blacks are the appropriate heirs of slaves, Eric Posner and Adrian Vermeule argue that this connection problem should be overlooked because, "the stigma of slavery attaches only to people who are perceived to be black and not to nonblacks."[153] This stigma of inferiority is related to societal racism, which in turn is linked to slavery.[154] Under this argument, modern Blacks are the appropriate heirs of slaves and, even if some are not direct heirs, they are the derivatively-harmed party for takings analysis.

A similar argument can be made using givings analysis. Givings theory argues that where government action unfairly rewards one party, that party should be required to reimburse the government.[155] Although no courts have adopted this model, it has strong intuitive appeal: arbitrary or capricious givings to one party are similar to the arbitrary and capricious takings, which led to the adoption of the Takings Clause.

Since whites enjoy greater income, educational opportunities, and employment opportunities than Blacks,[156] a givings analysis applied to slavery would hold that the advantages of non-Africans evidence a

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151. *But see* Cato v. United States, 70 F.3d 1103, 1108-10 (9th Cir. 1995) (rejecting plaintiff's claim in reparations context where plaintiff sought damages for the continued discrimination stemming from the enslavement of African Americans).

152. *See supra* notes 146-148 and accompanying text (discussing some of the continuing effects of slavery, including economic inequalities and the disparities associated with white privilege).

153. Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 708 (2003).

154. Finkelman, *supra* note 149, at 2063-70.

155. *See* Bell & Parchomovsky, *supra* note 11, at 574-80 (stating that a giving occurs when the government bestows a benefit upon someone, such as a change in zoning laws that increases property values, but when such a benefit is inequitably given, the government should assess charges against the recipient).

156. *See supra* notes 134-147 and accompanying text (discussing statistics regarding income, educational, incarceration, and employment disparities).

"giving" to non-slaves and their descendants. This giving is still occurring, and under givings analysis, should be taxed. A tax on a giving could have largely the same effect as remuneration for a taking.[157]

Of course, arguments involving derivative takings or givings are risky, primarily because courts have not yet approved these arguments. However, despite their lack of a strong legal foundation at present, these arguments are nevertheless valuable. First, slavery may prove a sufficiently compelling example for courts to accept these theories as a basis for compensation. Second, by making these arguments, reparations advocates can gain valuable allies by bringing takings scholars into the reparations fold. Finally, such arguments provide broader appeal for courts—traditional tort-based reparations arguments can appeal to liberal judges, while takings-based arguments may appeal to conservative judges.

III. SLAVERY IN THE CONSTITUTIONAL STRUCTURE

This Part examines whether the Constitution endorses slavery and how any constitutional endorsement might affect slaves' takings claims, viewed in light of the purpose of the Takings Clause. Section A discusses the purpose of the Takings Clause. Section B addresses constitutional text and history that could represent an endorsement of slavery. Section C analyzes how to avoid the negative results of any constitutional endorsement.

A. *Purpose of the Takings Clause*

This Section briefly analyzes three of the leading theories that describe the purpose of the Takings Clause. Each theory is evaluated to determine whether compensation for slavery is consistent with that theory. It finds each theory consistent with takings compensation for slavery.

1. Libertarianism: Richard Epstein

Richard Epstein, perhaps the most prominent expositor of the Takings Clause, has argued that many government acts—including most taxes—ought to be compensable under the Takings Clause.[158]

157. *See* Bell & Parchomovsky, *supra* note 11, at 591-93, 597-600 (commenting on the appropriateness of a givings tax where the opposite action would result in a compensable taking and analyzing the means for computing and levying such taxes).

158. *See* EPSTEIN, *supra* note 11, *passim*. This relatively hands-off approach is often characterized as libertarian. *See, e.g.*, Larry Alexander & Marion Schwartzchild, *The Uncertain Relationship Between Libertarianism and Utilitarianism*, 19 QUINNIPIAC L. REV. 657, 657-59 (2000).

Epstein argues that the clause exists "to guarantee a proportionate distribution of the gain among all of the parties from whom the government takes private property."[159] Like a private actor, the government must be held accountable for harms it inflicts on parties for its own good—where private parties are subject to tort law, the government is subject to takings limitations.[160] Noting that property can be viewed as a bundle of rights, Epstein argues that "partial takings" of any of that bundle ought to be compensated.[161] Epstein also contends that, "[t]he greater the numbers [of takings victims], the greater the wrong."[162]

Using Epstein's approach, the taking of slaves' self-ownership looks like a compensable taking. If the Takings Clause is designed to equitably distribute the gain from society's decisions to confiscate property, then slaves should receive their portion of the gain from the confiscation of their self-ownership; that is, compensation to offset the harm they have suffered and to bring them in line with the rest of the populace. Epstein's arguments for compensation for a partial taking of any of the bundle of property rights also weigh in slaves' favor—slaves certainly suffered at least a partial taking when their property right to quiet enjoyment was confiscated. His belief that the greater the scope of the takings, the greater the wrong, also suggests that slavery, and its mass confiscation of self-ownership, ought to be compensable.[163]

2. Historical analysis: William Treanor

William Treanor argues that James Madison, who bears most of the responsibility for the Takings Clause,[164] deliberately chose not to protect non-physical property.[165] Madison intentionally limited the

159. EPSTEIN, *supra* note 11, at 15.

160. *See id.* at 36-39 (discussing the need for compensation by analogy to private law).

161. *See id.* at 60-62 (arguing that the "partial loss of single incidents may determine the measure of damages but may not negate the taking").

162. *Id.* at 94.

163. Epstein's other writings suggest a belief that slavery was a confiscation of self-ownership. He writes that "slavery is the antithesis of the system of self-ownership on which any sensible property right rests. Its abolition should be regarded as a restoration of property rights." Richard A. Epstein, *The Seven Deadly Sins of Takings Law*: Lucas v. South Carolina Coastal Council, 26 LOYOLA L.A. L. REV. 955, 977 (1993). However, Epstein has written that Indian and slave claims may be blocked due to statutes of limitation. EPSTEIN, *supra* note 11, at 346-50. As this Article argues, that analysis does not apply to slavery since statutes of limitation should not apply to this taking. *See infra* Part IV.B.1.

164. *See* Treanor, *supra* note 11, at 849-55 (commenting on Madison's support of the principles that appear in the Takings Clause such as concern for protection of land property from majoritarian rule).

165. *See generally id.* at 836-55 (discussing Madison's views of the Takings Clause

clause's scope because he believed that the legislature was best equipped to deal with regulatory intrusions and that the Constitution adequately protected against such intrusions.[166] Constitutional protection was required only for certain physical takings, including the takings of land from property holders or of slaves from slave owners.[167] This was primarily because physical property takings were especially vulnerable to failures of the political process.[168] Treanor suggests that in today's society, compensation should also be given for environmental takings aimed at discreet and insular minorities.[169]

Application of Treanor's tests to slavery results in a mixed bag. The taking of slaves' self-ownership rights was neither an appropriation of physical property, nor one of Treanor's narrowly defined exceptions for regulatory takings. Treanor's belief that slaveowners' rights were protected could suggest non-acceptance of compensation for slaves. On the other hand, slaves' control over their bodies—one of the "bundle of sticks" constituting physical property ownership—was taken. As argued above, slaveowners' control of slaves constituted a physical taking,[170] thereby satisfying Treanor's test. In addition, because the political process certainly did not adequately consider slaves' property claims of self-ownership fairly, slaves' claims seem to fall under one of Treanor's tests, namely

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and suggesting that constitutional protections for property rights was initially limited to takings of physical property in order to protect against majoritarian confiscation of land and slaves).

166. *See id.* at 841-42 (recognizing Madison's belief that the checks and balances system could sufficiently protect property interests); *see also* Gary Lawson & Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. CHI. L. REV. 1081, 1087 (1999) (stating that prior to the ratification of the Takings Clause as part of the Fifth Amendment, the Constitution already reflected the principles underlying the Takings Clause; namely, compensation for government appropriations of property).

167. *See* Treanor, *supra* note 11, at 849-54 (detailing Madison's belief that the potential for population expansion and future majoritarian decisionmaking meant that ownership of land and slaves required additional protection).

168. *Id.* at 854; *see id.* at 827-34, 836 (discussing the adoption of state takings clauses prior to the adoption of the Constitution, and concluding that their adoption resulted from specific process failures involving land held by politically vulnerable groups). The background understanding of the Takings Clause, coupled with the Framers' and ratifiers' intents, indicate that the Takings Clause was designed to require compensation where political process failures threatened to consider property claims, and their attendant consequences on the economic well-being of the property owners, unfairly. *Id.* at 854-55.

169. *See id.* at 873-77 (describing environmental racism as the likelihood that minority communities will receive a disproportionately high number of hazardous waste sites due to such communities' lack of political advantage, therefore justifying the application of the Takings Clause to such environmental justice cases).

170. *See supra* notes 110-112 and accompanying text (recognizing that property consists of a collection of individual rights, a concept that supports the argument that slaves suffered a physical taking).

that majoritarian decisionmakers have not evidenced a history of fair consideration of property claims.[171]

3. Economic and philosophical approach: Frank Michelman

Frank Michelman argues that the Takings Clause offers a way to turn Kaldor-Hicks transactions—those that increase total societal wealth but decrease the wealth of particular parties—into Pareto superior transactions—those that benefit all parties.[172] Michelman argues that takings can be evaluated under either a fairness or a utility analysis. Both Michelman's utility analysis and his fairness analysis support arguments favoring compensation for slavery.[173]

a. Michelman's utilitarian analysis

Under a utilitarian analysis, compensation is appropriate where the "demoralization cost" of an action—the negative effect on total utility that occurs if the action invades property rights and upsets investment and property expectations—is greater than the cost of compensation.[174] According to Michelman, it is appropriate to compensate the victims of the takings because the "risk of majoritarian exploitation" creates greater disincentives for parties to contribute to society than do naturally occurring risks, such as earthquakes and plague.[175] Even larger demoralization costs may be suitable under circumstances where "capricious" majoritarian behavior is involved;[176] where societal actions cause disproportionate burdens to fall on particular parties;[177] and where actions tend to channel benefits and burdens to different groups of people.[178]

Slavery satisfies many, if not all, of these criteria. Slavery, because it involves the designation of members of a minority race for confiscation of their property right of self-ownership, appears to be a

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171. *See* Treanor, *supra* note 11.

172. Michelman, *supra* note 11, at 1176-78 (discussing the economics of efficiency). *See generally* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 14-17 (5th ed. 1998) (explaining the relationship between Pareto and Kaldor-Hicks efficiency).

173. Michelman notes that fairness analysis and utilitarian analysis often, though not always, reach the same result. Michelman, *supra* note 11, at 1223-24.

174. *See id.* at 1215 (noting the emergence of a rule making compensation mandatory in situations in which demoralization costs and efficiency gains exceed settlement costs).

175. *Id.* at 1216-17.

176. *Id.* at 1217 ("Capricious distributions will not be tolerated, even as accidental adjuncts of efficiency-dictated measure, when compensation settlements can be reached without much trouble . . . .").

