2014

The Breach of the Common Law Trust Relationship between the United States and African Americans – A Substantive Right to Reparations

Ayesha Bell Hardaway
Case Western University School of Law, Ayesha.Hardaway@case.edu

THE BREACH OF THE COMMON LAW TRUST RELATIONSHIP BETWEEN THE UNITED STATES AND AFRICAN AMERICANS: A SUBSTANTIVE RIGHT TO REPARATIONS

AYESHA BELL HARDAWAY∞

"You don't simply say 'I'm sorry' to the man you've robbed. You return what you stole or your apology takes on a hollow ring."[1]

∞ Visiting Assistant Professor of Law, Case Western Reserve University, School of Law, B.A. (Sociology), The College of Wooster, 1997; J.D., Case Western Reserve University, School of Law, 2004. A draft of this paper was presented at the Northwestern People of Color Conference at Loyola University School of Law. I would like to express my profound gratitude to Ruqaiijah Yearby, Ifeoma Ajunwa, Laura McNally-Levine, Avidan Cover, Jessie Hill, and Taja-Nia Henderson for their insightful and thoughtful comments. I would also like to extend my sincerest appreciation to Nya Hardaway, Najee Hardaway, Pamela Bell, and Tiiara Patton for their unwavering support and inspiration.

1. Rhonda V. Magee, *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, 883–84 (1993) (quoting Dr. Ernest Campbell's response to James Forman's Black Manifesto of 1969). Dr. Campbell was a minister at New York's Riverside Church, where Forman interrupted service to demand reparations in the amount of $500,000,000. Dr. Campbell understood the power of repentance and memorialized the above quote in a response letter to Forman's demands.

INTRODUCTION

Much to the dismay of the overly optimistic or naïve among us, the United States continues to be plagued by the vestiges of our vile beginnings. The enslavement of Africans and their descendants was an integral component of those beginnings and the subsequent development of the United States as a nation. African Americans were dominated, controlled, and considered less than human, all for the benefit of the country and its white citizens. The institutionalized racial hierarchy that began nearly 400 years ago continues to stifle the nation's progress toward racial equality. Indeed, despite the widely-touted expectation in 2008 that the election of America's first African American President signaled the emergence of a "post-racial" America, the 2012 re-election of the same African American to the White House has actually served to further illuminate the deep-seated racial animosity still present in today's society.[2]

Domination and elaborate control of Africans in colonial America, and later the United States, were exerted to provide the requisite framework for the economically profitable slave trade.[3] Long after the formal end of slavery, slavery apologists characterized the aims of slavery in pseudo-paternalistic terms as "training" and "civilizing . . . the untutored savage."[4] For decades, the United States and local governments continued to exercise their domination by enforcing a national system of slavery, racial segregation, and discrimination.[5] That system of laws and government-sanctioned norms became so pervasive and

2. *See generally* Paul Banahene Adjei & Jagjeet Kaur Gill, *What Has Barack Obama's Election Victory Got to do with Race? A Closer Look at Post-Racial Rhetoric and Its Implication for Antiracism Education*, 16 RACE ETHNICITY & EDUC. 134 (2013) (discussing the realities of race in the United States and Canada in the years since Obama's election and the fallacies of "post-racial" thinking). Political attacks laden with racial overtones and comments are evidence that we still live in a country where one's skin color is used to criticize, mock, and ridicule. *See id*. at 145–49.

3. *See* JOHN HOPE FRANKLIN & ALFRED A. MOSS JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 45, 132–37 (8th ed. 2000).

4. ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 149 (2004) [hereinafter BROOKS, ATONEMENT].

5. *See, e.g.*, *id*. at 34 (discussing the federal government's role as a "front-line perpetrator" of atrocities on Africans and African Americans).

commonly accepted that it has been personified as "Jim Crow."[6] As a result, racial hierarchy is firmly entrenched in American society, a hierarchy evident in current American educational, justice, and economic systems.[7] The nearly 400-year-old injury caused by institutionalized racial supremacy and discrimination in America has yet to heal. Reparations have been sought as a remedy for those injustices for nearly as long.[8]

The precepts of reconciliation—apology, atonement, and forgiveness—are woven into the core of humanity.[9] Apology, the first precept, is not possible until the malefactor acknowledges their error while expressing regret.[10] Until very recently, no apology for the atrocities of slavery had been made, and even the suggestion that such an apology was warranted was controversial.[11] In 2003, President George W. Bush acknowledged that the Trans-Atlantic Slave Trade was "one of the greatest crimes of history" and even went as far as to recognize that the United States was "[a] republic founded on equality for all [that] became a prison for millions."[12] Notably, President Bush was careful not to explicitly apologize for United States-sanctioned and enforced slavery.[13] It was not until 2009 that both houses of Congress passed resolutions to apologize for slavery and the subsequent government-enforced segregation.[14] Those resolutions, however, failed to take the next step in the reconciliation process by atoning for what was stolen. In fact, the Senate apology expressly disclaims any right to monetary reparations for the millions of African Americans denigrated and harmed by the government's actions.[15] As a result, the precepts of reconciliation

6. *See* FRANKLIN & MOSS, *supra* note 3, at 290.

7. *See generally* GLORIA J. BROWNE-MARSHALL, RACE, LAW AND AMERICAN SOCIETY: 1607 TO PRESENT (2d ed. 2013) (detailing America's legal history of racial discrimination against Blacks, Asians, and Native Americans).

8. The first reparations lawsuit was filed in 1915 by Cornelius J. Jones. *See* Johnson v. McAdoo, 45 App. D.C. 440 (1916), *aff'd*, 244 U.S. 643 (1917). However, demands for reparations began prior to the end of slavery. *See* Adjoa A. Aiyetoro & Adrienne D. Davis, *Historic and Modern Social Movements for Reparations: The National Coalition of Blacks for Reparations in America (N'Cobra) and Its Antecedents*, 16 TEX. WESLEYAN L. REV. 687, 693 & n.16 (2010) (citing DAVID WALKER, DAVID WALKER'S APPEAL 80 (Black Classic Press 1993) (1830)). David Walker's Appeal was published in 1830 and consisted of four letters to African Americans urging a revolution and Black unity while imploring whites to recognize the injustice of slavery. *See also* Aiyetoro & Davis, *supra*, at 693 (discussing Sojourner Truth's petition for land to be redistributed to former slaves).

9. *See* BROOKS, ATONEMENT, *supra* note 4, at 143 (discussing his formula for racial reconciliation in America: "atonement—apology and reparation—plus forgiveness").

10. *See id*. at 142.

11. *See, e.g.*, ROY L. BROOKS, WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN JUSTICE 352, 355, 370 (1999) (describing how President Clinton avoided formally apologizing for slavery and opposed reparations).

12. ALFRED L. BROPHY, REPARATIONS: PRO & CON 203–04 (2006).

13. *Id*. at 13.

14. *See* S. Con. Res. 26, 111th Cong. (2009); H.R. Res. 194, 110th Cong. (2008).

15. S. Con. Res. 26.

have not yet been applied by the United States in its efforts to achieve racial reconciliation.

Legal scholars have made extensive and significant contributions to the reparations debate and movement. Proponents of reparations have written on the prospect of making the international, tort, civil, and/or legislative case for reparations.[16] Numerous articles have also been produced to support the position that there can be no legal remedy for reparations for slavery and discrimination in the United States.[17] This article aims to add to the reparations scholarship by comparing the common law trust relationship between the United States government and African Americans to the government's common law trust relationship with Native Americans. That common law trust relationship can and should be a vehicle for establishing an equitable right to African American post-slavery reparations claims. In order to secure those damages, a viable waiver of sovereign immunity must be established. This article will also explore the establishment of a waiver of sovereign immunity by the United States for the disbursement of slave reparations. Existing Native American trust case law supports the argument that a breach of common law trust duties provides plaintiffs a right to an accounting from the government as well as a substantive right to monetary damages.

It has been written that there are no legal similarities in the relationships between the United States government and Native Americans and that of the government's relationship with African Americans.[18] This article seeks to

16. *See generally* Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81 (2004) (exploring the applicability of tort law and unjust enrichment claims to securing reparations for slavery and Jim Crow discrimination); Keith N. Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209 (2004) (discussing damages and injuries suffered by slaves and examining the potential use of tort law and derivative claims to remedy those injuries); Patricia Muhammad, *The Trans-Atlantic Slave Trade: A Legacy Establishing a Case for International Reparations*, 3 COLUM. J. RACE & L. 147 (2013) (evaluating reparations through the lens of international conventions and criminal statues); Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003) (arguing that African American reparations are necessary to redress both slavery and Jim Crow and exploring the various legal theories and legislative strategies employed to secure them); Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279 (2006) (analyzing the arguments against reparations based on the purported attenuation between the harms suffered during slavery and modern plaintiffs' injuries); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. THIRD WORLD L.J. 429 (1998) (utilizing critical legalism to argue that reparations can be used to remedy the shortcomings of affirmative action efforts).

17. *See generally* David Horowitz, *Unsavory Black Insinuations: A Reply to David Boyle*, 105 W. VA. L. REV. 699 (2003) (offering ten reasons why reparations claims lack a strong legal basis); Robert A. Sedler, *Claims for Reparations for Racism Undermine the Struggle for Equality*, 3 J.L. SOC'Y 119 (2002) (arguing that continued calls for slavery reparations will only erode white support for racial equality in America).

18. *See, e.g.*, Cato v. United States, 70 F.3d 1103, 1108 (9th Cir. 1995) ("[R]egardless of whether there are factual similarities between the treatment accorded Indian Tribes and African American slaves and their descendants (as Cato contends), there is nothing in the relationship between the United States and any other persons, including African American slaves and their

counter that statement. Part I explores previous African American reparations claims and the common barriers to those claims. Part II discusses the legal construct of common law trusts and the requisite duties applicable to common law trust relationships as detailed in four notable Native American trust cases. Part III, through analogy to the Native American trust relationship, explores the creation of the government's common law trust relationship with African Americans and its subsequent breach. Part IV argues the breach of common law trust duties should provide African Americans a right to monetary damages and injunctive relief as reparations.

I.
AN OVERVIEW OF AFRICAN AMERICAN REPARATIONS CLAIMS

Attempts to adjudicate the legal merits of slave reparations against the United States government date back to 1916.[19] Those attempts have continued over nearly a century without any success. The absence of a successful claim for African American reparations is unique. The government has recognized the merit and necessity of apologizing and providing compensation to atone for its past wrongs against other minorities. Specifically, the United States legislated payment of reparations to Japanese Americans who were interned during World War II.[20] In fact, as an international leader, the United States has not only demanded that other nations apologize for their own misdeeds but also has routinely intervened with military action to halt the oppressive acts of foreign governments against their own marginalized citizens.[21]

American courts served as sympathetic venues for reparation claims made by Jewish Holocaust survivors against Swiss banks, German banks, corporations and insurance companies.[22] The U.S. government has also played a role in political negotiations aimed at securing Holocaust reparations.[23] In 1997, Congress, in bold and hypocritical fashion, passed the Lipinski Resolution demanding that Japan pay immediate reparations and give a clear apology for its wrongful acts against others during World War II.[24] Moreover, various federal

descendants, that is legally comparable to the unique relationship between the United States and Indian Tribes.").