177. *Id.* at 1217 ("The clearer it is that the claimant has sustained an injury distinct from those sustained by the generality of persons in society . . . the more compelling will his claim to compensation become.").

178. *Id.* at 1218.

"majoritarian exploitation" of a powerless minority group. The use of race as a classification could be considered capricious.[179] The confiscation of self-ownership involved in slavery caused a disproportionate burden, both in absolute and in relative terms, to fall on a few select parties. Those parties lost all, or nearly all, of their self-ownership, which was an unusually important property interest for them. Finally, the taking of slavery channeled benefits to one group of people—landowners, slave owners, and traders—while allocating burdens to a different group.[180] Thus, under Michelman's utilitarian analysis takings compensation for enslaved persons would be justified.

b. *Michelman's fairness analysis*

Compensation is also appropriate if a redistribution is not "fair" under a Rawlsian fairness analysis.[181] Redistribution which "impair[s] liberties unequally" requires compensation.[182] Michelman suggests that compensation is required to achieve fairness under certain circumstances, including situations in which one party suffers an "unusually great" harm or in cases lacking "visible reciprocities of burden and benefit."[183]

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179. Observers during the time of slavery, however, may have felt differently. Their sentiments likely would depend on how confident they were that takings involving the confiscation of self-ownership would not be imposed on them. To the extent that they felt that these types of takings were safely limited along racial lines, these observers would have been secure in their investment-backed expectations that such takings would not be imposed against them, and so they would not consider the takings "capricious" for their utilitarian purposes.

180. Any benefit slaves received from their forced labor, such as being able to eat some of the crops they grew, was incidental to the benefit their owners reaped from their labor, and would be of minimal weight when calculating benefit and harm. *See infra* Section IV.A.2 (noting that slaves were not compensated).

181. Michelman employs John Rawls's definition of fairness. Rawls considers actions fair if they either accord no preferences to any party, or if they allow for disparities in treatment only in situations where all relevant parties could potentially be advantaged or disadvantaged, and the arrangement could reasonably benefit every participant. Michelman, *supra* note 11, at 1219 (citing John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164 (1958), *reprinted in* JUSTICE AND SOCIAL POLICY 80 (Frederick A. Olafson ed., 1961); John Rawls, *Constitutional Liberty and the Concept of Justice*, *in* NOMOS VI: JUSTICE (C. Friedrich & J. Chapman eds., 1963; John Rawls, *Sense of Justice*, 72 PHIL. REV. 281 (1963)).

182. Michelman, *supra* note 11, at 1221. The investigation under both the fairness and utilitarian analysis is to be long-term, with societal impositions viewed as evidence of trends or tendencies. Impositions in the name of efficiency are thus permitted where "the disappointed claimant ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite decision." *Id.* at 1223.

183. *Id.*

Michelman's fairness analysis, which is based on many of the same factors as the utilitarian analysis, unsurprisingly results in a similar outcome.[184] Fairness analysis suggests that compensation is appropriate where, among other things, a societal taking "has the effect of impairing liberties unequally";[185] where applicants are unlikely to agree, in the long term, that such takings functioned as part of a consistent practice that is less risky for groups to which they belong than a contrary practice would be; where harm is disproportionately focused on certain individuals; or where "visible reciprocities of burden and benefit" are not present.[186]

Slavery is a taking that concentrates harm on certain individuals. There is no reciprocity in this taking. The benefits accrue to one set of actors, while another set suffers the harm. Slavery thus has the effect of "impairing liberties unequally" over the long term.[187] Therefore, takings compensation for slavery seems appropriate under Michelman's fairness analysis, just as it is under his utilitarian analysis.

4. Other commentators' explanations

There are other theories about the Takings Clause's purpose that will not be fully examined here because of space constraints. A quick survey of other scholars, however, shows support for principles compatible with takings compensation for slavery.

Joseph Sax, for example, argues that government should be required to compensate injured parties when it confiscates property to increase its wealth, rather than to arbitrate disputes.[188] William Fischel suggests compensation is appropriate for property owners who lack a voice in the political process and are forced to endure regulations that most people "would not willingly impose on themselves if they were outsiders to their own community."[189] Jeb Rubenfeld would require compensation when property is put to a public use.[190] Daniel Farber proposes a "uniform rule" which would require the government to compensate all property owners from

184. *See supra* note 173 (asserting that Michelman's utilitarian analysis and his fairness analysis often have similar results).

185. Michelman, *supra* note 11, at 1221.

186. *Id.* at 1221-23.

187. An argument could be made that the taking is not unfair over the long term, given the possibility that slaves might, eventually become slave owners themselves and benefit from the taking. Such an outcome seems unlikely. The correlation of slavery with status as a member of a racial minority suggests that the same harms are likely to fall on the same groups over the long term.

188. Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62-65 (1964).

189. FISCHEL, *supra* note 11, at 62.

190. *See* Rubenfeld, *supra* note 16, at 1078-80.

whom it seizes land, thereby providing "horizontal equity" by ensuring that politically vulnerable groups are not denied compensation.[191] Saul Levmore suggests that burdens created by government actions, which would be compensable in tort law if they resulted from a private party's actions, should be compensable under the Takings Clause.[192] The Takings Clause, he suggests, is intended to protect individual actors (non-repeat players) from being unfairly taken advantage of by interest group politics.[193]

Despite their different approaches and beliefs regarding the purpose of the Takings Clause, the aforementioned commentators all put forth ideas that could potentially support an argument favoring compensation for the taking of slaves' self-ownership. In particular, Fischel's, Farber's, and Sax's theories would seem to strongly favor compensation for slave takings. Sax's theory supports the idea of takings compensation for slavery, because slavery was a taking that increased the government's wealth, and was not enacted to arbitrate disputes; Fischel's theory supports compensation because slaves lack a voice in the political process, and most persons would not willingly impose a condition like slavery upon themselves; and Farber's approach supports compensation because of its emphasis on protecting politically vulnerable groups. Takings compensation for slavery, then, can be viewed as consistent with these leading scholars' understandings of the purpose of the Takings Clause.

B. Avoiding the Constitutional Endorsement Problem

Slavery played a dominant, if unstated role, in the ratification of the Constitution. Madison and other Framers realized that confrontation with southern leaders about the future of slavery was not politically feasible and that such debate could derail the Constitutional Convention.[194] As such, the Framers sought to avoid the question of slavery at the Convention, thereby implicitly allowing the South to continue the practice.[195] Had an abolitionist country been pursued, there would likely have been no federal government.[196]

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191. *See* Daniel Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 306-08 (1992).

192. *See* Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1350-53 (1991).

193. *See* Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 287-89 (1990).

194. *See* Finkelman, *supra* note 92, at 435-37 (arguing that James Madison maneuvered to prevent early debates on slavery out of a fear that they might prematurely end the convention).

195. *See id.* at 424 (arguing that the construction of the Constitution was in part based on an attempt to protect the interests of slaveowners); *see also* PAUL FINKELMAN,

Because the present federal structure only came into being as a result of a concession to slave states, the Constitution's entire structure, Paul Finkelman writes, was anti-emancipation.[197] For this reason, southerners saw the document as no threat to slavery.[198] However, to avoid antagonizing the North, the approval of a pro-slavery constitution was accomplished through circumlocution—thus, the word "slavery" never appeared in the document until the Thirteenth Amendment was ratified.[199]

The Constitution directly discusses slavery in five places: the Three-Fifths Clause;[200] the Importation Clause;[201] the Fugitive Slave Clause;[202] and two other incidental references.[203] Finkelman contends

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SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 6-10 (1999) (noting that Southern delegates "tenaciously fought" for slaveowner's interests, managed to inject the issue of slavery into "almost every debate," and were generally successful in preserving those interests).

196. *See, e.g.*, Finkelman, *supra* note 92, at 437-40 (contending that if the states that favored population-based representation could not have convinced the smaller states to compromise, the entire Constitutional Convention might have been derailed); *id.* at 453-56 (describing the "dirty compromise," under which southern representatives to the Constitutional Convention agreed to support the Commerce Clause in exchange for northern support for the proscription on state export taxes—taxes which were considered an attack on slavery); *cf. id.* at 425-47 (noting abolitionist criticism of the compromise). Wendell Phillips, an abolitionist, argued that the Nation as a whole went into the compromise knowingly and willingly. WENDELL PHILLIPS, THE CONSTITUTION, A PRO-SLAVERY COMPACT 5 (1856).

197. *See* Finkelman, *supra* note 92, at 432 (stating that the Constitution created a federal government with limited powers that "ensured against emancipation").

198. *See id.* at 432-33 (arguing that because the federal government created by the Constitution was not empowered to regulate the states directly, most Southerners did not feel that it threatened slavery, and as such, did not oppose its ratification).

199. *See id.* at 427 (noting that the Southern representatives to the constitutional convention conceded that, in place of the term "slavery," the phrase "other persons" would instead be used in the Constitution).

200. The Three-Fifths Clause states, "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons." U.S. CONST. art. I, § 2, cl. 3.

201. The Importation Clause states, "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." *Id.* § 9, cl. 1.

202. The Fugitive Slave Clause states, "No Person held to Service of Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered upon Claim of the Party to whom such Service or Labor may be due." *Id.* art. IV, § 2, cl. 3.

203. The first incidental reference reads, "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." *Id.* art. I, § 9, cl. 4. That is, the method defined in the Three-Fifths clause will be used to determine population for the purposes of taxation.

The other incidental reference sets out the rules for amending the Constitution.

that, "taken together, these five provisions gave the South a strong claim to 'special treatment' for its peculiar institution."[204] In addition, a number of other constitutional clauses indirectly related to slavery.[205]

This evidence suggests a potential constitutional endorsement problem: If the Constitution allows or endorses slavery in some places (such as the various slave clauses), it might be inconsistent to read it as implicitly disallowing it in another. This obstacle can be avoided by showing that there is reason either to disregard any implied endorsement or to limit it so as not affect the viability of a takings claim.

There are several ways to do this. First, one way to avoid this problem is by emphasizing that the constitutionality of slavery is not universally accepted. A number of contemporaneous abolitionist

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It states, "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth clauses in the Ninth Section of the first Article . . . ." *Id.* art. V. That is, the slavery clauses could not be modified by amendment prior to 1808.

204. *See* Finkelman, *supra* note 92, at 429 (noting that this claim is supported by the "extra political muscle" provided to southern states by the Three-Fifths Clause).

205. Finkelman asserts that slavery was affected and aided by the following clauses: U.S. CONST. art. I, § 8, cl. 15 (empowering Congress to raise militias to "suppress Insurrections," including slave rebellions); *id.* § 9, cl. 5 (prohibiting the federal government from taxing exports, thereby preventing indirect taxation on the exportation of slaves); *id.* § 10, cl. 2 (prohibiting state taxation of exports and imports, thereby preventing states in which slavery was not legal from taxing the products of slave labor); *id.* art. II, § 1, cl. 2 (establishing the Electoral College, which ensured that voters in slaveholding states would play a disproportionate role in electing the President); *id.* art. IV, § 3, cl. 1 (allowing new slave states to be admitted); *id.* § 4 (guaranteeing that the U.S. Government would protect states from "domestic violence," including slave rebellions); *id.* art. V (ensuring that the slave states could prevent any constitutional prohibition of slavery, because of the three-fourths majority necessary for the ratification of Constitutional amendments). Finkelman, *supra* note 92, at 429-30.