19. *See* Johnson v. McAdoo, 45 App. D.C. 440 (1916), *aff'd*, 244 U.S. 643 (1917).

20. Civil Liberties Act of 1988, 50 U.S.C. § 1989 (1988) (expired 1998).

21. The United States government has opted to deploy military troops into foreign territory for the purpose of ending attacks against civilians deemed to be crimes against humanity. For example, it was estimated, as of September 2011, that the United States spent over one billion dollars on the military intervention in Libya. *See, e.g.*, John Barry, *America's Secret Libya War*, DAILY BEAST (Aug. 30, 2011, 2:12 AM), http://www.thedailybeast.com/articles/2011/08/30/america-s-secret-libya-war-u-s-spent-1-billion-on-covert-ops-helping-nato.html.

22. BROPHY, *supra* note 12, at 45–46; Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615, 615–617 (2003).

23. *See* BROPHY, *supra* note 12, at 45.

24. BROOKS, ATONEMENT, *supra* note 4, at xiii.

courts and the Supreme Court have remedied past government mismanagement of Native American property and funds by ordering that the government provide accountings and payments to Native Americans.[25]

Prior lawsuits seeking African American reparations in American courts have been unsuccessful. These claims sought to remedy the purported tortious, racist, and/or inequitable treatment suffered by slaves and their descendants. Private corporations,[26] state municipalities,[27] and the federal government[28] have been named defendants in the actions. The claims against those defendants have attempted to recover damages for inequitable gains related to unjust enrichment from slave labor,[29] receipt of tax proceeds on cotton cultivated and harvested by slave labor,[30] insurance proceeds earned from policies that insured the purchase of slaves,[31] and the tortious acts committed against Blacks during the American slave trade.[32]

Lawsuits against the government by descendants of enslaved Africans that sought to secure judicial remedies for the injustice of slavery and discrimination have failed. A common refrain found in the dismissals of those suits points to the inadequacy of the judiciary to address reparations claims because of doctrinal barriers such as sovereign immunity, statutes of limitations, and standing.[33] The doctrine of sovereign immunity is one of a few legal constructs routinely cited as a major impediment to plaintiffs' attempts to recover monetary damages from the federal government.[34] As discussed below, however, sovereign immunity should not be considered a fatal flaw to reparations claims for African Americans.

---

25. *See, e.g.*, United States v. Sioux Nation, 448 U.S. 371, 424 (1980) (holding that legislation appropriating Sioux Nation land constituted a taking for which just compensation must be paid); United States v. Shoshone Tribe, 304 U.S. 111, 116–18 (1938) (holding that value of compensation owed to Shoshone Tribe for land taken by the United States included value of minerals and lumber); Cobell v. Norton, 240 F.3d 1081, 1094, 1110 (D.C. Cir. 2001) (concluding that the Interior Department was "still unable to execute the most fundamental of trust duties—an accurate accounting").

26. *In re* African-American Slave Descendants Litig., 471 F.3d 754, 759, 762 (7th Cir. 2006).

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

28. Cato v. United States, 70 F.3d 1103 (9th Cir. 1995).

29. *In re* African-American Slave Descendants Litig., 471 F.3d at 757.

30. Johnson v. McAdoo, 45 App. D.C. 440, 441 (1916), *aff'd*, 244 U.S. 643 (1917).

31. *In re* African-American Slave Descendants Litig., 471 F.3d at 759.

32. *Id.* at 760. *See also Cato*, 70 F.3d at 1106.

33. *See In re* African-American Slave Descendants Litig., 471 F.3d at 759, 762 (concluding that plaintiffs lacked standing to sue and that claims were barred by statutes of limitations); *Cato*, 70 F.3d at 1107 (concluding that reparations suit was barred by sovereign immunity); Obadele v. United States, 52 Fed. Cl. 432, 440 (2002) (concluding that plaintiffs were not entitled to restitution under statutory scheme aimed at compensating Japanese victims of internment), *aff'd*, 61 F. App'x 705 (Fed. Cir. 2003).

34. *See generally* Ogletree, *supra* note 16 (discussing the numerous legal barriers to a reparations claim). Identifying a waiver to sovereign immunity for African American reparations claims is the primary focus of this article's argument.

A. Waivers of Sovereign Immunity

The common law doctrine of sovereign immunity has routinely been cited as a barrier to reparations claims. The doctrine, which originated in England, is based on the notion that the royal government—in its sovereignty—cannot be sued by its subjects without its consent.[35] The concept of sovereign immunity has been inherited as a staple of American government. The doctrine is often expressed by the idea that "the King can do no wrong."[36] However, it has been argued that this phrase meant precisely the opposite of what it does today.[37] "It meant that the king must not, was not allowed, not entitled, to do wrong . . . ." Thus, while the King would not issue writs against himself, he could consent to suit to "let justice be done."[38]

This doctrine, in the original English context, did not have a determinative impact on the right of subjects to get redress when the government acted illegally.[39] To the contrary, the English system was specifically designed to allow its subjects to obtain relief against the government.[40] The formality of sovereign immunity for the English did not serve as a fatal blow to the potential plaintiffs.[41] In fact, the government regularly consented to suits against it brought by English subjects.[42]

Like the English system, although one may successfully file suit against the United States for injunctive relief or declaratory judgment, one cannot win monetary damages without consent or the passage of a bill by Congress.[43] The English doctrine of sovereign immunity has been significantly altered by American law, however, in that the American system lacks the workarounds developed in the English system.[44] The American interpretation does not provide for routine consent from the government to be sued.[45] Instead, American citizens are only permitted to sue the government if their claims fall within one of the few exemptions enacted and sanctioned by the government.[46] The American system allows the government—the alleged wrongdoer in instances where sovereign immunity is invoked—to dictate when it will be exposed to liability.

---

35. CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3654 (3d ed. 1998).

36. *Id*.

37. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 3–4 (1963).

38. *Id*. at 4.

39. *Id*. at 18.

40. *See* Jaffe, *supra* note 37, at 3.

41. *Id*.

42. *See id*. at 3.

43. *See id*. at 5–6.

44. *Id*. at 6 (discussing how real property suits in which the Crown held an interest could be initiated without consent).

45. WRIGHT, MILLER & COOPER, *supra* note 35, § 3654.

46. *Id*.

The instinct of self-preservation is a reality that undoubtedly tempts any wrongdoer from voluntarily taking responsibility. Under this framework, it is no wonder that the elected politicians in Congress have failed to pass legislation expressly permitting reparations claims. The majority of the nation—largely Americans—with the power to elect those politicians will not support providing reparations payments to the descendants of African slaves.[47]

The doctrine of federal sovereign immunity was not written into the U.S. Constitution.[48] Professor Erwin Chemerinsky has forcefully argued that it is inconsistent with American democracy and the Constitution.[49] Most importantly, there is one glaring difference between England and the United States in this context: the American federal government was not set up as a monarchy. Yet, even without concrete evidence that the Framers intended for sovereign immunity to be a part of American democracy, the concept has permeated the common law. In 1821, Chief Justice John Marshall announced that "[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States."[50] The Ninth Circuit has described the doctrine of sovereign immunity as "axiomatic."[51] However, even in the face of such language and such closely held beliefs, several exceptions to the doctrine of sovereign immunity have been established.[52]

Exceptions to the doctrine of sovereign immunity have typically been enacted by Congress.[53] Historically, if an individual wanted to sue the federal government, the injured party had to request that Congress pass a private bill concerning her specific suit.[54] Not surprisingly, this process produced mixed results.[55] Citizens needed experience and knowledge of how to proceed through Congress when seeking passage of their bills.[56] Even when a citizen possessed the requisite familiarity with the bill passage process, her fate rested heavily on the current composition of Congress.[57] In response to these issues, Congress passed the Court of Claims Act in 1855.[58] The Court of Claims was formed to resolve claims based upon federal laws or regulations, or upon contracts with the

47. *See* BROOKS, ATONEMENT, *supra* note 4, at xi.

48. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1205 (2001) (arguing that the doctrine of sovereign immunity is contrary to the historical and legal principles of American government).

49. *See generally id.*

50. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411–12 (1821).

51. Cato v. United States, 70 F.3d 1103, 1107 (9th Cir. 1995) (citing Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987)).

52. 1-6A JACOB A. STEIN, GLENN A. MITCHELL & BASIL J. MEZINES, ADMINISTRATIVE LAW § 6A.02 (2015).

53. *Id*.

54. *Id*.

55. *Id*.

56. *Id*.

57. *Id*.

58. *Id*.

federal government.[59] Before a decision of the Court could be made final, it had to be approved by Congress.[60] As a result, a plaintiff's claim was still subject to unpredictable outcomes should the composition of the Congress change. The United States government remained in need of a more routine process to achieve more consistent results. To that end, two pieces of legislation were enacted: the Federal Tort Claims Act and the Tucker Act.

1. The Federal Tort Claims Act

The Federal Tort Claims Act ("FTCA") was enacted in 1946 as a sovereign immunity waiver for certain types of tort claims. The FTCA grants federal courts jurisdiction over claims against the federal government for "negligent or wrongful act[s] or omission[s]," including claims for money damages, if a private person would be similarly liable.[61]

While the FTCA provides a mechanism for plaintiffs to sue the federal government, certain procedural limitations make bringing a suit under the FTCA very different from the traditional tort suit. For example, jury trials are not available under the FTCA.[62] Additionally, before claims reach a court under this provision, they must be brought before the proper governmental agency.[63] Only once all administrative remedies have been exhausted can FTCA claims be filed in federal court. The available remedies do not include punitive damages or pre-judgment interest.[64]

Finally, government liability under the FTCA is based on individual liability, but the individuals responsible for passing (or not passing) legislation, Congresspersons and Senators, enjoy absolute immunity from suit under Article I, Section 6 of the Constitution.[65] Given the statute's limitations and requirements, it seems certain that the FTCA cannot provide a viable avenue to damages in the quest for African American slave and discrimination reparations. This roadblock, however, does not foreclose the availability of reparations from the government for breaches it committed in violation of the duties that arise as a result of the government's post-slavery common law trust relationship with African Americans.

2. The Tucker Act

The Tucker Act (the "Act"), passed in 1887 by Congress, replaced the previously unwieldy and unpredictable practice of requesting a waiver of

59. *Id*.
60. *Id*.
61. 28 U.S.C. §§ 1346, 2674 (2012).
62. *Id*. § 2402.
63. *Id*. § 2675.
64. *Id*. § 2674.
65. Supreme Court of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719, 731 (1980); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975).

sovereign immunity for each potential suit an individual wished to file against the government.[66] The Act provided a means by which routine claims for monetary contract damages could be brought against the United States.[67] The legislative history of the Act reveals that it was "designed to give the people of the United States what every civilized nation of the world has already done—the right to go into the courts to seek redress against the Government for their grievances."[68] Jurisdiction was given to both the Court of Claims and the federal district courts to hear and decide claims brought against the United States "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or non-liquidated damages in cases not sounding in tort."[69] In other words, for cases involving contracts, the Constitution, federal statutes, admiralty, or non-tort claims, the government has waived its immunity. If the claim is for damages of $10,000 or less, then both the Court of Claims and the federal district court have jurisdiction.[70] The Court of Claims has exclusive jurisdiction over cases involving claims of more than $10,000.[71]

Courts have recognized that the Indian Tucker Act[72] is very similar in purpose and design to that of the original Tucker Act.[73] The original Tucker Act barred Indian Tribal claims from United States courts.[74] The Indian Tucker Act, passed in 1949, reflected a legislative acknowledgment that the United States had assumed a fiduciary obligation towards Native Americans.[75] A report released by the House of Representatives cautioned that, "[i]f we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States."[76] Thus, the Indian Tucker Act has at times been treated as an explicit waiver of sovereign immunity.[77] However, as explored below, this waiver does not automatically provide Native American plaintiffs with access to monetary damages from the government.

Relatively recent suits seeking African American reparations have relied on the FTCA and the Tucker Act to support their claims. As discussed below, courts have rejected these claims without proper consideration of how the

66. 1-6A STEIN, MITCHELL & MEZINES, *supra* note 52, § 6A.02.

67. *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 213–14 (1983); 5-45 STEIN, MITCHELL & MEZINES, *supra* note 52, § 45.05.

68. *Mitchell II*, 463 U.S. at 213–14 (internal quotations omitted).

69. 28 U.S.C. § 1491(a)(1) (2012).

70. 5-45 STEIN, MITCHELL & MEZINES, *supra* note 52, § 45.05.

71. *Id*.

72. 28 U.S.C. § 1505 (2012).

73. *See, e.g.*, *Mitchell II*, 463 U.S. at 214–15.

74. *Id*. at 214.

75. *Id*. at 214–15 (quoting legislative history referring to the government's "obligations" and "fiduciary duties" towards Indian funds and property).

76. *Mitchell II*, 463 U.S. at 215.

77. *See, e.g.*, *id*. at 214–16.

government's common law trust relationship with African Americans factors into the legal analysis.

B. Notable African American Reparations Claims

There have been a number of reparations suits filed in U.S. courts. Some decisions have acknowledged that there is a moral argument to claims for reparations.[78] Nonetheless, several courts have found that the actions are time-barred[79] by the six-year statute of limitations for civil suits against the United States and that the government has not consented to be sued by African Americans for reparations.[80] As a result, African American reparations suits have been routinely dismissed within the American court system.

Individual cases have been filed as pro se claims against the United States. Many of these suits were allowed by the courts to be filed *in forma pauperis*.[81] A 2002 suit in the United States Court of Federal Claims utilized a unique approach to the struggle to attain slave reparations. *Obadele v. United States*[82] involved three African American male plaintiffs seeking redress for the wrongs suffered by their ancestors as members of the African American race during and after slavery. The *Obadele* plaintiffs filed claims with the Justice Department Civil Rights Division, Office of Redress Administration ("ORA").[83] The claims were filed near the expiration of the Civil Liberties Act of 1988.[84] The Civil Liberties Act provided an apology to individuals of Japanese ancestry from the government for those who were evacuated, relocated, or interned during World War II.[85] It also authorized the ORA to make reparations to successful claimants in the amount of $20,000.[86] The ORA denied the plaintiffs' application based on their failure to meet the threshold criteria of Japanese ancestry.[87] Plaintiff

78. *See* Jackson v. United States, No. C 94-01494 CW, 1994 U.S. Dist. LEXIS 7872, at *1 (N.D. Cal. June 7, 1994) (commenting that "[t]he moral weight of Plaintiff's charges cannot be gainsaid"); Obadele v. United States, 52 Fed. Cl. 432, 442 (2002), *aff'd*, 61 F. App'x (Fed. Cir. 2003).

79. *See, e.g.*, Powell v. United States, No. C 94-01877 CW, 1994 U.S. Dist. LEXIS 8628, at *1 (N.D. Cal. June 20, 1994).

80. 28 U.S.C. § 2401(a) (2012).

81. *In forma pauperis* is a Latin phrase that means the plaintiff has been declared indigent for the purposes of the case and therefore is permitted to file the suit at no cost. Proceeding carries substantial risks. Federal law authorizes courts to dismiss *in forma pauperis* complaints even before the defendant has been served if the court determines that the complaint is frivolous or fails to state a claim for relief. 28 U.S.C § 1915(e)(2)(B) (2012). This provision has spelled a quick end for reparations suits filed *in forma pauperis*. *See, e.g.*, *Powell*, 1994 U.S. Dist. LEXIS 8628; *Jackson*, 1994 U.S. Dist. LEXIS 7872; Lloyd v. United States, No. C 94-01192 CW, 1994 U.S. Dist. LEXIS 7869 (N.D. Cal. June 7, 1994).

82. 52 Fed. Cl. 432 (2002).

83. *Id*. at 434–35.

84. Civil Liberties Act of 1988, 50 U.S.C. app. § 1989b (1988) (expired 1998).

85. *Id*.

86. *Id*.

87. *Obadele*, 52 Fed. Cl. at 435.

Obadele subsequently filed a timely appeal to the Assistant Attorney General for the Civil Rights Division.[88] That appeal specifically requested that the Attorney General seek an extension of the Civil Liberties Act from Congress to include Dr. Obadele and other individuals similarly situated.[89] After considering Dr. Obadele's administrative appeal over the course of six months, the Assistant Attorney General denied the appeal on the same day the ORA program was scheduled to expire by statute.[90] The Assistant Attorney General informed Dr. Obadele, at that time, of his right to seek judicial review of the denial within sixty days.[91]

Plaintiff Obadele filed a timely appeal with the Court of Claims asserting a right to remedy under the Civil Liberties Act and asserting jurisdiction under the Tucker Act.[92] The government sought dismissal of the case or, in the alternative, a judgment based on the administrative record.[93] The court denied the motion to dismiss based on the express grant of jurisdiction in the Civil Liberties Act for judicial review of denied claims, regardless of whether the persons seeking review are in fact eligible for compensation.[94]

The court ultimately found that plaintiffs were not entitled to reparations under the Civil Liberties Act.[95] Over the government's assertions that the court's analysis could go no further, the court proceeded to consider the plaintiffs' arguments that the racial requirement for compensation violated equal protection and due process.[96] The court employed a strict scrutiny analysis and upheld the Civil Liberties Act, agreeing with other courts to consider the question that the statutory scheme was a permissible "race-conscious" remedial measure and that it was narrowly tailored to address specific instances of prior governmental racial discrimination.[97] As a result, the Court of Claims affirmed the ORA's

88. *Id*. The Assistant Attorney General accepted the administrative appeal of Dr. Obadele and exchanged correspondence with him regarding the need for additional documentation to support the appeal. *Id*.

89. *Id*. Dr. Obadele's request specifically asked for the compensation amount for individuals of African ancestry to be increased to five times the original $20,000 allotted under the Civil Liberties Act of 1988. His stated basis for the requested increase was the longer period of racist suffering endured by African Americans as opposed to persons of Japanese ancestry. *Id*.

90. *Id*. The agency informed Dr. Obadele that he was not eligible because he was neither of Japanese ancestry nor the spouse or parent of such a person. *Id*.

91. *Id*.

92. *Id*. at 433.

93. *Id*.

94. *Id*. at 437.

95. *Id*. at 440.

96. *Id*.

97. *Id*. at 443 (citing Jacobs v. Barr, 959 F.2d 313 (D.C. Cir. 1992)). Notably, the court in *Jacobs* faced a German plaintiff who had been interned during World War II. In rejecting his constitutional challenge, the court emphasized the government's interest in remedying past racial discrimination, which Germans did not face. While granting relief to descendants of interned Japanese Americans but denying it to descendants of interned Germans serves the interest of remedying past discrimination, granting it to persons of Japanese ancestry but denying it to persons of African ancestry does *not*, because the latter group suffered specific, racialized discrimination

administrative ruling and held that the denial of plaintiffs' claims by the ORA was not contrary to law.[98]

Reparations suits seeking to recoup monies from corporate entities that financially benefited from slavery have also been filed. The consolidated case of *In re African-American Slave Descendants Litigation*[99] was filed on behalf of the descendants of African American slaves seeking recovery for violations of various state laws and the Civil Rights Act of 1866.[100] The consolidated complaint alleged that defendant corporations provided services to slave owners, and that some defendants owned and trafficked in slaves, in violation of Northern anti-slavery state laws and, in some cases, of the Thirteenth Amendment.[101]

The Seventh Circuit Court of Appeals affirmed the district court's dismissal. The court concluded that the plaintiffs lacked standing to sue on behalf of their ancestors' estates.[102] Nor could the plaintiffs claim injury to themselves by virtue of what had been done to their ancestors, according to the court, because it would be an "impossible" task to connect remote past harm to a modern person's condition or calculate the appropriate damages.[103] As the court summarily opined, "the wrong to the ancestor is not a wrong to the descendant."[104] The court stated that calculating the economic damages owed to any specific plaintiff would be impossible[105]—arguably eliding the role that discovery and expert economists could play in litigation. With regard to the statute of limitations, the court reasoned that it would be impermissible to toll the statute for a century or more and further opined, without basis or support, that some courts in the North and the South would have been receptive to reparations suits within the permissible filing deadlines.[106]

In 1995, the Ninth Circuit Court of Appeals ruled that plaintiffs lacked standing to sue for injury caused to all African Americans as a result of discrimination.[107] The court also held that the doctrine of sovereign immunity

---

just as the former did. The *Obadele* court apparently did not recognize this distinction in adopting the reasoning of the *Jacobs* court.

98. *Id*. at 444. The court acknowledged that plaintiffs made a compelling political case for why the harms suffered by African Americans during and after slavery justify redress, and pointed to the legislation sponsored by Representative John Conyers as a potential means of rectifying the injury. *Id*. at 442.

99. 471 F.3d 754 (7th Cir. 2006).

100. *Id*. at 757. *See also* 42 U.S.C. § 1982 (2012).

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

102. *Id*. at 759–62.

103. *Id*.

104. *Id*. at 759.

105. *Id*. at 760. The court elsewhere acknowledged that studies of "intergenerational mobility" could, in fact, estimate the "aggregate effects" of wrongs like slavery. *Id*. (citing articles). But the court dismissed this because it concluded that one could not prove "that a given black American today is worse off by a specific, calculable sum of money." *Id*.

106. *Id*. at 762.