Finkelman also discusses clauses that, while not inherently favoring slavery, ultimately protected it by way of later judicial interpretation of congressional act: U.S. CONST. art. I, § 8, cl. 4, the Naturalization Clause (granting Congress the power to prohibit the naturalization of non-whites); *id.* cl. 17, the Federal District Clause (allowing Congress the power to authorize and regulate slavery in Washington, D.C.); *id.* art. III, § 2, cl. 1, the Diversity Jurisdiction Clause (giving judges the power to prevent slaves and free Blacks from bringing suit in federal courts, by extending the right to sue in federal court only to "citizens" of different states, and not to inhabitants); *id.* art. IV, § 1, the Full Faith and Credit Clause (requiring each state to grant legal recognition to the laws and judicial proceedings of other states, thus obligating free states to recognize laws creating and protecting slavery); *id.* § 2, cl. 1, the Privileges and Immunities clause (mandating that citizens of all states be given equal rights in other states, but failing to extend these rights to Blacks); and *id.* § 3, cl. 2 (empowering Congress to regulate the territories so as to protect slavery). Finkelman, *supra* note 92, at 430-32.

scholars argued that slavery was unconstitutional.[206] The strength of their arguments is magnified by the eventual vindication of their cause. While slavery was not abolished until the passage of the Thirteenth Amendment,[207] it can be considered unconstitutional prior to that time; the Thirteenth Amendment ended slavery without directly affecting any constitutional text except the slave clauses, suggesting that any implied endorsement did not have full constitutional approval.

The slavery clauses expired early in the nation's history and were completely mooted by the Thirteenth Amendment. Further, nowhere else in the Constitution is there any affirmation of the validity of slavery. If slavery was already unconstitutional—an appealing conclusion—then there was no implicit endorsement of slavery.

Second, any implied endorsement of slavery is almost certainly at odds with modern law. If the government were to enact new laws allowing slavery, a strong case could be made that victims would be entitled to takings compensation.[208] The stark difference between modern law and any prior slavery endorsement suggest that society does not have a strong reason to honor any prior endorsement.[209]

Third, the Takings Clause's general language is strong enough to override any suggestions that the slave clauses act to contradict it.

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206. *See, e.g.*, GEORGE W. F. MELLEN, AN ARGUMENT ON THE UNCONSTITUTIONALITY OF SLAVERY (1841) (arguing that the states violated the Constitution when they secured slavery); LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (1860) (arguing that absolute rights—the rights which "God and nature" created—are vested in all humankind, and, accordingly, slavery, which restricts the absolute right of liberty, has never been constitutional); JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 7 (Mnemosyne 1969) (n.d.) (stating that if slavery were constitutional, the federal government would have had to guarantee, and thereby enforce, slavery); Frederick Douglass, *The American Constitution and the Slave: An Address Delivered in Glasgow, Scotland, on 26 March 1860*, *in* 3 THE FREDERICK DOUGLASS PAPERS, SERIES ONE: SPEECHES, DEBATES AND INTERVIEWS 340-66 (John W. Blassingame ed., 1985) (advocating that the Constitution is not a slave-holding instrument, and as such does not, and never did, guarantee the right for one group of people to enslave another group). For a modern discussion of these arguments, see Randy E. Barnett, Essay, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner;s Theory of Interpretation*, 28 PAC. L.J. 977, 988-1014 (1997) (examining Spooner's theory and arguing that it is superior to alternative theories).

207. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction").

208. Of course, other compensation would probably also be available.

209. Discounting of any constitutional implication of slavery because of changed modern law requires one to apply the modern law retroactively. The history of takings law—and of common law in general—has been one of retroactive application of legal standards. *See* discussion *infra* Part IV.B.3 (discussing retroactivity objections).

Even if the Framers believed that the Takings Clause, as drafted, did not require compensation for slavery, the text itself is what was ratified. As Richard Epstein suggests, "the dominant loyalty is not to the framers' views [if any] of the consequences it entailed."[210] It is possible that the Framers meant to endorse both the Takings Clause and any idea contrary to its text without being aware of the implicit tension between the two.[211] Their explicit decision to endorse the text of Takings Clause takes precedence over their silent belief that other constitutional provisions inherently limit the clause's effect.[212] If in conflict with the text, the "unwritten expectations of the framers . . . must yield to the internal written logic of the text."[213] This approach allows any expectation by the Framers that slavery would not require compensation to yield to the text's internal written logic that slavery is compensable.[214] Epstein suggests that the Framers drafted the clause in general terms, with the question of how it applied to particular situations left for future generations to uncover.[215] Thus, Epstein posits, the correct attitude towards the Framers view, if any, is "ambivalence toward[s] historical sources."[216] This corresponds to the analysis already set forth: There is no direct evidence that the Framers viewed the Takings Clause as inapplicable to slavery, and even if they had, that expectation would properly be ignored.[217] This textualist argument—relying on the text of the

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210. EPSTEIN, *supra* note 11, at 28. Epstein uses this analysis to argue that wage controls, which may not have been considered by the Framers to be compensable within the Takings Clause, are in fact a taking. *Id.*

211. *Id.*

212. *Id.* One manner in which slavery differs from Epstein's analysis, of course, is that he is dealing with application of takings to a novel situation. The Framers never dealt with rent control, workers' compensation, issues surrounding oil and gas interests, or the details involved with zoning. *Id.* To the extent that Epstein's argument relies on this element of novelty, it is less persuasive in the area of slavery, which the framers were painfully familiar with. However, Epstein's analysis and his general propositions do not seem restricted to areas of novelty. While they may have even more weight in those areas, they certainly have potent persuasive power even in areas of law, such as slavery, with which the Framers were familiar.

213. *Id.*

214. *See id.* at 29.

215. *Id.*

216. *Id.*

217. Sketchy support for resolving the ambiguity in favor of compensation can be found in the fact that the Bill of Rights, as amendments, technically were adopted after the body of the Constitution and thus might benefit from the "later in time" rule. However, any later-in-time application is dubious since the two documents were adopted essentially at the same time. There are also representation problems with this argument. That is, the southern states likely would have balked if they had realized that they were forcing compensation for slavery. It seems unfair to ascribe to them support for this idea; such a late shift is suspect on grounds of democratic accountability.

clause, rather than any subjective intent of the Framers[218]—leads to the same conclusion as more liberal arguments.[219]

Fourth, even if the Constitution endorses slavery, the limited scope of that endorsement means that takings claims are not barred. The slavery clauses do not endorse slavery, nor do they express a government's desire to protect slave owners or prevent any compensation to slaves. The three main slavery clauses have no bearing at all on takings compensation: Neither the Three-Fifths Clause, the Importation Clause, nor the Fugitive Slave Clause is inconsistent with the idea of compensation to slaves for their taken self-ownership.[220]

Fifth, assuming that the Constitution endorses slavery, such endorsement is consistent with requiring takings compensation for any harm caused. Indeed, even explicit constitutional approval of a practice does not preclude a requirement of takings compensation if property is taken pursuant to that authority.[221] For example, government may seize property under the War Power, or regulate trade under the Commerce Power, yet still trigger the Takings Clause requirement of compensation. Similarly, acts undertaken pursuant to any constitutional endorsement of slavery may still require compensation under the Takings Clause.

In summary, constitutional endorsement of slavery, if it exists, does not prevent a takings claim. Such endorsement was contested at the time slavery existed, and is certainly out of step with modern law. It goes against the strong language of the clause itself. Finally, it is sufficiently limited in scope that it does not affect takings claims.

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218. This argument is textualist in that it relies on the text of the clause. However, if the Framers did not believe that the Takings Clause governed slavery, and if that belief was widely held among the populace, this argument may not comport with versions of textualism or originalism that rely on contemporaneous definitions.

219. The Supreme Court has allowed the Takings Clause to be applied to many types of cases that were not contemplated by the Framers—most prominently to regulatory takings. *See infra* notes 285-287.

220. In fact, as noted above, the language of the Fugitive Slave clause suggests that slavery was a creation of regulation, a man-made blemish upon the underlying baseline of freedom. *See supra* notes 126-127 and accompanying text.

221. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 172 (1979) (recognizing that proper exercise of Congress's Commerce Clause authority does not create a "blanket exception to the Takings Clause" of the Fifth Amendment); United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261 (1950) (noting that the United States was responsible for compensating the lessee of condemned property taken by the government pursuant to its War Powers).

IV. THE PRIMA FACIE TAKINGS CASE

This Part addresses what would be required for a takings case based on the slavery takings. Section A discusses the elements of a Takings Clause violation, and section B discusses defenses likely to arise in response to such an action.

A. *Elements of a Takings Clause Violation*

The Takings Clause states, "nor shall private property be taken for public use, without just compensation."[222] A Takings Clause violation claim has four prerequisites. First, private property must exist. Second, this property must be taken by the government.[223] Third, the taking must be for public use.[224] Fourth, the original owner must have not been compensated for the taking.[225] This Article has already examined the first two elements: private property[226] and taking by the government.[227] This section examines the remaining two elements that would need to be established to show a prima facie case: public use and lack of compensation.

1. *Public use*

The public use requirement is unlikely to be an obstacle for three reasons. First, under the case law, public use has not been strictly required in regulatory takings cases.[228] Second, in instances where public use is required, courts have been extremely lenient and allowed compensation based on the thinnest reeds of public use.[229]

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222. U.S. CONST. amend. V.
223. In many cases, these first two elements are combined, since the existence of private property can often be assumed. *See, e.g.*, Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003 (1992). In this Article they have been examined separately, since there is a potential question about the existence of private property.
224. Brown v. Legal Found. of Washington, 123 S. Ct. 1406, 1417 (2003).
225. *Id.*
226. *See supra* Part I (discussing property right of self-ownership).
227. *See supra* Part II (discussing slavery as a taking).
228. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323-24 (2002) (acknowledging the distinction between acquisitions of property for public use and regulations prohibiting private uses of property, thereby making it inappropriate for courts to treat physical takings cases as controlling precedents for regulatory takings cases).
229. One important case in this area is *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 462-63 (Mich. 1981), which held that a large private company taking property of homeowners in order to expand its factory constituted a public use. In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241-42 (1984), the Supreme Court determined that private land taken from landowners and redistributed to homeowners and lessees under a legislative scheme intended to break up large parcels historically controlled by a land oligopoly constituted a public use. Breaking up the private land was found to have the public use of "[r]egulating oligopoly and the evils associated with it." *Id.* at 241-43. The case law has led one scholar to characterize the public use requirement as "extremely permissive."