107. Cato v. United States, 70 F.3d 1103, 1105 (9th Cir. 1995)

barred their suit.[108] Two groups of African American plaintiffs, collectively referred to here as Cato, sought compensation in the amount of $100 million for, among other things, forced labor, kidnapping, and deprivation of freedom.[109] The plaintiffs also sought "an acknowledgement of the injustice of slavery in the United States and in the 13 American colonies between 1619 and 1865, as well as of the existence of discrimination against freed slaves and their descendants from the end of the Civil War to the present."[110] At issue was whether sovereign immunity, or some other jurisdictional problem, barred Cato's theories of liability. The Ninth Circuit found that Cato's complaint was properly dismissed by the lower court, as it neither identified a "constitutional or statutory right that was violated" nor asserted "any basis for federal subject matter jurisdiction or waiver of sovereign immunity."[111]

In her complaint, Cato argued that the Thirteenth Amendment created a national right for African Americans to be free of the badges and incidents of slavery, and that as African Americans continue to suffer from the lingering incidents of slavery, there should be relief available under the FTCA for "intentionally inflicted harm and violation of duty by the federal government."[112] Because Cato represented herself, and her complaint did not refer to any basis upon which the United States might have consented to suit, the district court looked for the most applicable waiver of sovereign immunity and settled upon the Federal Tort Claims Act.[113] The Ninth Circuit ruled that the FTCA was not applicable to suits seeking reparations for at least three distinct reasons. First, the court noted that the FTCA, by its terms, is only available for claims which accrued on or after January 1, 1945.[114] Though the effects of slavery and post-Civil War discrimination continued long after 1945, the actual enslavement of Africans and their descendants obviously occurred long before 1945. This provision effectively bars any reparations claims sought by African Americans for the wrongful acts committed by the government during slavery and thereafter. Second, the FTCA permanently bars all claims brought more than two years after their accrual.[115] Consequently, assuming tort claims from slavery were possible under the FTCA, the statute of limitations requires that the claim be filed within two years of the acts.[116] Finally, under the FTCA there must be a

108. *Id*.
109. *Id*. at 1106.
110. *Id*.
111. *Id*.
112. *Id*. at 1109.
113. *Id*. at 1106.
114. *Id*. at 1107 (citing 28 U.S.C. § 1346(b) (2012)).
115. *Id*. (citing 28 U.S.C. § 2401(b) (2012)).
116. The FTCA limitations period might be equitably tolled to account for the long periods of American history when African Americans were barred, either formally or practically, from obtaining relief in most state courts. It is unlikely, however, that any court would entertain the argument that this continued to be the case within the past two years, so the point is largely moot.

government employee acting, or failing to act, in their official government capacity.[117] The plaintiffs in *Cato* claimed that Congress was liable for failing to pass reparative legislation, but as the court noted, failure to discharge a "discretionary" duty (including legislative duties) is not cognizable under the FTCA.[118]

Cato aptly argued that the continuing violations doctrine should apply because African Americans are still subjected to the badges and incidents of slavery and thus that her action should not be barred by the statute of limitations.[119] Though the court agreed that the doctrine was applicable to constitutional and statutory violations, it noted that the doctrine would only help to overcome the jurisdictional barrier if the underlying substantive claims were viable.[120]

The court also found that the analogy to Indian land claim cases presented by Cato to be unpersuasive.[121] The Ninth Circuit agreed with the government's contention that regardless of whether or not there were factual similarities between the treatment accorded Indian tribes and African American slaves and their descendants, "there is nothing in the relationship between the United States any other persons, including African American slaves and their descendants, that is legally comparable to the unique relationship between the United States and Indian tribes."[122] The court then reasoned that "[c]ourts have recognized fiduciary responsibilities running from the United States to Indian Tribes because of specific treaty obligations and a network of statutes that by their own terms impose specific duties on the government."[123] The court found nothing comparable to this in the Thirteenth Amendment, or in the other Civil War amendments or the various Civil Rights Acts, and thus concluded that the relationship between the federal government and Indian Tribes did not provide a basis for relief in an African American reparations case.[124]

The *Cato* court's view of the Native American analogy is seriously flawed. While the court in *Cato* saw "no basis in the Indian land cases"[125] for awarding

---

Cf. In re African-American Slave Descendants Litigation, 471 F.3d 754, 762 (7th Cir. 2006) (rejecting a similar argument for tolling).

117. *Cato*, 70 F.3d at 1110 (citing 28 U.S.C. § 2680(b) (2012)).

118. *Id*. (citing 28 U.S.C. § 2680(a)).

119. *Id*. at 1108.

120. *Id*. at 1109. The court notably did not reject the continuing violations argument for tolling the statute of limitations; it merely resolved the case on grounds that made the applicability of the statute of limitations redundant. While it is prudent not to read too much into a court's decision to not decide an issue it does not have to, this could signal a willingness on the part of the *Cato* court to take seriously the argument for treating racism and the aftermath of slavery as a continuing violation. If that is so, it could be a fruitful basis for overcoming time bars in future reparations cases, where other jurisdictional and substantive requirements are met.

121. *See id*.

122. *Id*.

123. *Id*.

124. *Id*.

125. *Id*. at 1108.

reparations, this author believes that the court should have addressed additional relevant factors in its analysis. First, comparable common law relationships exist both between Native American and the United States and between African Americans and the United States. A more full and complete examination by the *Cato* court of the United States Supreme Court decision in *Mitchell II*, concerning the existence of a common law trust relationship and the fiduciary duties that accompany it, would have benefitted both the *Cato* plaintiffs and the court's analysis. While Cato's complaint did not make a showing as to the extent of the government's control over African Americans and their property, nothing in the Ninth Circuit's decision indicates that the court ever considered the merit of a common law trust relationship in making its decision.

Second, much of the court's analysis was devoted to the applicability of the FTCA's waiver of sovereign immunity for plaintiffs' claims. After holding that the FTCA did not provide a cognizable claim, the court stated that *Mitchell II* could not be used to support a waiver of sovereign immunity because Cato's claims did not fall within the Tucker Act.[126] Had the claim been brought under the Tucker Act, and framed in the language of a breached trust, the court might have seen more merit in the comparison to Native American case law.[127]

The court's requirement for a specific treaty or network of statutes is misguided. The trust relationship between Native Americans and the national government, as recognized by the Supreme Court, did not originate in a statute. Prior to the enactment of the General Allotment Act or the Indian Tucker Act, courts had long acknowledged the trust relationship between the federal government and Native Americans. The government's political goals prompted the Supreme Court to recognize a trust relationship between the federal government and Native Americans in 1831.[128] The Court in *Mitchell II* extended this line of jurisprudence, stating that "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people" created a special trust relationship.[129] Furthermore, the Court held that where such a common law trust relationship is present, and where the government is given control over resources held in trust, a fiduciary

126. *Id*. at 1111.

127. The unreported decision of *Berry v. United States*, No. C-94-0796-DLJ, 1994 U.S. Dist. LEXIS 9665 (N.D. Cal. July 1, 1994), held that the plaintiff could not rely on the Tucker Act and the Freedmen's Bureau legislation for jurisdiction because the claim exceeded $10,000 (and so jurisdiction was exclusive to the Court of Claims) and because the court construed "any Act of Congress" to exclude expired legislation such as the Freedmen's Bureau Bill. The latter conclusion, which is unsupported and unexplained, runs contrary to the general rule that the expiration of a statute does not extinguish liability incurred under that statute while still operational. *See* 1 U.S.C. § 109 (2012).

128. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

129. United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 225 (1983) (quoting Seminole Nation v. United States, 316 U.S. 286, 296 (1942)).

duty automatically arises.[130] Trustee liability is a natural consequence of breach of these fiduciary duties.[131] *Cobell v. Norton* similarly stated that the presence of a common law trust gives rise to fiduciary duties.[132] The court also noted the presumption that money held for Native Americans by the United States is held in trust.[133]

As discussed in Part III, the proposition that there are no similarities between African Americans and Native Americans ignores the similar approaches taken by the United States government to exercise domination and control over both groups to build this nation.[134] It is precisely that treatment which gives rise to legally cognizable fiduciary duties. The absence of specific statutes or regulations is the essence of the common law. As a result, the perception that *Cato* is a fatal blow to African Americans' attempts to secure monetary damages from the federal government is premature. Such views fail to explore the applicability of common law trust jurisprudence as a legal avenue to recompensing the inequitable African American experience in the United States.

II.
COMMON LAW TRUST JURISPRUDENCE

The legal mechanism known as a trust is a well-established staple of the Anglo-American legal system.[135] As described by the Restatement of Trusts, a trust is "a method of disposing of property and of enabling the transferor to provide *flexibly* for varied purposes and for a number of beneficiaries, often in sequence over time and often including persons yet to be born."[136] The law of trusts provides legally enforceable rights to beneficiaries who previously had only mere equitable interests.[137]

130. *Id*. ("[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians.").

131. *Id*. at 226 (noting that a trust relationship "includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust"). *Accord* RESTATEMENT (THIRD) OF TRUSTS § 100 (2003).

132. 240 F.3d 1081, 1101–02 (D.C. Cir. 2001).

133. *Id*. at 1098.

134. *See* ANTHONY S. PARENT, FOUL MEANS: THE FORMATION OF A SLAVE SOCIETY IN VIRGINIA, 1660–1740, at 9–25 (2003) (contextualizing the seizure of Native American land as a necessary precondition to the formation of a slave society in Virginia); Anthony Peirson Xavier Bothwell, *We Live on Their Land: Implications of Long-Ago Takings of Native American Indian Property*, 6 ANN. SURV. INT'L & COMP. L. 175, 176–77 (2000) (discussing the forceful dislocation of Native Americans).

135. *See generally* RESTATEMENT (THIRD) OF TRUSTS (2003) (providing a summary of the common law related to trusts through a discussion of general principles, comments, and illustrations).

136. *Id*. at 4 (emphasis added).

137. *See id*. at 3–4.

A. Legal Structure of the Trust Relationship

Under the common law, trusts are created when three elements are present: the trust corpus (also referred to as trust property), trustee, and beneficiary.[138] The trust corpus is to be held for the benefit and equitable interests of the beneficiaries.[139] The trustee, who holds the property in trust, is under a fiduciary duty to act in the interest of the beneficiaries.[140] Acting in the interest of the beneficiaries is the minimum standard of fiduciary duty to which a trustee must comply.[141] Trustees generally have a fiduciary obligation to not profit at the beneficiaries' expense.[142] Additional fiduciary duties can and do arise depending upon the nature and details of various trusts. The beneficiary can be a class of one or more persons to whom the trustee owes said duties.[143] It is important to recognize that a trust may be created even though the class of beneficiaries has yet to be identified.[144] Likewise, the trust is not destroyed if the position of the trustee is temporarily vacant.[145] Further, even if the trust corpus ceases to exist, any legal claim by, or on behalf of, the beneficiaries against the trustee constitutes trust property.[146] As a result, the right to damages under the common law of trusts yields from the breach of duties, not the continued or current existence of the trust property.

The Native American trust cases discussed in Part II.C illustrate that when the government exercises elaborate control over the resources and money of another, a common law trust relationship arises. Many of those decisions emphasize the historical context of the relationship between the government and indigenous Americans. The historical relationship between African Americans and the United States lends itself to a similar analysis.

B. The Native Americans' Common Law Trust Relationship

Sovereign immunity is only a barrier to reparations suits seeking monetary recompense from federal or state governments. Federal courts have generally held that they lack jurisdiction over reparations cases because the government has not consented to be sued in that context.[147] Because Congress has failed to enact legislation similar to the Civil Liberties Act of 1988, the American judicial system has refused to redress the injustices suffered by African Americans.

---

138. *See id*. § 2 cmt. f.
139. *See id*.
140. *See id*.
141. *See id*. § 2 cmt. b.
142. *See id*.
143. *See id*. § 2.
144. *See id*. § 2 cmt. h (internal citation omitted).
145. *See id*. § 2 cmt. g.
146. *See id*. § 2 cmt. i.
147. *See, e.g.*, Cato v. United States, 70 F.3d 1103, 1107 (9th Cir. 1995); Johnson v. McAdoo, 45 App. D.C. 440, 441 (1916), *aff'd*, 244 U.S. 643 (1917).

However, when a common law trust relationship exists, the barrier of sovereign immunity is broken.

Native Americans have brought suit against the United States in several different types of cases. The selected cases discussed herein all pertain to issues surrounding American misuse and abuse of Native American land, money, and resources.[148] The background of these cases involves the historical reality that Native Americans originally occupied the land upon which the Portuguese, Dutch, and English came to dominate.[149] Once here, the foreign nationals methodically pushed the Native Americans off their lands.[150] Eventually, the American government entered into treaties, common law trust relationships, and/or formal trusts with certain Native American nations,[151] leaving them confined to reservations with little control over their resources.[152] To achieve its goal of asserting domination over the land and physical resources occupied by Native Americans, the U.S. has gone to extraordinary lengths to "monopoliz[e] . . . control over the process of acquiring and redistributing tribal territory."[153] These acquisitions have occurred largely without tribal consent or authority.[154] The enactment of laws such as the General Allotment Act has served to continually erode Native American property rights and resources.[155] This enormous loss is evidenced by the staggering decrease in tribally-owned land, from 156 million acres in 1881 to approximately forty-eight million acres by 1934.[156] During this mass confiscation, American courts were content to assume a paternalistic role in the negotiation and transfer of tribal land.[157]

Similar to Africans and their descendants, Native Americans were exploited and forced into subservient existences by the United States.[158] Litigation

148. *See, e.g.*, United States v. Sioux Nation, 448 U.S. 371 (1980) (seeking compensation for taking of land); United States v. Shoshone Tribe, 304 U.S. 111 (1938) (same).

149. *See* Bothwell, *supra* note 134, at 176 (discussing the displacement of Native Americans by European colonizers).

150. *Id*.

151. *See id*. at 179–81.

152. *See id*. at 202–03.

153. Richard Monette, *Governing Private Property in Indian Country: The Double-Edged Sword of the Trust Relationship and Trust Responsibility Arising Out of Early Supreme Court Opinions and the General Allotment Act*, 25 N.M. L. REV. 35, 46 (1995).

154. *See id*. at 39–40.

155. *See id*. at 40.

156. *Id*. at 41.

157. *See id*. at 42–43.

158. As many scholars have pointed out, there are important differences between African Americans and Native Americans. Some of these differences include the fact that Native American tribes are recognized as sovereign nations, while there is no sovereign African American nation. Additionally, Native Americans have the benefits of treaties and explicit contract agreements with the United States. The U.S.–Native American relationship has been likened to a relationship between two separate nations, while the African American relationship with the United States is one of a nation and its citizens. *See* BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 73–78 (1973); Graham Hughes, *Reparations for Blacks?*, 43 N.Y.U. L. REV. 1063, 1063–64 (1968) (discussing the historical similarities and differences between Native Americans and African

between Native Americans and the United States reaches back to the establishment of early American courts.[159] It is well settled that a common law trust relationship exists between the United States and the indigenous American nations.[160] As discussed in greater detail below, the judicial branch of the United States government has used this common law trust relationship as a basis to find that the government owes certain fiduciary duties due to its control over Native American resources. Although the extent of those duties varies largely on a case by case basis, the United States government has been routinely found to be a trustee for the benefit of Native Americans. For some time, case law clearly held the government owed fiduciary duties as it related to its dealings with Native Americans and their resources. Though *Mitchell I* and related cases assert that monetary damages cannot be obtained absent a specific statute, there is a line of jurisprudence that supports the opposite proposition, that the duties of trust owed by the federal government to Native Americans are legally enforceable without need of a statute, treaty, or agreement.[161] The principle suggested by these cases is that, within the trust relationship, the federal government and its executive officials are not permitted to act in an adverse manner toward Native American trust property.[162] The following subpart explores four cases to chronicle the progression of jurisprudence regarding the intersection of sovereign immunity waivers and fiduciary duties and to analogize the highlighted cases to our government's relationship with African Americans.

C. Important Common Law Trust Case Law

1. Mitchell I

In *United States v. Mitchell* (*Mitchell I*) the 1,465 members of the Quinault Tribe, together with the Quinault Allottees Association, sued the United States Secretary of the Interior.[163] The suit alleged government mismanagement of timber resources located on the reservation.[164] According to plaintiffs, this mismanagement constituted a breach of the fiduciary duties owed to the Quinault

---

Americans); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African-Americans*, 67 TUL. L. REV. 597, 648 (discussing differences between Native Americans and African Americans).

159. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

160. *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 225 (1983); Cobell v. Norton, 240 F.3d 1081, 1098 (D.C. Cir. 2001).

161. *See* Reid Payton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN L. REV. 1213, 1230–32 (1975) (citing United States v. Creek Nation, 295 U.S. 103 (1935); Cramer v. United States, 261 U.S. 219 (1923); and Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919) as Supreme Court cases that limit federal action with regard to Native American land based on the government's fiduciary obligations).

162. *Id*. at 1234.

163. 445 U.S. 535, 537 (1980).

164. *Id*. The reservation was created in 1873 by executive order. *Id*. at 536. The General Allotment Act of 1877 authorized the government to disburse allotted land to individual Native Americans, and the majority of the Quinault land was disbursed by 1935. *Id*.

Tribe by the government. Among other things, the suit claimed that the government failed to obtain a fair market value for the timber they sold off the land; failed to get payment for some of the sold timber; did not pay, or in some cases paid inadequately, interest on monies obtained as payment for the timber; and took excessive administrative fees.[165] The case was appealed to the Supreme Court after the Court of Claims held that the General Allotment Act ("GAA") placed a fiduciary duty upon the United States to manage the timber resources properly.[166]

The Court of Claims also found that by enacting the General Allotment Act, the government waived any claims of sovereign immunity.[167] The GAA permitted the President to allot a specific amount of agricultural and grazing land to every Native American living on a reservation.[168] Importantly, the Act stated that the U.S. government was to hold the allotted land in trust for the individual allottees.[169] The Act, in essence, allowed the government to have a great degree of control over the land despite giving it to the tribal members. The Supreme Court granted certiorari to resolve whether the GAA authorized plaintiffs to receive monetary damages from the United States if allegations of mismanagement of allotted forested lands proved to be true. In its opinion, the Supreme Court found fault with the ruling from the Federal Court of Claims.

The Supreme Court held that the *Mitchell I* plaintiffs could not maintain a suit against the government based on the GAA and Indian Tucker Act.[170] The Court began by stating that "[i]t is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued' . . . . In the absence of clear congressional consent, then, 'there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States.'"[171] The Court reasoned that the Tucker Act is merely jurisdictional and does not give claimants a substantive right to bring suit.[172] Thus, according to the Court, the plaintiffs would need to locate a separate, substantive right to serve as a basis for a waiver of sovereign immunity.

Next, the Court concluded that the GAA could not provide the requisite substantive right.[173] Although section 5 of the GAA expressly mandated that the land be kept by the United States "in trust" for the allottees,[174] the Court referred to the legislative history to conclude that the legislative intent of the Act was to

165. *Id*. at 537.
166. *Id*. at 541.
167. *Id*. at 541.
168. General Allotment Act, ch. 119, § 1, 24 Stat. 388 (1887) (repealed 1934).
169. *Id*. § 5.
170. *Mitchell I*, 445 U.S. at 546.
171. *Id*. at 538 (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)).
172. *Id*. at 538.
173. *Id*. at 542.
174. General Allotment Act, ch. 119, § 1, 24 Stat. 388 (1887) (repealed 1934).

create a limited trust relationship that did not impose any of the fiduciary duties the plaintiffs alleged had been breached.[175]

To support this limited trust construction, the Court pointed to the language of the GAA in sections 1 and 2.[176] The Court stated that "these sections indicate that the Indian allottee, and not a representative of the United States, is responsible for using the land for agricultural or grazing purposes."[177] However, this author would suggest that such use is not contrary to any ordinary trust relationship. Consider the minor child whose deceased parent leaves a trust for his or her benefit. The child is authorized to use the trust corpus (those things held in trust) for his or her benefit, just as the Native Americans were able to use the land for crops and to nourish farm animals. There is a trustee for the trust of the minor child even if the child is living in the home held in trust, just as the government was a trustee of the land that the Native Americans were allowed to use. Should the trustee in the case of the minor child fail to pay the utilities or home owner's insurance for the child's residence, the trustee would certainly be open to liability. The Supreme Court contradicted essential common law trust elements by stretching the statutory language and history to support an unnaturally limited trust relationship. The Court suggested that the express "in trust" language was simply intended to protect the allotments from state taxation and prevent alienation.[178]

Ultimately, the Court held that "[a]ny right of the respondents to recover money damages for Government mismanagement of timber resources must be found in some source other than [the General Allotment] Act."[179] According to *Mitchell I*, the Tucker Act only satisfies the jurisdictional requirement and was not an explicit waiver of sovereign immunity.

2. Mitchell II

United States v. Mitchell (*Mitchell II*)[180] involved an appeal from the Court of Claims' decision on remand from *Mitchell I.* This time, the Quinault Tribe prevailed in their suit for monetary damages against the United States. The key difference between the two cases was the statutes and regulations that the Quinault Tribe members used as the basis for their claim.[181]

175. *Mitchell I*, 445 U.S. at 542–44.

176. *Id*. at 542–43.

177. *Id*.

178. *Id*. at 543–44. As the dissent pointed out, "[t]he Act could hardly be more explicit" that it created a trust relationship, and its language would undeniably be sufficient to create a trust by any settlor other than the United States. *Id*. at 547–48 (White, J., dissenting).

179. *Id*. at 546.

180. 463 U.S. 206 (1983).

181. *See Mitchell I*, 445 U.S. at 551 n.7 (suggesting that, when the Court of Claims hears the case on remand, it could find that monetary damages are appropriate under the Tucker Act on an alternative ground or under another statute).