The Supreme Court has written that, "where the exercise of the eminent domain powers is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[230]

Third, even if a concrete public use were needed, it is clear that slavery had important public uses. Slavery allowed for agricultural advances, particularly the cultivation of tobacco, which sustained large segments of the colonial economies.[231] Slavery allowed plantation owners to receive acceptable returns on invested capital, encouraging them to invest in their plantations.[232] Numerous economic studies have demonstrated that the Southern economy was driven by slave labor, with which it was able to maintain profitability and growth.[233] One estimate is that slaves contributed $40 million to the U.S. economy between 1790 and 1860 alone.[234]

Governments also directly reaped benefits from the legality of slavery. One major area in which governments benefited was in revenue from slave taxes. One scholar notes that, beginning with colonial times and continuing throughout the Civil War, slave taxes raised more revenue for the American governments than any other source.[235] Property taxes on slaves comprised a majority or a near-majority of property tax revenue in North Carolina, South Carolina, Georgia, Virginia, Maryland, and other southern states.[236] Prior to the ratification of the Constitution, slave imports were also a significant

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FISCHEL, *supra* note 11, at 72.

230. *Midkiff*, 467 U.S. at 241.

231. BELL, *supra* note 3, at 49 (noting that slave labor significantly impacted the colonies' growth and development in the eighteenth century); G. Melvin Herndon, *Tobacco*, *in* DICTIONARY OF AFRO-AMERICAN SLAVERY, *supra* note 71, at 735 (noting that once tobacco began to be produced in large quantities, plantations shifted to primarily slave labor); JAMES WALVIN, BLACK IVORY: A HISTORY OF BRITISH SLAVERY 8-10 (1992) (discussing how Maryland and Virginia profited greatly from tobacco because of slave labor); *see also* Outterson, *supra* note 91, at 138-40 (noting the economic benefits of slavery, including tobacco cultivation).

232. Harold D. Woodman, *Profitability of Slavery*, *in* DICTIONARY OF AFRO-AMERICAN SLAVERY, *supra* note 71, at 592, 595-96 (acknowledging that slavery was economically profitable, but also suggesting that slavery profited whites socially by allowing them to stay in control).

233. *Id.*; Outterson, *supra* note 91, at 138-40 (providing specific economic statistics as to how each state profited as a result of slavery).

234. Complaint and Jury Trial Demand ¶ 10, Farmer-Paellmann v. FleetBoston Fin. Corp., No. CV-02-1862 (E.D.N.Y. Mar. 26, 2002). The current value of that amount, though difficult to pin down, is probably in the trillions of dollars. *See* Matthew Kaufman, *The Cost of Slavery was High, But Who Will Pay It?*, HARTFORD COURANT, Sept. 29, 2002, at 75-76 (noting estimates ranging from $2 trillion to $12 trillion); *see also* Robert Browne, *The Economic Case for Reparations to Black America*, 62 AM. ECON. REV. 39, 39-46 (1972) (calculating various possible methods for valuing slave labor).

235. Outterson, *supra* note 91, at 135.

236. *Id.* at 138-40.

source of tax revenue.[237] Governments depended largely on property taxes and taxes on imports—income taxes would not become constitutionally acceptable until the passage of the Sixteenth Amendment in 1913.[238]

Even if taxes are not considered evidence of public use, governments benefited in many other ways from slavery. Local governments auctioned off unclaimed vagrant slaves, contraband slaves, and sometimes slaves of intestates.[239] These sales were no small matter; for example, one scholar estimates that half of South Carolina's annual slave sales were court-conducted sales caused by probate auctions, mortgage foreclosures, and sheriffs' seizures of debtors' property.[240] Other local governments reaped similar benefits.[241]

The federal government also profited from slavery. The Continental Congress levied funds from the states, much of which had been derived in the first instance from slave taxes.[242] The federal government also imposed slave property taxes twice, and incredibly, auctioned off the slaves who were aboard ships seized for slave trading after the transatlantic trade was outlawed in 1808.[243]

In addition to direct benefits, governments received indirect benefits. One such benefit was the availability of cheap labor.[244] Another was taxation on slave products, such as tobacco and cotton.[245] In sum, the direct and indirect benefits governments received from slavery are sufficient to satisfy the public use requirement.

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237. *Id.* at 138-40, 144-45. Through direct and indirect taxes, slavery "supported the bulk of the revenue needs of Southern governments." *Id.* at 147.

238. U.S. CONST. amend. XVI (granting Congress the "power to lay and collect taxes in incomes").

239. *See* Russell, *supra* note 80, at 484-90 (highlighting individual stories of slaves travelling on a seized ship who were delivered to New Orleans' local sheriff's department and sold).

240. *See* Russell, *supra* note 80, at 485-87 ("South Carolina's courts operated as a great auctioneering firm. The various agents of the courts drew profits from the sale of slaves in the form of commissions, just as commission-merchants did.").

241. Outterson, *supra* note 91, at 138-40, 144 (discussing that Maryland and Virginia profited off of tobacco because of slave labor, and Florida, Louisiana, and Mississippi benefited from high slave taxes).

242. *Id.* at 144.

243. *Id.* at 145-46.

244. *See, e.g.*, ROBINSON, *supra* note 4, at 2-6 (chronicling government use of cheap slave labor to build the Capitol building).

245. *See* Outterson, *supra* note 91, at 147-48 (noting that in addition to providing exports which could be taxed, slave labor also created wealth for slave owners, who could then purchase imports which were also taxed).

2. Lack of compensation

The final element for showing a compensable taking is to establish that slaves were not compensated. It is axiomatic that slaves were not paid for their services. However, it could conceivably be argued that they were otherwise remunerated, either through emancipation or through transport to the New World.[246]

After the original taking of their self-possession, slaves had one major group interaction with government: their emancipation. Though emancipation was a beneficial government act from the point of view of those freed, it does not constitute compensation because emancipation itself provided no monetary relief.

One popular idea accompanying emancipation was to give freed slaves forty acres of land and certain surplus and seized army animals (often characterized as "forty acres and a mule").[247] President Johnson, bowing to political pressure, killed the legislation, and the freed slaves instead received nothing.[248] It is possible that, had such

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246. Some conservative opponents of reparations have argued that certain governmental programs which benefit Blacks suffice as compensation. *See, e.g.*, John McWhorter, *Against Reparations*, THE NEW REPUBLIC, July 23, 2001, at 32, 36-37 (asserting that the large and unprecedented expansion of welfare over the past forty years should be considered as constituting reparations). *Cf.* Outterson, *supra* note 91, at 136 (noting the argument sometimes made that events in American history, such as the Civil War and emancipation, coupled with the New Deal and affirmative action, effectively constitute reparations).

As a general matter, this argument seems dubious. Welfare payments are income based and are made irrespective of one's race or ancestry. Plus, numerous slave descendants are ineligible for welfare. *Cf.* Kenneth Brooks, *Social Contradictions*, VALLEJO TIMES-HERALD, Aug. 26, 2002 ("Being poor is not and should not be a requirement for receiving compensation for inhumane treatment."), *available at* http://timesheraldonline.com/articles/2002/08/28/export2814.txt (on file with the American University Law Review).

The characterization of welfare as takings compensation would be especially inappropriate. No court or commentator has suggested that takings victims are limited in their ability to bring takings claims by the presence or absence of receipt of other government monies. To adapt the fact pattern of a well-known takings case, even if a developer received tax breaks, development grants, or other government aid, he may still properly bring a takings claim if a state takes his property by regulation. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). One's ability to bring a takings claim is independent of other government payments. In fact, if welfare is a reparation, then Blacks are being "taken" once again, since whites are the numerical majority of welfare recipients. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHARACTERISTICS AND FINANCIAL CONDITION OF AFDC RECIPIENTS, FISCAL YEAR 1992 47 (1992) (noting that whites constituted thirty-nine percent of welfare recipients in 1992, while Blacks were only thirty-seven percent of recipients).

247. The forty acres idea originated with General Sherman's Special Field Order No. 15, in which he ordered that certain seized confederate land be distributed to freed slaves, who would receive forty acres each. *See* Special Field Order No. 15, *in* WHEN SORRY ISN'T ENOUGH, *supra* note 3, at 365-66. Following Sherman's order, Radical Republicans proposed legislation granting forty acres to each freed slave. *See* Lopez, *supra* note 5, at 653-55.

248. *Id.* at 654; *see* Chisolm, *supra* note 5, at 685-87 (noting that the Freedman's Bureau Act of 1865, if passed, would have allowed for up to three million acres of

awards been given, they could have served as full or partial compensation for the government taking. However, the compensation requirement is not satisfied by an unmet promise.

Slaves did have their taken property, their self-ownership, restored to them through emancipation.[249] However, restoration of taken property is not sufficient compensation in takings claims. Government must pay compensation for the time it possessed the property—rent, so to speak.[250] Case law is clear the question of whether a taking is worthy of compensation hinges not at all upon whether the act was permanent or temporary; the just compensation clause does not differentiate between the two.[251]

An argument could be made that transportation to the New World was itself compensation. On the surface, this argument has some appeal. Transatlantic fares cost hundreds or thousands of dollars in today's money. Other cases have allowed "in kind compensation" to meet constitutional requirements.[252] However, any characterization

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land to freed slaves).

249. "Emancipation" as used here refers to all government actions to end slavery, which took place at different times in different states. Most Northern states ended slavery years before the Civil War. For example, slavery in Massachusetts was gradually ended after the adoption of the Massachusetts Constitution in 1780 and the subsequent judicial interpretation of that constitution as prohibiting slavery. HIGGINBOTHAM, *supra* note 18, at 89-99. Pennsylvania passed legislation in 1780, which provided for the "Gradual Abolition" of slaves. *Id.* at 299. Under that law, all children born to slaves after passage of the law would serve their masters until the age of twenty-eight, after which they would be free. *Id.* at 299-304. Pennsylvania also passed a law in 1788 restricting interstate travel of slaves to prevent slave traders from taking pregnant slaves out of the state to avoid emancipation. *Id.* at 304-05.

New York, needing soldiers to help fight the Revolutionary War and alarmed that slaves might join the British, passed legislation in 1781 authorizing manumission of slaves who fought in the war. *Id.* at 137-38. In 1785, New York attempted to ban the slave trade, although the law had easily exploitable loopholes. In 1788, New York banned the export of slaves to other states to close those loopholes, and in 1799, finally passed a law to gradually emancipate the slaves. Children born to slave mothers were to become free at the age of twenty-eight for men and twenty-five for women. Finally, in 1817, New York passed a law which ended slavery by 1855. *Id.* at 138-47. Slaves in Southern states were freed by action of the emancipation proclamation. Slaves in border states were not affected by the emancipation proclamation and were freed by operation of the Thirteenth Amendment.

250. *Cf.* United States v. Causby, 328 U.S. 256, 261-62 (1946) (suggesting payment for the use of owner's land is analogous to interest).

251. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987) (explaining that denying a landowner the use of his property is a taking whether it is temporary or permanent). *But cf.* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 306, 319-20 (2002) (finding no *per se* physical taking where regulation prevented development for a period of thirty-two months).

252. As early as *Pennsylvania Coal Co. v. Mahon*, in 1922, the Court recognized that some government acts provide "an average reciprocity of advantage that has been recognized as a justification of various laws." 260 U.S. 393, 415 (1922). For example, government seizure of some zoning or development rights, accompanied by the provision of other rights, can provide adequate compensation so as to defuse a

of transportation as in-kind compensation is entirely inappropriate. Unlike voluntary immigration, transportation was forced on slaves.[253] It subjected slaves to horrendous conditions that commonly killed a third or more of a ship's "cargo."[254] It therefore cannot satisfy the just compensation requirement.[255]

B. Defenses

There are three primary defenses that might be asserted against a takings claim:[256] statute of limitations, sovereign immunity, and retroactivity.[257] Each is examined in this Section.

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takings claim. *See, e.g.*, Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104, 137-38 (1978) (failing to find a compensable taking in city landmark law due in part to city's provision to landowner of other development rights).

253. Not only did slaves not choose to come to America, there has been a strong "Back to Africa" element in much of Black political discourse, exemplified by the work of Marcus Garvey. *See generally* Scott L. Cummings, *Community Economic Development as Progressive Politics*, 54 STAN. L. REV. 399, 412 n.48 (2001) (citing literature that discusses the impact of Marcus Garvey's advocation in the 1920s that Blacks migrate back to Africa). *See also* AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY 195-97, 210 (2003) (criticizing the paternalistic idea that most people in other countries would prefer to be in America).

254. One case brought by insurers to recover the value of lost "property" illustrates the generally brutal treatment of slaves in transit. The court noted:

> [S]ixty negroes died for want of water for sustenance; and forty others, for want of water for sustenance, and through thirst and frenzy thereby occasioned, threw themselves into the sea and were drowned; and the master and mariners, for the preservation of their own lives, and the lives of the rest of the negroes, which for want of water they could not otherwise preserve, were obliged to throw overboard 150 other negroes.

Gregson v. Gilbert, 99 Eng. Rep. 629, 629 (K.B. 1783).

255. Even if transportation could be considered compensation for the slaves who survived, the numerous slaves who died in transit were not compensated.

256. Other special defenses exist in Takings Clause jurisprudence, but none of these are applicable in the slavery context. For example, the government is generally not required to pay compensation where a taking is intended to remedy a nuisance, rather than to increase societal wealth. Such takings—for example, shutting down a plant emitting noxious fumes—are properly viewed as exercises of the police power, rather than the takings power. EPSTEIN, *supra* note 11, at 110-21; FISCHEL, *supra* note 11, at 59-61. This exception is not applicable to the taking of slaves' self-ownership.

The Takings Clause is subject to a host of other sundry defenses under certain situations that are inapplicable in the context of slavery. *See, e.g.*, Benjamin Longstreth, Note, *Protecting "The Wastes of the Foreshore": The Federal Navigational Servitude and its Origins in State Public Trust Doctrine*, 102 COLUM. L. REV. 471, 471 (2002) (noting that under the navigational servitude doctrine, the federal government is not required to pay compensation to private interests if they are regulating navigable waters to protect navigation).

257. Each of these defenses would be raised by the government. Private actors are not likely to have standing to challenge a takings suit. *Cf.* Posner & Vermeule, *supra* note 153, at 714 (discussing the lack of standing to challenge descendancy-based reparations scheme). *But cf. id.* at 716-18 (noting possibility that plaintiffs might have standing to challenge racially-based schemes).

1. Statute of limitations

In federal cases, the normal statute of limitations for bringing a claim is six years.[258] Unless the statutory defense can be avoided, any takings claim based on slavery would be barred because of the time elapsed since the taking.[259] However, there are several exceptions to the statute of limitations that could apply.

An initial route is to argue that the statute should be tolled because of an inability in bringing claims at an earlier date.[260] Claims against states could not be brought under federal law until incorporation.[261] In addition, claims were *de facto* barred for many years by rules, both explicit and implicit, denying Blacks access to the courts.[262] Thus, any inability on the part of slave descendants to bring an action earlier stems not from their own inaction or "sleeping on their rights," but rather from societal flaws over which they had no control.[263] In such circumstances, it makes sense to prohibit the state from raising delay-based defenses when the state's actions contributed to the inability to seek a remedy earlier. This is similar to the "discovery rule" where a statute of limitations is tolled until the harm is discovered.[264] Here,

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258. *See* 28 U.S.C. § 2401(a) (2002).

259. The only Takings Clause claim brought by Japanese Americans for lost property due to internment during World War II was dismissed after a long procedural battle, on grounds of government immunity and statute of limitations. Hohri v. United States, 586 F. Supp. 769 (D.D.C. 1984). *See generally* Magee, *supra* note 5 (detailing the history of *Hohri* dismissal and the difficulties in obtaining successful reparations claims).

260. *See generally* 4 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1056, at 255-63 (3d ed. 2002) (discussing how the principle of equitable tolling can halt the running of a statute of limitations if the plaintiff uses reasonable care to learn the facts that would discover the defendant's wrongful acts). *But cf.* Hair v. United States, No. 02-5115, 2003 WL 22805336, at *6-*8 (Fed. Cir. Nov. 26, 2003) (finding that the government need not provide "notice" of its refusal to pay claims in order to begin the statute of limitations period).

261. *See generally* Van Dyke, *supra* note 20, at 76 (alleging that, until the federal government properly enforced the Fourteenth Amendment, the immunity enjoyed by states would continue); *Does America Owe a Debt to Descendants of its Slaves*, *supra* note 4, at 83 ("[N]o former slave could have sued in, say, 1870 and expected to get a hearing").

262. *See* Christopher Waldrop, *Black Access to Law in Reconstruction: The Case of Warren County, Mississippi*, 70 CHI.-KENT L. REV. 583, 583-84 (1994) (arguing that freed slaves did not feel fully free to use the legal system and that the failure of reformers to "fully open the legal system to freed slaves" doomed reconstruction and increased white supremacy).

263. Because slaves had no control over these societal flaws, the situation is analogous to the doctrine of futility in administrative law contexts. *See generally* Robert C. Power, *Help Is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. ILL. L. REV. 547, 578-79 (1987) (describing the futility exception to administrative exhaustion requirements, which holds that where further administrative proceedings would be futile, delaying judicial review until their completion is unnecessary).

264. *See, e.g.*, Diamond v. E. R. Squibb & Sons, Inc., 397 So. 2d 671, 671-72 (Fla. 1981) (tolling statute of limitations in suit against a chemical manufacturer where

the legally cognizable harm was not practically able to be addressed in court until recently.

Similarly, a case can be made that the taking behavior is continuing, in which case no statute of limitations applies.[265] As self-ownership is an inalienable right, any taking can be considered continuous. Each day, the government designated slaves as property and illegitimately confiscated their inalienable property right of self-ownership. As this seizure was illegitimate, it could not affect the underlying inalienability of the property, and therefore a similar taking necessarily occurred the next day, and the next, and so on. Every time the government reasserted slaves' status as the property of others, slaves' inalienable self-ownership property rights were retaken. Because the transfer of property interests was never legitimate, even slaves who were born into the slavery system—never having experienced uncontested control of their self-ownership—were takings victims.[266]

It is also possible to argue that the original taking and the derivative harm are part of the same takings transaction. That is, not only was slavery a taking, but it was part of a continuous taking, still in effect today, from Blacks. Under that view, the entire treatment of Blacks, from slavery up to modern discrimination, constitutes part of the same taking.

Statutes of limitation are also subject to specific exceptions for war crimes and crimes against humanity. The United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity is clear in that it forbids statutory limitations in two situations: war crimes and crimes against

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the harm was not discovered until twenty years after actual tort).

265. *See* Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 134-36 (E.D.N.Y. 2000) (tolling statute of limitations because of defendant bank's "continued denial and failure to return the looted assets to plaintiffs"); Morris A. Ratner, *Factors Impacting the Selection and Positioning of Human Rights Class Actions in the United States Courts*, 58 N.Y.U. ANN. SURV. AM. L. 623, 627-29 (2002) (stating that the victims of human rights abuses are often prevented by their abuse from pursuing litigation until after the statute of limitations has run and suggesting that equitable tolling principles may provide a solution).

Similarly, the slavery taking behavior is continuous because the state has made no attempt to reimburse slaves for the taking of their self-ownership property rights, yet continues to profit from this taking. *Cf.* Adjoa A. Aiyetoro, *Formulating Reparations Litigation Through the Eyes of the Movement*, 58 N.Y.U. ANN. SURV. AM. L. 457, 470-71 (2002) (discussing the unfairness of using a statute of limitations in adjudication with respect to the idea of continuing harm). *But see* Cato v. United States, 70 F.3d 1103, 1108 (9th Cir. 1995) (rejecting a continuous harm argument when dismissing a tort-based reparations claims on statute of limitations grounds).

266. *See infra* notes 323-324 and accompanying text (discussing the potential for a takings claim, regardless of when the claimant obtained title).

humanity.[267] This Convention applies directly to criminal prosecutions and does not speak to other legal actions.[268] However, it seems consistent to suggest that a taking or other legal action, if committed incident to a war crime or crime against humanity, would be within the aegis of the Convention, and hence not subject to statutes of limitations.[269] Though the convention was not adopted until 1968, it was designed to operate retroactively.[270]

The taking of slaves' property rights of self-ownership might fit under either of these two exceptions. Slavery was a war crime, because slaves were generally taken through wars.[271] In fact, the

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267. *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, G.A. Res. 2391, U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968) [hereinafter *Convention*]. *See also Does America Owe a Debt to the Descendants of Its Slaves?*, *supra* note 4, at 83 (discussing the necessity of the war crimes and the crimes against humanity exceptions in light of the absolutely serious nature of the crimes).

268. *Convention*, *supra* note 267, at 40.

269. *Cf. Does America Owe a Debt to the Descendants of its Slaves?*, *supra* note 4, at 83 (suggesting that standard reparations claims could rely on these two exceptions).

270. *See* Duc V. Trang, *Beyond the Historical Justice Debate: The Incorporation of International Law and the Impact on Constitutional Structures and Rights in Hungary*, 28 VAND. J. TRANSNAT'L L. 1, 3-6 (1995) (discussing a Hungarian case wherein a draft law that allowed for the prosecution of crimes committed during an uprising in the 1950s, which contained explicit reference to the Convention, was upheld despite its retroactive application); Jean-Olivier Viout, *The Klaus Barbie Trial and Crimes Against Humanity*, 3 HOFSTRA L. & POL'Y SYMP. 155, 159-61 (1999) (discussing a French case against a former Nazi in which the Convention rules were applies retroactively); *cf.* Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 190-92, 232-38 (1997) (discussing how statutory limitations threaten application of justice against Nazi war criminals).