On remand, the Court of Claims once again found that the tribal members were entitled to monetary damages, based on numerous statutes involving Native Americans, their resources, and their land.[182] The Court of Claims found that these statutes implicitly imposed fiduciary duties on the government and thus made it liable for breach of those duties. The Supreme Court granted certiorari, noting the large amount of damages at stake, and affirmed.[183]

The Court made several holdings while affirming the Court of Claims' ruling that the government was liable for its breach of fiduciary duties. First, the Court clarified its previous ambiguity concerning the Tucker Act, unequivocally holding that by giving the Court of Claims jurisdiction over certain claims against the United States, Congress had waived sovereign immunity for those claims.[184] To support the conclusion that consent to be sued was the purpose of the Tucker Act, the Court discussed the origins of the Act and identified the bill's purpose as "giv[ing] the people of the United States what every civilized nation of the world has already done—the right to go into courts to seek redress against the Government for their grievances."[185] The enactment itself declared that it "provide[d] for the bringing of suits against the United States."[186] Finally, the Court pointed out that the unambiguous purpose of the Act was supported by at least two recent cases and that the Act had been construed to allow suit against the United States for decades.[187] Therefore, if the basis of a suit is within the scope of the Tucker Act, then it is presumed that the United States has consented to the suit.

The Court then compared the Indian Tucker Act to the Tucker Act and found that it had a similar history and purpose.[188] It logically follows that by granting the Court of Claims jurisdiction over claims by Indian nations against the government, Congress waived sovereign immunity for those claims in the same way as with the Tucker Act. The Court disclaimed the dicta found in *Mitchell I* and other cases that suggested the Tucker Act was not a waiver of sovereign immunity, although it insisted that the results in those cases did not depend upon the sovereign immunity analysis and so were not now open to question.[189]

---

182. *See Mitchell II*, 463 U.S. at 211 (relying on 25 U.S.C. §§ 406, 407, 466, 318, 323, 324, 325, 162a, 413 (2012)).

183. *Id*. at 211 & n.7 ("Because the decision of the Court of Claims raises issues of substantial importance concerning the liability of the United States, we granted the Government's petition for certiorari.").

184. *Id*. at 212.

185. *Id*. at 213–14 (quoting 18 CONG. REC. 2680 (1887) (statement of Rep. Bayne)).

186. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505.

187. *Mitchell II*, 463 U.S. at 215 (citing Army & Air Force Exch. Serv. v. Sheehan, 456 U.S. 728, 734 (1982); Hatzlachh Supply Co. v. United States, 444 U.S. 460, 466 (1980)).

188. *Id*. at 214–15 (citing 28 U.S.C. § 1505 (2012)).

189. *Id*. at 216. Given this major shift between *Mitchell I* and *Mitchell II*, it is interesting to note that Justice Marshall wrote both majority opinions.

Having definitively established a waiver of sovereign immunity that was open to the plaintiffs, the Court next tackled the issue of when a substantive right exists to obtain monetary damages against the United States. This, the Court said, is not provided by the Tucker Act.[190] Instead, the Tucker Act stipulates that the right to sue must come from "the Constitution, or any Act of Congress or any regulation of any executive department."[191] In addition, the claimant must prove that the source of law being relied upon "can be fairly interpreted as mandating compensation by the Federal Government for the damages sustained."[192] While there was no specific language within the statutes and regulations relied upon in *Mitchell II* that authorized a substantive right to money damages, the Court looked to the purpose of those laws.[193] The Court concluded that the statutes and regulations here imposed on the government "full responsibility to manage Indian resources and land for the benefit of the Indians" and accordingly "establish[ed] a fiduciary relationship."[194]

The Court in *Mitchell II* also used strong and persuasive language to describe the origin of the fiduciary relationship between the government and Native Americans. Aside from the language of the statute and regulations, the Court found that a fiduciary relationship "necessarily arises when the Government assumes such elaborate control" over the property and monies of Native Americans.[195] The Court observed that under such an arrangement, "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary ([the group with ownership rights to the property and/or money being held, in this case Native Americans]), and a trust corpus ([the property and/or money])."[196] The Court explained that:

> "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) *even though nothing is said expressly* in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection."[197]

According to the *Mitchell II* Court, the Tucker Act is indeed a waiver of sovereign immunity. The waiver only gives proper plaintiffs the right to sue the

190. *Id*.

191. 28 U.S.C. § 1491 (2012).

192. *Mitchell II*, 463 U.S. at 216–17 (quoting United States v. Testan, 424 U.S. 392, 400 (1976)).

193. *Id*. at 219–23 (discussing the government's control over Indian timber and rights-of-way).

194. *Id*. at 224.

195. *Id*. at 225.

196. *Id*.

197. *Id*. (emphasis added) (quoting Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980)).

federal government; plaintiffs must also have a substantive right to obtain money damages from the government. But that right need not be explicit; in the case of Native Americans, the Court found a right to money damages arising out of laws and regulations that did not expressly provide for such. While *Mitchell II* used statutes as support for finding the government liable to the Quinault Tribe, there is dicta concerning the existence of a fiduciary duty even outside of those statutes. The Court's opinion, expressly identifying the elements of a common law trust relationship, indicated that elaborate control by the government over the land, forest, and property belonging to another establishes a fiduciary relationship, even if the control arises outside the context of legislation.

3. Cobell v. Norton

The D.C. Circuit's 2001 decision in *Cobell v. Norton*[198] provided an insightful and comprehensive summary of multiple phases of the government's "elaborate control" over indigenous lands and Native Americans. The government's control over the land at issue in *Cobell* began over a hundred years prior to the filing of the case.[199] The funds at issue were generated from the lands held in trust that were to be managed by the government for the benefit of account holders in Individual Indian Money ("IIM") accounts.[200]

Plaintiffs, the beneficiaries of IIM accounts, filed a class action suit alleging that the Department of the Interior breached its fiduciary duties pertaining to the accounts.[201] Plaintiffs alleged, among other things, that the government failed to provide proper accounting of each IIM. Plaintiffs sought a declaratory judgment outlining the government's trust responsibilities and injunctive relief guaranteeing those responsibilities would be met.[202] The government admitted its failure to keep proper and accurate accounting of the number of IIM accounts and their balances.[203] Nevertheless, and in the face of an extensive network of statutes and regulations regarding the IIM and related federal oversight, the government asserted sovereign immunity during the district court proceedings.[204] The district court held, and the court of appeals affirmed, that jurisdiction was proper and sovereign immunity was waived under the Administrative Procedure Act for non-monetary relief.[205]

198. 240 F.3d 1081 (D.C. Cir. 2001). This action was settled in 2011 for $3.4 billion. Cobell v. Salazar, 679 F.3d 909, 916 (D.C. Cir. 2012). Reportedly, this was the largest settlement ever reached with the U.S. government. Dennis M. Gingold & M. Alexander Pearl, *Tribute to Elouise Cobell*, 33 PUB. LAND & RESOURCES L. REV. 189, 192 (2012).

199. *Cobell*, 240 F.3d at 1086.

200. *Id*. at 1087.

201. *Id*. at 1092–93.

202. *Id*. at 1086.

203. *Id*. at 1089.

204. *Id*. at 1093.

205. *Id*. at 1093–94.

The court of appeals made it clear that, even without a statute establishing a trust, the relationship between the federal government and Native Americans gives rise to a definite fiduciary duty when the government controls tribal monies or property.[206] Citing *Mitchell II*, the court found that when certain elements exist, a fiduciary duty arises.[207] The court noted that, absent explicit language to the contrary, there is a presumption that money held by the United States for Native American nations is held in trust.[208] The basis and rationale for the presumption rests in the elaborate control the United States has over the property. Thus, this ruling provides precedent for courts to find the existence of a trust relationship even when such a relationship is not explicitly stated in a federal regulation or statute.[209] Moreover, government trust obligations are defined by the court in traditional terms of equity.[210] The court stated that while the relationship giving rise to a common law trust must be rooted in some legislation or executive action, the duties arising from the trust relationship need not be explicitly stated and may be implied from the nature of the relationship itself.[211] Therefore, it is presumed that when money belonging to Native Americans is being held by the government, courts should find that a trust relationship exists between the parties.[212]

At the outset of its analysis, the court established that the substantial trust responsibilities the United States owes Native Americans are a result of the "elaborate control" the government has exerted over their property.[213] The court then discussed the "contentious and tragic" relationship resulting from the violent expansionism of the United States.[214] These ambitions led the government to take the land and property of Native Americans—at times with the use of treaties, but, as the court acknowledged, also by force.[215] Furthermore, the court stated that there existed within the government an "[u]nofficial policy [that] encouraged the forcible dislocation of Indian tribes."[216] This analysis is consistent with the historical development of Native American law. The Anglo-American concept of trust law was introduced early during the development of our nation. To this end, the Supreme Court equated the government's relationship to Native Americans with that of a guardian and a ward in 1831.[217] That characterization of the relationship was useful to the United States for the

206. *Id*. at 1098.
207. *Id*.
208. *Id*.
209. *Id*.
210. *Id*. at 1099.
211. *Id*.
212. *Id*. at 1098.
213. *Id*. at 1086.
214. *Id*.
215. *Id*.
216. *Id*. at 1087.
217. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

purposes of achieving its desired goals at that specific time.[218] The necessary consequence of that long history of control is that the federal government be held accountable for the theft and mismanagement of Native American land and resources.

4. United States v. White Mountain Apache Tribe

The judicial analysis of the United States–Native American trust relationship continued in 2003 with the Supreme Court's decision concerning land held in trust for the White Mountain Apache Tribe.[219] Through Congressional legislation enacted in 1960, Fort Apache—along with its prior improvements—was proclaimed to "be held by the United States in trust for the White Mountain Apache Tribe."[220] A portion of the land that comprised the Fort was used as a Native American boarding school.[221] The Department of the Interior was entitled to "use any part of the land and improvements for administrative or school purposes."[222] Over time, the United States allowed the property and the buildings contained thereon to fall into disrepair, and many of the buildings on the property were condemned and demolished by the Department of Interior.[223]

The Court asked whether the 1960 legislation, holding the Fort Apache land in trust, gave the Court of Federal Claims jurisdiction over a claim for money damages under the Indian Tucker Act.[224] After swiftly reaffirming that the Tucker Act (and its companion legislation, the Indian Tucker Act) provided the requisite waiver of sovereign immunity to support jurisdiction in the Federal Court of Claims,[225] the Court reiterated that neither the Tucker Act nor the Indian Tucker Act conferred a substantive right to plaintiffs for monetary damages.[226]

In finding that the United States had a duty to preserve and repair the occupied buildings, the Court noted that the government had exercised its right to use and occupy the land and so "obtained control at least as plenary as its

218. *See, e.g.*, Chambers, *supra* note 161, at 1218–19 (discussing the United States' assumption of the guardian role while subjugating Native Americans to the role of wards so as to further the government's goals of maintaining Native American property ownership within the "system of American land tenure").

219. United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003). The property at issue, Fort Apache, was established by the United States Army in 1870 and used as a military base until 1922, when control of the property was transferred to the United States Secretary of the Interior. *Id*. at 468.