The retroactive application of the treaty is subject to some limitations. It is always problematic to apply modern standards to acts completed when the world looked at rights differently. It is possible that slavery gradually became a crime against humanity and therefore escaped notice by the legislatures and executive. However, abolitionist arguments may have put the United States on notice of this change. Discussions of the evils of slavery, such as Chief Justice Marshall's *Antelope* opinion, may provide evidence that the United States was on notice that slavery constituted a crime against humanity. *See* The Antelope, 23 U.S. (10 Wheat.) 66, 120 (1825).

There was also widespread belief that slavery was wrong even as it was condoned. The abolition of the slave trade and the universal abolition of slavery late in the nineteenth century—less than a generation after its abolition in the United States—suggest knowledge that slavery was a crime against humanity. Thus, application of the U.N. treaty to circumvent the statute of limitations does not open up the "can of worms" which allows the Romans to sue the Vandals for the sack of Rome. This objection has been discussed at some length in the traditional tort-based reparations literature. *See* Armstrong Williams, *Presumed Victims*, *in* SHOULD AMERICA PAY?, *supra* note 4, at 165, 170 (suggesting that granting reparations raises concerns about giving restitution to other wronged groups throughout history); Matsuda, *supra* note 19, at 384-85 (discussing the slippery slope and "outer limit" objections to reparations); HUMAN RIGHTS WATCH, AN APPROACH TO REPARATIONS 1 (2001) (noting "practical limits" to time frame for reparations and suggesting that, due to the time problem, focusing on "contemporary effects" of human rights abuses is most appropriate).

271. *See* BOAHEN ET AL., *supra* note 71, at 108-10 (discussing capture of slaves by war).

definition of "war crimes" used by the Nuremberg tribunal included slavery.[272] Equally convincing is an argument that the taking involved in slavery occurred incident to a crime against humanity, and thus no statute of limitations bar can be raised. Slavery is not difficult to characterize as a crime against humanity. It is held in universal opprobrium. Any attempt to institute a regime of slavery today would qualify as a crime against humanity.[273] "If there ever was a crime upon humanity, what white folks did to black people is the worst," suggests one commentator.[274]

Statutes of limitations also do not apply where a defendant has engaged in fraudulent concealment.[275] Fraudulent concealment in general requires that a plaintiff "prove that the defendant concealed the wrong and that as a result the plaintiff could not, with due diligence, have discovered his claim."[276] Accordingly, an argument can be made that government acts to limit the ability of Blacks to bring claims in court were the equivalent of fraudulent concealment of the taking. Government policies limiting access to court by Blacks

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272. Article 6 of the London Agreement defines war crimes as:

> [V]iolations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

Charter of the International Military Tribunal, *in* Agreement For the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6, 59 Stat. 1544.

273. *But see* Chris McGreal, *Britain Blocks EU Apology for Slave Trade*, GUARDIAN, Sept. 3, 2001, at 2 (noting that at the 2001 United Nations Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance, delegates from many African nations unsuccessfully urged the European Union to characterize the slave trade as a crime against humanity).

274. SHOULD AMERICA PAY?, *supra* note 4, at 83; *see also* Roger Wareham, *The Popularization of the International Demand for Reparations for African People*, *in* SHOULD AMERICA PAY?, *supra* note 4, at 226, 230-36 (describing slavery as a crime against humanity). Chief Justice Marshall's *Antelope* opinion, discussed earlier, could support a conclusion that the United States knew slavery was a crime against humanity. *See* discussion *supra* note 34. *But see* Aiyetoro, *supra* note 265, at 469-71 (noting difficulties in making the case for slavery as a crime against humanity).

275. *See, e.g.*, Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) (making an exception for the statute of limitations in all federal cases where the plaintiff has been defrauded but is unaware of the violation, and preventing the statute of limitations from starting until after the fraud is discovered); King & King Enters. v. Champlin Petroleum Co., 446 F. Supp. 906, 910 (E.D. Okla. 1978) (citing *Holmberg* and other Supreme Court and circuit court precedent when stating the threshold proposition that, "[i]t is settled that the fraudulent concealment of a cause of action tolls a statute of limitations and that this federal fraudulent concealment rule is read into every federal statute of limitations").

276. Richard L. Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 GEO. L. J. 829, 855 (1983).

effectively concealed any remedy available to them, and this concealment provides support for tolling the statute of limitations.

Finally, the statute of limitations can be avoided through a legislative act: Congress could modify the statute.[277]

2. Sovereign immunity

The doctrine of sovereign immunity provides that in many instances, a government may not be sued without its permission.[278] Sovereign immunity has arisen in other reparations cases. For example, the Ninth Circuit Court of Appeals upheld dismissal of the *Cato* litigation, which sought reparations for slavery, on grounds that the government had not waived its sovereign immunity.[279]

However, recent decisions have established that the defense of sovereign immunity is not applicable to takings claims. In *First English Evangelical Lutheran Church v. County of Los Angeles*,[280] the Supreme Court noted that the remedy provided under the Takings Clause is "self-executing."[281] The requirement of compensation is based in the Constitution, the Court ruled, and fundamental to its notion of justice.[282] This case makes clear that sovereign immunity is not a defense to takings claims.

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277. *See* Ratner, *supra* note 265, at 628-29 (discussing legislative extension of statutes of limitation); *see also* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 313-15 (1945) (upholding Congress's ability to retrospectively alter statutes of limitation); SHOULD AMERICA PAY?, *supra* note 4, at 82 (suggesting that one way of avoiding the statute of limitations in a potential breach-of-contract case for slave reparations would be for Congress to intervene and waive the statute of limitations).

Other specially tailored exceptions have been created by Congress or the courts before, such as with Indian land cases. Oneida Indian Nation v. New York, 691 F.2d 1070, 1084 (2d Cir. 1982) (stating that "a suit by the United States as trustee on behalf of an Indian Tribe is not subject to state delay-based defenses" and that it would be "anomalous to allow the trustee to sue under more favorable conditions than those afforded the tribes themselves").

278. *See generally* Van Dyke, *supra* note 20, at 76.

279. Cato v. United States, 70 F.3d 1103, 1107-11 (9th Cir. 1995) (stating that the United States can only be sued to the extent that it has waived its sovereign immunity, and holding that the plaintiff failed to meet her burden to establish that the Federal Tort Claims Act's limited waiver of sovereign immunity covered the plaintiff's reparations claim).

280. 482 U.S. 304 (1987).

281. *Id.* at 315; *see also id.* at 316 n.9.

282. *See id.* at 316 n.9 (stating that the Constitution requires a compensation remedy whenever there is a taking); *id.* at 316-17 and cases cited therein (supporting contention that constitutional law commands compensation in takings cases).

This result has generated similar discussion in subsequent cases as well as in academia. *See* Reich v. Collins, 513 U.S. 106, 109-10 (1994) (stating that when taxes are "erroneously or illegally assessed," the taxes should be refunded); Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 338-40 (1988) (suggesting that *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987), prevents sovereign immunity from barring compensation claims). *But see* Richard H. Seamon,

It is not impossible to conceive of a takings jurisprudence that accords more respect to sovereign immunity, and it is certainly possible that sovereign immunity may surface at some point and create problems for any takings claims based on slavery. However, if current case law is followed, sovereign immunity should not prevent the bringing of claims for compensation for the taking of slaves' self-ownership property rights.

3. Impermissible retroactivity

It could be argued that retroactive application of constitutional standards to a pre-constitutional time period is improper because slave statutes in the original colonies predated the Constitution. However, courts generally reject such defenses and rulings of a constitutional nature are commonly applied retroactively.[283] As the Supreme Court has emphasized, "Both the common law and [Supreme Court] decisions have recognized a general rule of retrospective effect for the constitutional decisions of this Court. Nothing in the Constitution alters the fundamental rule of retrospective operation that has governed judicial decisions for almost a thousand years."[284] Takings decisions change the state of the law, and citizens and governments are expected to conform accordingly.[285]

Takings Clause jurisprudence currently includes many concepts not envisioned by the Framers, such as regulatory takings.[286] Judicial

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The Asymmetry of State Sovereign Immunity, 76 WASH. L. REV. 1067, 1072-80 (2001) (arguing that the Supreme Court has not conclusively decided whether sovereign immunity prevents unconsenting states from being sued for Takings Clause violations).

283. *See, e.g.*, Harper v. Va. Dep't of Taxation, 509 U.S. 86, 94 (1993) (noting that Supreme Court rulings, when interpreting federal law, must be applied retroactively to all cases still open on direct review); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544 (1991) ("When the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata.").

284. *Harper*, 509 U.S. at 94.

285. In most civil cases, including takings cases, the correct standard for a court to apply is whether an action would be a compensable taking under a modern understanding of the clause, rather than whether it was understood to be compensable at the time of the taking. Numerous takings cases, such as *Mahon* and *Penn Central*, altered the status of the law in significant ways. For example, *Mahon* first established the principle of regulatory takings. *See supra* notes 114-115. *Penn Central* approved of groundbreaking laws, countenancing a rather invasive confiscation on the grounds that in-kind compensation was acceptable, harm was not inappropriately targeted, and reciprocity of advantage applied. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (holding that there was no taking where the government precluded a property owner from building on his property because it was designated as a historical landmark).

286. *See* Treanor, *supra* note 11, at 849-55 (stating that while compensation for

acceptance of the regulatory takings doctrine illustrates that the Takings Clause has not been interpreted to be circumscribed by the relatively narrow boundaries understood by the Framers. Slavery does present a particularly special case, a taking that occurred centuries before any possible remedy, but it can still be addressed using modern understandings of takings.[287]

The fact that a statute predated the Constitution is not sufficient to immunize it from constitutional requirements. Presumably, a state assumed the responsibility of bringing its laws into accord with the new Constitution upon ratification.[288] Thus, state statutes allowing slavery would trigger takings compensation since states had ratified the new Constitution.

While states were not bound by the Bill of Rights until its incorporation, which happened well after the abolition of slavery,[289] the federal government has always been bound by the Bill of Rights. As a result, federal acquiescence in the taking of slaves may be a compensable taking. Holding the states accountable for violation of the federal Takings Clause is not such a stretch either. First, many states have takings clauses of their own.[290] Second, the failure to compensate for the prior taking continues to this day—well past incorporation of the Takings Clause. These arguments provide at least a colorable claim for holding the states accountable for Takings Clause violations even prior to incorporation.

In addition, Keith Hylton argues that modern legal standards can be applied to slavery because slavery is properly viewed not as a law-sanctioned regime but "as a corruption or displacement of the law."[291] Consequently, applying today's law to slavery should not be seen as the retroactive application of law to slavery, but rather as "bringing

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regulatory takings was not implicitly disagreed with by the Constitution, it was explicitly rejected by the Framers in discussion).

287. Applying a modern understanding of takings, of course, would allow compensation for claims brought under a theory of regulatory takings based on the initial slave laws. If a claim is to be brought under a derivative takings theory, as suggested above, this problem is less serious; any derivative takings claim would be based on the effects of slavery on modern-day slave descendants, and, therefore, would presumably apply modern understandings of the Takings Clause.