220. Act of March 18, 1960, Pub. L. No. 86-392, 74 Stat. 8.

221. *White Mountain*, 537 U.S. at 468.

222. White Mountain Apache Tribe v. United States, 249 F.3d 1364, 1370 (Fed. Cir. 2001), *aff'd*, 537 U.S. 465.

223. *Id*.

224. *White Mountain*, 537 U.S. at 471.

225. *Id*. at 472.

226. *Id*. at 472.

authority over the timber in *Mitchell II*."[227] The Court recognized that "one of the fundamental common law duties of a trustee is to preserve and maintain trust assets" and "elementary trust law . . . confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch."[228] Of great importance is the Court's recognition that when the government owes a fiduciary duty, "[i]t naturally follows that the Government should be liable in damages for the breach of its fiduciary duties."[229]

The previously highlighted Native American cases support the argument for African American reparations. This support rests in the United States Supreme Court and federal court holdings that acknowledge a common law trust relationship as a legal theory of recovery from the government. That relationship, and its concomitant fiduciary duties, is formed when elaborate control is exerted over the property and assets of a people. As detailed below, the control exerted over the lives and property of African Americans during and after the Civil War created a similar trust relationship with the federal government.

III.
AFRICAN AMERICANS' COMMON LAW TRUST RELATIONSHIP WITH THE FEDERAL GOVERNMENT

A. Origins

The common law trust relationship between the United States government and African Americans began in January 1863. At that time General Nathaniel Banks, under the authority of the United States government during its occupation of Louisiana, instituted a "compulsory system of free labor."[230] That system required some 50,000 African Americans in Louisiana to work on 1,500 plantation estates as employees working for the federal government or "for individual planters under contracts supervised by the army."[231] Conditions of employment required that the laborers sign yearly contracts, avoid "vagrancy," and obtain permission to leave the plantations from their respective employers.[232] The system provided the laborer with an extremely low wage that, when considered along with the other conditions of employment, amounted to

227. *Id*. at 475.

228. *Id*. *Accord* RESTATEMENT (THIRD) OF TRUSTS § 76 (2003) (noting the trustee's duty to "protect[]" trust property).

229. *White Mountain*, 537 U.S. at 476 (quoting United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 226 (1983)).

230. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 55–56 (1988).

231. *Id*. at 56.

232. *Id*. at 55.

little more than slave labor.[233] The government expanded the compulsory system of free labor into the entire Mississippi Valley and compelled the labor of more than 700,000 African Americans.[234] But compelling labor was merely a by-product of the government's overarching goal "to take charge of the contrabands."[235] Plantations were leased to Northern investors, who stood to turn a quick profit while often denying the African American laborers under their employ even the meager wages to which they were entitled.[236] Although the Treasury Department mandated wage increases during a brief period when it took control of the Mississippi Valley system, President Lincoln soon returned control to the military, which slashed wages—even for laborers who had signed contracts guaranteeing higher rates.[237] The government, through its military force, specifically controlled and benefitted from the labor of African Americans without providing equitable compensation.

By September of 1863, President Abraham Lincoln instructed the commissioners of the American Freedmen's Inquiry Commission[238] to make confiscated lands available for purchase in twenty-acre plots to African American households "so as to give them an interest in the soil."[239] It was clear during this time that the federal government was actively involved in creating property interests for the former slaves.

With the Civil War nearing its end, Secretary of War Edwin M. Stanton and General William T. Sherman met with African American community leaders in Savannah, Georgia, on January 12, 1865, to discuss the confiscated Confederate lands.[240] Following this meeting, the General issued Special Field Order No. 15 and ordered the division of plantations on the Atlantic coast into forty-acre plots for the use of freed slaves.[241] Within six months, the order had provided land to 40,000 African Americans.[242] In the words of Bureau Commissioner Howard, the purpose of Sherman's Order was to "give the freedmen protection, land and

233. *See id*. (describing how laborers were paid either five percent of the annual crop proceeds or three dollars per month, plus food, shelter, and medical care).

234. *Id*. at 56–57.

235. *Id*. at 57.

236. *Id*. at 57–58.

237. *Id*. at 58.

238. *See* FONER, *supra* note 230, at 68; PAUL A. CIMBALA, THE FREEDMEN'S BUREAU: RECONSTRUCTING THE AMERICAN SOUTH AFTER THE CIVIL WAR 7 (2005).

239. Verdun, *supra* note 158, at 601 n.7. This directive from President Lincoln followed two prior pieces of legislation. The first, the Act of August 6, 1861, authorized the confiscation of property from landowners engaged in insurrection. *See* Act of Aug. 8, 1861, ch. 60, 12 Stat. 319. The second piece of legislation authorizing confiscation of property was signed on July 17, 1862. *See* Act of July 16, 1862, ch. 190, 12 Stat. 589. Thereafter, on February 10, 1863, Lincoln created a commission of five men to decide if the land should be used for police, charitable, or educational purposes. Verdun, *supra*, at 601 n.7.

240. FONER, *supra* note 230, at 70.

241. *Id*. at 70–71. Sherman later expanded the order to instruct the army to loan mules to African Americans. *Id*.

242. *Id*. at 71.

schools, as far and as fast" as possible.[243] Though Sherman would later say that the land grants were to be temporary, the Order itself promised "possessory title[s],"[244] and the officer implementing the Order told the recipient freedmen that the land was theirs.[245] African Americans on the "Sherman Reservation" cultivated the land under government supervision and were shocked when the government reversed course on the land grants.[246]

Governmental control over the labor and livelihood of African Americans recently freed from the bondage of slavery gained legislative authority with the creation of the Bureau of Refugees, Freedmen, and Abandoned Lands.[247] The Act establishing the Bureau authorized the government, through the actions of a Commissioner appointed by the President, to control all "subjects relating to refugees and freedmen from rebel states."[248] The legislation represented the federal government's effort to codify the means by which it would protect the more than half a million former slaves for which it had assumed a duty to care.[249] To do so, the Act provided that the government, through the Department of War, would supervise and manage the confiscated or purchased land in the South for the purpose of renting said property to every newly freed male citizen.[250] The land distribution plan was created to serve two main purposes: (1) to provide the newly freed African Americans resources "where by faithful industry they can achieve independence" and (2) to provide what was owed to the freedpersons for their "two hundred years of unrequited toil."[251] Though the government had title to the property, the Act provided that the land would subsequently be available for the freedmen to purchase in forty-acre parcels.[252] The original purpose of this possessory conveyance was not lost on the African Americans to whom the property was turned over. Freedpersons who were allotted lands, and thousands more who anticipated allotments, understood the land to be their inheritance following the Civil War.[253]

Officials operating under the authority of the Freedmen's Bureau Bill controlled labor relations among African Americans, the government, and planters.[254] Major General Oliver Otis Howard, the command leader of the

243. FONER, *supra* note 230, at 159; *see also General Sherman Enacts "Forty Acres and a Mule*,*"* AFR. AM. REGISTRY, http://www.aaregistry.org/historic_events/view/general-sherman-enacts-forty-acres-and-mule (last visited Mar. 13, 2015).

244. Magee, *supra* note 1, at 888.

245. FONER, *supra* note 230, at 71.

246. CIMBALA, *supra* note 238, at 55.

247. *See* Act of Mar. 3, 1865, ch. 90, 13 Stat. 507.

248. *Id*.

249. *See* CIMBALA, *supra* note 238, at 4 (describing how "over half a million" slaves "came under the protection of the nation" by the end of the war).

250. 13 Stat. at 508.

251. CIMBALA, *supra* note 238, at 52.

252. *See* 13 Stat. 507.

253. CIMBALA, *supra* note 238, at 52.

254. *See* FONER, *supra* note 230, at 164–65.

Bureau in 1865, created a "practicable system of compensated labor" aimed at increasing the hire rate of African Americans.[255] Strikingly similar to the duties of a trustee, Howard's assistant commissioners were charged with "wisely, faithfully, conscientiously fearlessly" securing reasonable wages for the laborers.[256] The wages for free men, women, and children were negotiated by, and enforced under the authority of, the Bureau.[257] Nonetheless, efforts by Bureau officials to collect back wages owed to African American laborers were frequently unsuccessful.[258] And though the Bureau was enacted for the benefit of freedpersons, the Bureau regularly required African Americans to sign labor contracts that were not in their best interests.[259]

Of equal importance, the United States charged itself with protecting the life and liberty of its newly freed citizens.[260] The Freedmen's Bureau was charged with securing justice for African Americans and settling their grievances.[261] The legislation further required that the Commissioner provide annual accountings and reports to the President who, in turn, would report to Congress.[262]

B. The Breach

The promises of the Freedmen's Bureau were the first and last explicit effort by the United States government to redistribute at least some portion of the nation's ill-gained wealth.[263] The government quickly breached its duties to provide property to, manage the affairs of, and protect the lives of newly freed African Americans. After the assassination of President Lincoln, and while the legislative purpose of the Freedmen's Bureau Act was being carried out, President Andrew Johnson deliberately deviated from that purpose by changing Bureau personnel to individuals who were not committed to the legislative intent of the Bill.[264] The government further breached its fiduciary duties when it

255. CIMBALA, *supra* note 238, at 11.

256. *Id*. *Cf.* RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b, f (2003).

257. *See* FONER, *supra* note 230, at 165–66.

258. *See* Magee, *supra* note 1, at 890.

259. FONER, *supra* note 230, at 166–67. Bureau agents would fine or imprison African American laborers who did not accept the terms of the contracts negotiated for them, even though the contracts barely paid subsistence wages and required that the freedpersons commit to work for a year. *Id*. Although one Bureau official noted the high number of "houseless, homeless, poor wandering, idle white men in the South," the government never required that these "idle white men" sign labor contracts or restricted where they were allowed to live and work. *Id*. at 167. The government's coercion of African Americans to sign labor contracts was unique to their relationship.

260. *Cf.* Act of Mar. 3, 1865, ch. 90, 13 Stat. 507 (giving the Bureau "control of all subjects" relating to freed slaves).

261. *See* FONER, *supra* note 230, at 149 (describing the courts created by the Bureau to adjudicate disputes between planters and freedpersons).

262. *See* 13 Stat. 507.

263. *Cf.* BROPHY, *supra* note 12, at 30–32 (listing reparations efforts and proposals and the total cost of those efforts).