288. States that did not ratify the Constitution assumed this responsibility once the Constitution became operative through its ratification.

289. *See* FISCHEL, *supra* note 11, at 65-66 (noting that the Takings Clause was incorporated to apply to state governments in 1897 with *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897), in which the Supreme Court held that a railroad right of way constituted a taking).

290. *See id.* at 65 (noting that the constitutions of every state except New Hampshire and North Carolina contain versions of a takings clause).

291. *See* HYLTON, *supra* note 137, at 11.

law to a regime from which [law] had been entirely displaced."[292] Hylton argues that slaveowners' insistence on the non-applicability of laws to slaves was itself part of their offense.[293] Such application, while retroactive, would be limited to cases involving "institution[s] . . . founded on the absence of law."[294]

In summary, retroactive application of Takings Clause compensation requirements suffers from the problems common to retroactive application of any law. However, these considerations are no more convincing here than in other instances where retroactive application of law is deemed acceptable and should not be considered a barrier to takings compensation.

V. TAKINGS CLAIMS IN THE REPARATIONS FRAMEWORK: PRACTICAL APPLICATIONS

A. *Taking Takings to the Courts*

This Article has argued that slavery contains the elements of a Takings Clause violation. In any lawsuit for just compensation based on slavery, it would be necessary to establish as a legal matter that self-ownership is a compensable property right, and that slavery was a taking of that right.

Advocates could start by bringing lawsuits against the state governments of states that enacted laws allowing slavery. These suits would likely be brought in conjunction with other claims, such as equal protection claims and tort-based reparations claims. Takings claims could also be added as amendments to complaints in existing reparations litigation against the government.

Suits against states could bring attorneys general to the bargaining table for settlement discussions. Should they proceed to jury verdicts, they could also result in compensation for the taking. However, the possibility of varied or contradictory judgments would complicate suits against states.

Suit could also be brought against the federal government. A federal suit could avoid some problems that might arise in state suits, such as issues arising from the non-incorporation of the Takings

292. *Id.* at 3.

293. *Id.* at 3, 6-7. Hylton argues that what made slavery a special institution is not the government regulations that supported slavery, but rather the lack of regulations. *Id.* at 6. This argument implies an abdication of the government's Hobbesian role in controlling bad actors. *See id.*; *see also* MODERN PHILOSOPHY, *supra* note 47, at 51-55 (discussing Hobbesian conception of the role of government).

294. HYLTON, *supra* note 137, at 10. "The limiting principle is suggested by the special legal status that the institution claimed for itself." *Id.*

Clause at the time of the takings. It would also introduce new issues; the federal government, while it participated in slavery, never participated to the extent that state governments did. As such, the action of the taking might be harder to establish at the federal level. As with the states, any suit brought against the federal government should probably be pursued in conjunction with other related claims, such as Fourteenth Amendment claims and traditional tort-based reparation claims.[295]

B. Taking Takings to the Legislature

Takings arguments can also be raised in the legislative arena, where reparations efforts have thus far been unsuccessful. Reparations advocates could emphasize to Congress and the country that slaves were kidnapped and their property rights of self-ownership taken in violation of the Takings Clause. They could highlight the hypocrisy of Madison and others in suggesting that slave owners—poor, helpless, victimized slave owners—should receive compensation for the "taking" of emancipation. Advocates could use the takings argument to buttress other arguments in favor of reparations, affirmative action, and government investment in improving Black lives.[296]

The moral weight of the takings argument, combined with the many other arguments already enlisted by reparations supporters, could influence Congress to more closely examine the question of reparations, both in the traditional and in the takings context.[297]

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295. To bring a suit, plaintiffs would need a representative who has standing. This could be accomplished by locating a slave descendant to act as a lead plaintiff. *See* Aiyetoro, *supra* note 265, at 467-69 (proposing that standing could be established by claiming that the U.S. government failed to eliminate, under the Thirteenth Amendment, the badges and indicia of slavery).

296. *Cf.* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 575-80 (2002) (proposing that affirmative action programs can be seen as a form of reparations); Brief of Amici Curiae The National Coalition of Blacks for Reparations in America (N'COBRA) and The National Conference of Black Lawyers (NCBL) in Support of Respondents at 12-17, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (Nos. 02-241 & 02-516) (arguing that the Fourteenth Amendment does not prohibit affirmative action in education to serve as a reparation for slavery).

297. Some scholars have suggested that resolution of mass claims through the political process avoids inefficiencies inherent in the judicial system. *See, e.g.*, Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 GEO. L.J. 2167, 2170 (2000) (stating that transaction costs for product liability and environmental claims consume as much as two-thirds of any award given through the court system). *But see* Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 971-74 (2001) (suggesting that judicial resolution of compensation claims enjoys the benefits of flexibility, accountability, visibility, and appropriately vigorous pursuit of claims).

Legislators could use the takings argument to point out that America has a moral obligation to pay for the taking of slaves' self-ownership, independent of any legal obligation the country has to make slaves whole.[298] Legislative framing of the issue as a takings problem may make any compensation statute less susceptible to attack in court, given courts' oftentimes greater protection of property rights than liberty rights.[299] Even if legislators were unable to enact just compensation laws, they could possibly assist a takings suit to proceed more smoothly by legislation as limited as extending the statute of limitations for slavery takings claims.

C. The Value of Just Compensation

Numerous scholars and advocates have made reparations proposals and a full treatment of the numerous possibilities for compensation is beyond the scope of this Article. A brief examination of some reparations proposals suggests that they could easily be used to satisfy the just compensation required by the Takings Clause. For example, numerous reparations scholars, such as Randall Robinson, have urged the creation of a fund that would provide educational and economic benefits to Blacks.[300] Some have suggested "subclassing" award recipients, as in class action lawsuits, to determine appropriate awards.[301] Other advocates, such as Congressman John Conyers, have

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298. For a discussion of the use of rhetoric by legislators to create public awareness of issues and to frame their solutions, see generally Daniel M. Filler, *Random Violence and the Transformation of the Juvenile Justice Debate*, 86 VA. L. REV. 1095, 1096, 1110-21 (2000) (reviewing JOEL BEST, RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS (1999), which discusses how the state uses rhetoric to shape public perceptions of juvenile crime and gun control); Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 346-64 (2001) (examining the use of child-victim stories and statistics to generate support for Megan's Law).

299. *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 373 (1993) (noting "a tilt by the Rehnquist Court in favor of protection of property rights and away from the strong preference given to personal rights by the Warren and Burger Courts").

300. *See* ROBINSON, *supra* note 4, at 244-45 (discussing Robert Westley's proposal of establishing a private trust, which would "be funded out of the general revenues of the United States to support programs" that further the education and economic empowerment of Blacks); *see also* Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 HARV. L. REV. 1689, 1698 (2002) (arguing that reparations should augment existing programs by supporting institutions in Black communities, Black-owned businesses, and affirmative action programs).

301. *See, e.g.*, Chisolm, *supra* note 5, at 721-22 (noting that since not all Blacks are descendant of slaves, an appropriate strategy is to treat Blacks, as a class, like an injured party, and then create subclasses to determine eligibility for specific remedies).

eschewed making concrete suggestions and asked for further study of the matter.[302]

Just compensation for slavery takings could probably be designed in a similar manner to trust funds proposed by reparations advocates. In addition, just compensation could be designed based on any findings of committees set up to study the issue. Fluid compensation, or *cy pres* compensation models,[303] could be used based on theories developed in numerous mass tort cases.[304] Some portion of any award could go to organizations, as was done in the Holocaust cases[305] and the Agent Orange case.[306] It is also possible that other valid approaches exist. The problem is certainly complex, as is distribution

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302. *See* Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 107th Cong. (2001). The bill states:

> (b) PURPOSE.—The purpose of this Act is to establish a commission to—
>
> (1) examine the institution of slavery which existed from 1619 through 1865 within the United States and the colonies that became the United States, including the extent to which the Federal and State Governments constitutionally and statutorily supported the institution of slavery;
>
> (2) examine de jure and de facto discrimination against freed slaves and their descendants from the end of the Civil War to the present, including economic, political, and social discrimination;
>
> (3) examine the lingering negative effects of the institution of slavery and the discrimination described in paragraph (2) on living African-Americans and on society in the United States;
>
> (4) recommend appropriate ways to educate the American public of the Commission's findings;
>
> (5) recommend appropriate remedies in consideration of the Commission's findings on the matters described in paragraphs (1) and (2); and
>
> (6) submit to the Congress the results of such examination, together with such recommendations.

303. The Restatement (Second) of Trusts defines the cy pres doctrine as follows:

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.

RESTATEMENT (SECOND) OF TRUSTS § 399 (1959). *See generally* Note, *Damage Distribution in Class Actions: The Cy Pres Remedy,* 39 U. CHI. L. REV. 448 (1972) (describing how the *cy pres* doctrine can be applied to class action law suits).

304. *See, e.g.*, Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990) (noting that "[f]ederal courts have frequently approved [*cy pres* awards] in the settlement of class actions where the proof of individual claims would be burdensome or the distribution of damages costly").

305. *See In re* Holocaust Victim Asset Litig., 105 F. Supp. 2d 139, 140 (E.D.N.Y. 2000) (granting final approval of a $1.25 billion settlement agreement after determining that it reflected "a fair, reasonable, and adequate compromise," even though specific information about individual recoveries was not yet discovered).

306. *See generally* PETER SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 206-23 (1987) (providing an in-depth analysis of the Agent Orange litigation and explaining the compensation scheme crafted by the court, which among other things, gave millions of dollars to veterans' organizations for legal, medical, and social services).

of any compensation.[307] As with other compensation schemes, the logistical problems of victim identification and award distribution should not prove fatal to restitution.[308]

One compensation issue unique to takings claims is that courts generally award market price for takings.[309] However, there is no market for self-ownership, which is an inalienable good.[310] Given this difficulty, it is probably appropriate instead to compensate based on disgorgement of unjust enrichment.[311]

An alternative might be to base compensation on the market value of the labor (*i.e.*, what slaveowners would have had to pay in the absence of slavery). That value could serve as a minimum, with a premium added to reflect the fact that the labor was involuntary.

The calculation of appropriate compensation could use the economic valuations of life as set out in economic studies.[312] The

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307. *See, e.g.*, Weinstein, *supra* note 297, at 971 (discussing how courts use fluid recovery to deal with the problems of mass tort claims, such as with aggregated settlements, compensation-administration plans, and insurance type installment payment programs); David Chen, *Defining Limit of Generosity for 9/11 Fund*, N.Y. TIMES, July 14, 2002, at 25 (noting the difficulties in formulating disbursement awards from the September 11th Victim Compensation Fund as well as the fact that many families believe the awards, though potentially in excess of $20 million, do not fairly value a person's worth and lost income).

308. *See* Posner & Vermeule, *supra* note 153, at 702 (noting that despite any purported problems with slave reparations, the problems—and solutions—are no different than other complex cases such as "wrongful life" cases wherein the people bringing the claim would not exist if not for the wrongdoing).

309. *See, e.g.*, United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984) (holding that just compensation is measured by the market value of the property at the time of the taking, unless the market value is too difficult to find or would lead to injustice, because market prices are easily determined and generally reliable).

310. Market price in the slavery context could arguably be established through examining prices of slave sales. However, that market is almost certainly undercompensatory. Slave market prices reflect only the property's value after the taking. Since the value of property is adversely affected by the taking, such *ex post* market valuations may undervalue the property.

The problem of properly valuing slave labor is exacerbated by the fact that, prior to the government action allowing slavery, the market in question did not exist. The government taking (and corollary gift to private property owners) created an entirely new market. *See generally* POSNER, *supra* note 172, at 65 (discussing the problems that arise when market value results from government action).

311. *See* Sebok, *supra* note 62, at 651-57 (discussing unjust enrichment in the reparations context). The Supreme Court has stated that:

> [A]n exception to the normal measure of just compensation is required [where] fair market value is not ascertainable. Such cases, for the most part, involve properties that are seldom, if ever, sold in the open market. Under those circumstances, we cannot predict whether the prices previously paid, assuming there have been prior sales, would be repeated in a sale of the condemned property.

50 Acres of Land, 469 U.S. at 29-30 (internal quotations omitted).

312. Professor Kip Viscusi has written extensively about the economic valuation of life. *See* W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 697-701 (2d ed. 1995) (stating that an implicit value of life ranges from $1 million to $6 million); W. Kip Viscusi, *The Value of Risks to Life and Health*, 31 J. ECON. LITERATURE 1912, 1930

value in such studies for death is about $5 million to $7 million—that is, people tend to value their life at about that rate.[313] If that amount is accepted as the value of life, then the value of self-ownership is presumably some fraction of that amount.

In sum, though compensation would raise many issues, much of the groundwork for distribution, including examining and discussing various payment options, has already been set out in the reparations literature. One question unique to takings claims—how to approximate market price for inalienable property—is adequately resolved by instead using either disgorgement analysis or market value of labor.

VI. WHAT TAKINGS CLAIMS ADD TO THE REPARATIONS MODEL

The Takings Clause gives reparation advocates a new theory to argue for compensation for slavery. It has both advantages and disadvantages as compared with the traditional tort-based reparations model.

A major advantage, as noted above,[314] is that the Takings Clause arguably is not subject to the defense of sovereign immunity. This is especially significant because the only reparations case to date to make it to the appellate level, *Cato v. United States*, foundered on precisely those grounds.[315]

Takings claims may also be less susceptible to the defenses of attenuation, which have plagued traditional tort-based claims. Attenuation has been a great bugbear for reparations claims. Tort law in general is reluctant to recognize claims of harm that are attenuated rather than direct.[316] Tort theory has trouble explaining

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(1993) [hereinafter Viscusi, *Value of Risks*] (arguing that the value of life of a U.S. airline passenger averages about $5 million); *cf.* POSNER, *supra* note 172, at 214-17 (discussing economic valuation of death using insurance and risk, and the drawbacks of that method). Viscusi's approach to valuation of life has been criticized by some scholars. *See* David A. Hoffman & Michael P. O'Shea, *Can Law and Economics Be Both Practical and Principled?*, 53 ALA. L. REV. 335, 395-98 (2002) (noting that the economic analysis and decision-making that Viscusi suggests that corporations should utilize is offensive to the public and results in higher awards being implemented by jurors against such corporations).

313. *See* Viscusi, *Value of Risks*, *supra* note 312 (concluding in 1993 that the value of life was $5 million). Adjusted for inflation, it would now be worth a little over $6 million. *Id.*

314. *See supra* Part IV.B.2 (discussing application of the defense of sovereign immunity to takings claims for slavery).

315. *See* Cato v. United States, 70 F.3d 1103, 1111 (9th Cir. 1995) (holding that, *inter alia*, the plaintiff's claims fell outside the United States' limited waiver of sovereign immunity under the Federal Tort Claims Act).

316. *See* HYLTON, *supra* note 137, at 2, 35-38 (discussing how courts limit defendant liability through the use of procedures like foreseeability and proximate cause). *See generally* J. Mark Appleberry, Note, *Negligent Infliction of Emotional Distress: A Focus on*

how claims made many years after a crime can meet all of the elements of a tort.[317] Tort actions seeking tort compensation for claims bridging generations have not generally been successful.[318] For example, in the DES mass tort case, the court did not award damages to granddaughters, finding that the harm was too attenuated.[319] In the Holocaust cases, which also dealt with slave labor, the primary concern was in dealing with the victims themselves.[320] Importantly, there was not an overwhelming degree of attenuation between the crime and the settlement in the Holocaust cases.[321]

Slavery reparations claims, in contrast, bring a large degree of attenuation—a generational gap. However, the Supreme Court clarified that "the Takings Clause does not have 'an expiration date'" in its ruling allowing property owners who acquire title after the enactment of a regulation to bring takings claims.[322]

While takings claims have often been prosecuted as torts, they are not solely rooted in the tort law tradition.[323] Since takings claims

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Relationships, 21 AM. J.L. & MED. 301, 304, 314-22 (1995) (arguing that rules limiting tort claims for negligent infliction of emotional distress create an arbitrary cutoff and that a better rule would focus on the relationship between the parties).

317. *See* KEITH N. HYLTON, A FRAMEWORK FOR REPARATIONS CLAIMS 5-7 (Boston Univ. Sch. of Law Working Paper Series, Working Paper No. 03-05, 2003) (arguing that because of the passage of time, tort claims for slave reparations suffers from the problem of identifying class members and establishing causation), *available at* http://www.bu.edu/law/faculty/papers/pdf_files/HyltonK033103.pdf (on file with the American University Law Review); *see also* HYLTON, *supra* note 137, at 38-40 (noting the difficulty in determining the value of slave labor due to the fact that slaves were not compensated, and discussing the trouble in figuring out what the appropriate value would be to current generations). Jeremy Waldron has argued that the indeterminacy of such claims weighs against their viability. Jeremy Waldron, *Superseding Historical Injustice*, 103 ETHICS 4, 6-27 (1992); *cf.* HYLTON, *supra* note 137, at 48-50, 53-56 (suggesting that rejecting reparation claims on moral grounds, as argued by Waldron, fails to recognize both the continuing impact of slavery on current society, and that those who benefited from slavery should be required to pay compensation).

318. *But cf.* Posner & Vermeule, *supra* note 153, at 700 (noting that some reparation schemes allow payments to descendents based on the fact that when the property was expropriated the takers knew they were injuring future generations).

319. *See* Enright v. Eli Lilly & Co., 570 N.E.2d 198, 203 (N.Y. 1991) (holding that, although the effects of DES could extend for generations, the court must limit liability to those who took the drug so that the amount of compensation would be manageable).

320. *In re* Holocaust Victim Asset Litig., 105 F. Supp. 2d 139, 143 (E.D.N.Y. 2000) (approving settlement and distribution plan for those "recognized as targets of systematic Nazi persecution").

321. The settlement was approved in July, 2000, approximately six decades after the Holocaust began. *Id.*

322. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) (asserting that future successors to property may challenge unreasonable land use limitations, or else "postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable").

323. *See* City of Monterey v. Del Monte Dunes, 526 U.S. 687, 716-17 (1999) (noting that takings claims were brought as both torts and as quasi-contracts cause of

originate in property, an argument can be made that they do not require the same showing of proximate cause as traditional torts. In addition, if theories of derivative takings or continuous takings are approved, there is no attenuation to be raised because the injury is current. Similarly, takings jurisprudence allows a claim to be brought despite the fact that some slaves receive their property interest—*i.e.* were born—after the imposition of laws removing that interest.[324] Takings claims on behalf of slavery victims and their descendants may thus avoid some of the difficulties that have plagued tort-based reparations actions.

In addition to specific legal differences, takings claims also have the benefit of drawing from a different legal history and tradition than tort claims and appealing to a different demographic. While tort claims for reparation are based on harm to liberty and human rights[325]—pillars of liberal and critical thought—takings claims would be based on a property deprivation—a pillar of libertarian thought. This difference could impact just how compensation claims are viewed in increasingly more conservative courts.[326] To the extent that a Takings Clause argument can expand the base of support for compensation for slavery, it serves a vital function.[327]

Enlisting the Takings Clause to address the harm of slavery also encourages healthy cross-pollination of legal ideas. Great benefits could result from Takings Clause scholars and reparations scholars working together to address the historic injustice of slavery takings.

Finally, takings claims provide another opportunity to raise these issues in a judicial forum. Every time these claims are raised, there is a chance they will succeed, as well as a chance that defendants will choose to settle. Even if takings claims are as much of a long shot as traditional tort-based reparations claims, two long shots are better than one.

It is clear that takings claims present a unique set of difficulties. Specifically, they require the establishment of a property right of self-

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actions).

324. *See Palazzolo*, 533 U.S. at 630 (holding that a takings claim is not barred simply because an owner took title of the property after the regulation was enacted).

325. *See* HYLTON, *supra* note 137, at 2-3 (noting that potential claims under tort law could include "social torts" such as deprivation of status and the denial of religious freedom).

326. *See* Erwin Chemerinsky, *Understanding the Rehnquist Court: An Admiring Reply to Professor Merrill*, 47 ST. LOUIS U. L.J. 659, 659-75 (2003) (discussing the conservative nature of the Rehnquist Court).

327. *See* Boris I. Bittker & Roy L. Brooks, *The Constitutionality of Black Reparations*, in WHEN SORRY ISN'T ENOUGH, *supra* note 3, at 374, 385 (noting that "a judicial resolution of . . . legal questions surrounding black reparations might well turn on public policy considerations").

ownership.[328] They also run against problems of possible constitutional endorsement, mentioned earlier.[329] Plus, the more promising takings arguments are based on new applications of takings law, such as derivative takings, that have not yet been approved by courts. Finally, Takings Clause claims can only be brought against the government, not private actors.

Takings Clause arguments, then, are not a silver bullet that can remedy every problem presented by compensation claims. Rather, they provide an additional tool for the reparations advocate. This tool could be fruitful, especially as legal theories are further developed to avoid the problems associated with takings claims.

CONCLUSION

The taking of slaves' self-ownership should be viewed as a compensable act under the Takings Clause. The idea has intuitive appeal—if slaves did not suffer a taking, who did? The argument also creates a kindlier, more reasonable persona for the Takings Clause, which unfortunately until now has only been associated with slavery through arguments favoring compensation for slaveowners.

Slavery looks in many ways like a prima facie taking. Unique problems certainly exist in takings analysis, when applied to slavery. However, impetus for overcoming these problems can be found in the strong parallels to the purposes of the Takings Clause and the policy behind reparations. The argument that slavery violated the Takings Clause violation can be employed before courts and legislatures to expand the debate on reparations, and to help attain just compensation for millions of takings victims.

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328. *Supra* Part I.
329. *Supra* Part IV.B.