264. *See* CIMBALA, *supra* note 238, at 14–15.

placed the political agenda of the day above that of the African American beneficiaries with whom the government had already commenced a common law trust relationship.[265]

To curry political favor from Southern landowners, the executive branch removed over 400,000 acres from the purview of the Freedman's Bureau and returned it to former Confederate landowners who had been pardoned during Reconstruction.[266] Bureau Commissioner Howard believed, based on the representations of the United States Attorney General, that the presidential pardons of Confederate Southerners were never intended to affect the land that had previously been confiscated or abandoned.[267] Commissioner Howard's Circular No. 13, issued to freedpersons and Bureau personnel by the Commissioner, expressly communicated that the pardons were to have no effect on the Freedmen's Bureau Bill.[268] Under the active legislation, freedmen were owed a minimum of three more years of protection on the land.[269] However, the wording of President Johnson's order empowered the prior landowners to immediately evict African Americans lawfully occupying the land.[270] Instead of being able to work and live on the allotted lands for the remaining three years, as provided by the Freedmen's Bureau Bill, African Americans were once again forced into year-long labor contracts with their former owners.[271] President Johnson also ordered United States attorneys not to begin any new land confiscation cases.[272]

Not only did the government return land that had been confiscated and designated as available to African American laborers, the government removed African Americans from property on which they were then residing. In Virginia alone, almost 20,000 African American laborers were illegally evicted from property.[273] A second Freedmen's Bureau Bill was passed on July 16, 1866; however, it presented African Americans with three options starkly different from the outright promise of conveyance from the government to African Americans under the first Freedmen's Bureau Bill and Sherman's Field Order No. 15. Those who presented valid possessory titles could either remain on the

---

265. *See* RESTATEMENT (THIRD) OF TRUSTS § 78 (2007) (discussing the duty of loyalty owed to beneficiaries and the incontrovertible requirement that trustees avoid acting unfairly or in bad faith).

266. BROOKS, ATONEMENT, *supra* note 4, at 7 (quoting Pigford v. Glickman, 185 F.R.D. 82, 85 (D.D.C. 1999)); CIMBALA, *supra* note 238, at 54.

267. CIMBALA, *supra* note 238, at 53–54.

268. *Id*.

269. Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, 508 (providing that "the person to whom it was so assigned shall be protected in the use and enjoyment of the land for the term of three years").

270. *See* FONER, *supra* note 230, at 159–60; Verdun, *supra* note 158, at 602 n.10.

271. FONER, *supra* note 230, at 164.

272. DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT 60 (1991).

273. CIMBALA, *supra* note 238, at 54.

land and sign labor contracts with the former landowners or purchase land on the coast of South Carolina from the government; those who did not meet the technical requirements to have their titles recognized were given no option but to leave the property they had cultivated and made home for at least the past year and a half to find work someplace else.[274] A great majority of recently emancipated African Americans could not satisfy the new requirements unexpectedly thrust upon them. Not only was poverty a barrier, poor recordkeeping on the part of the government, or closed and inaccessible land offices, rendered access to surveys and maps impossible.[275] The new land being offered as a substitute was often poor quality and uninhabitable.[276] These factors were only compounded by the harsh reality that whites, regardless of land ownership status, were staunchly opposed to Black land ownership. The lack of intervention by the Bureau, created precisely to protect freedpersons, combined with fierce opposition from the white populace, forced African Americans back into a system of labor without compensation.[277]

The government's breach of duties is further evidenced by its failure to negotiate fair and reasonable wages for African American workers. The Bureau initially enforced payment agreements between laborers and planters.[278] However, by 1866, under the executive leadership of President Johnson, the Bureau was regularly failing to fulfill this duty.[279] Where once the Bureau had enforced prompt payment, even placing liens on crops, over time contracts that withheld wages until the end of the year (so as to prevent laborers from leaving) became the norm.[280] The Bureau's duties under the Freedmen's Bill were now usurped by the government's desire to rebuild its economic base of Southern agriculture.[281] The United States controlled African Americans during this time by ordering them to work and used military force to compel those who resisted.[282] Military orders prohibited travel without passes, insubordination, idleness, and vagrancy.[283]

Instead of negotiating fair wages for African Americans, the Bureau was more concerned with ingratiating the Johnson administration to white landowners by enforcing harsh labor discipline policies.[284] To that end, African Americans were forced to sign contracts that favored the planters, as well as the government, and imposed requirements on the personal lives of African

274. *Id*. at 56–57.
275. *Id*. at 61.
276. *See id*.
277. *See* FONER, *supra* note 230, at 165–67.
278. *Id*. at 165.
279. Magee, *supra* note 1, at 890.
280. FONER, *supra* note 230, at 166, 171.
281. *Id*. at 153.
282. *Id*. at 166.
283. *Id*. at 154.
284. CIMBALA, *supra* note 238, at 15.

Americans as a condition of receiving compensation.[285] Labor contracts often contained forfeiture clauses that permitted employers, at their discretion, to determine when a worker's conduct forfeited all wages—even those earned prior to the alleged misconduct.[286]

The Bureau further breached its duties by hiring personnel such as Thomas Hunnicutt, a former plantation overseer and driver, who actively worked against the mission of the agency and the interests of its beneficiaries by forcing freedpersons into labor agreements and openly requiring sexual favors from freedwomen.[287] The Bureau was keenly aware that the wages and conditions of employment they enforced were not sufficient to keep African American workers out of poverty, but the Bureau did nothing to secure proper wage increases.[288] Indeed, Bureau agents were often perceived by white planters as "substitute[s] for overseers and drivers."[289]

It was during the Bureau's tenure, and while it owed a duty to African Americans, that the "Black Codes" in Southern states were enacted.[290] The Codes required that African Americans provide proof of employment and stable housing each January.[291] Though the Bureau had a duty to secure justice and settle grievances of African Americans, personnel at the Bureau offices often included agents filled with racist animus and bias against the very individuals they were charged with serving.[292] The Assistant Commissioners also failed to protect the rights of African Americans when military officers exacted physical punishment in retribution for the freedpersons violating one of the many Bureau orders.[293] The government continued to breach its duty to protect the life and liberty of African Americans through its failure to prosecute the innumerable brutal assaults, rapes, and murders of African American men, women, and children that occurred between Reconstruction and the enactment of the Civil Rights Act of 1964.[294]

C. Historical Similarities of Elaborate Domination and Control

The government used its control over African Americans, via its military and the Freedmen's Bureau, to relocate African Americans to areas beneficial to

285. FONER, *supra* note 230, at 166–67.

286. CIMBALA, *supra* note 238, at 157–58.

287. *Id*. at 30; Randy Finley, *The Personnel of the Freedmen's Bureau in Arkansas*, in THE FREEDMEN'S BUREAU AND RECONSTRUCTION: RECONSIDERATIONS 93, 100 (Paul A. Cimbala & Randall M. Miller eds., 1999).

288. FONER, *supra* note 230, at 166.

289. *Id*. at 168.

290. CIMBALA, *supra* note 238, at 71.

291. *Id*.

292. *See* CIMBALA, *supra* note 238, at 30 (discussing Thomas Hunnicutt, a former overseer who sexually abused freedwomen while working for the Bureau); Finley, *supra* note 287, at 100.

293. CIMBALA, *supra* note 238, at 149.

294. *Cf.* FONER, *supra* note 230, at 148; FRANKLIN & MOSS, *supra* note 3, at 345–50, 514.

the government and to force African Americans into labor contracts for the purpose of rebuilding the nation's agricultural economic base post-Civil War.[295] Similarly, Native Americans were forced to relocate onto reservation lands so that America's borders could expand.[296]

Though there are undeniable differences between the historical experiences and nationality of Native Americans and African Americans,[297] there are definite similarities in the government's domination and control over both groups and their respective resources. When tasked with deciding reparation claims, courts have failed to acknowledge the compensable damages caused by the purposeful intentions of those who stole land from Native Americans and then used African and African American labor, during slavery and afterwards, to cultivate it.[298] Most importantly, courts have failed to recognize their power and authority to provide relief based on existing laws.

The government's duties to Native Americans have been recognized and upheld by the Court in *Mitchell II*. These same duties can and should be applied to African Americans. The pattern and practice of stripping both groups of their resources and financial interest by the United States government merits remuneration. The United States secured its most valuable possession—cultivated and profitable land—only through control and supervision over both Native Americans and African Americans and their resources. The government's gain caused long-term harms that are widely evident today. Representative Howard, a co-sponsor of the 1934 Act referenced in *Mitchell II*, recognized that "[t]he failure of their governmental guardian to conserve the Indians' land and assets and the consequent loss of income or earning power, has been the principal cause of the present plight of the average Indian."[299] The same was

295. FONER, *supra* note 230, at 153–54 (describing how the army forced African American laborers to work in order to achieve "[t]he aim of revitalizing the South's production of agricultural staples"); *id*. at 164–65 (describing how Bureau agents forced African Americans to sign sharecropping contracts and relocated laborers).

296. *See* General Allotment Act, ch. 119, § 1, 24 Stat. 388 (1887) (repealed 1934); Indian Removal Act of 1830, ch. 148, 4 Stat. 411. The government's control and domination of Native Americans proceeded in several phases. *See* Cobell v. Norton, 240 F.3d 1081, 1086–87 (D.C. Cir. 2001). The first phase involved the forcible dislocation of Native Americans as part of the nation's expansionist objectives. *Id*. The Indian Removal Act of 1830 made the relocation of Native Americans official government policy by offering unsettled land to Native Americans in exchange for their settled and occupied land in the east. *Id*. During the latter half of the nineteenth century, the second phase, the government divided Native American land into parcels, removed it from tribal ownership, and redistributed it to individual Native Americans in order to "extinguish tribal sovereignty, erase reservation boundaries and force assimilation of Indians into society at large." *Id*. (quoting Yakima v. Yakima Indian Nation, 502 U.S. 251, 254 (1992)). To that end, the enactment of the General Allotment Act in 1887 provided formal authorization of the government's allotment and assimilation policies. During this phase, the United States took over ninety million acres of property, constituting around two-thirds of all Native American land, over the course of fewer than fifty years. *Id*.

297. *See supra* note 158.

298. *See* PARENT, *supra* note 134, at 19–25, 55 (2003).

299. United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 221 (1983).

true of the labor contracts that African Americans were forced into by the Freedmen's Bureau under the authority of the federal government. One Bureau agent aptly observed that "[w]ith labor at fifteen dollars a month . . . it is one endless struggle to beat back poverty."[300]

These acknowledgements by Representative Howard and others are not new revelations. The government has repeatedly breached its fiduciary duties and advanced its own interests at the expense of struggling African Americans. This is evidenced by the government's interaction with some slaves who owned property prior to the Emancipation Proclamation.[301] An 1827 account of southern law revealed that "[b]ecause they were property, slaves could not legally own property. A slave could acquire and hold *personal* property but only by the consent of his master, who granted it as a favor."[302] Nonetheless, slaves obtained horses, cattle, land, and money as their own property.[303] They found time and opportunity to farm and use their livestock for their own financial gain during times when they were not working for their masters.[304]

While this account is relatively unknown and has the potential to re-shape our perspectives of African American history, the fact that slaves owned property is not itself the ultimate hinge of the argument for reparations. Instead, the critical issue is what Union soldiers did with the property of African Americans during and immediately after the Civil War. Accounts reveal the experiences of former slaves such as Pompey Bacon.[305] Mr. Bacon and his family welcomed Union soldiers onto their land and into their homes for meals in 1864.[306] He recalled being grateful to the soldiers as they fought for the freedom of slaves, his gratitude prompting him to clothe naked soldiers and feed those who had not eaten for days.[307] However, Mr. Bacon's kindness (and the kindness of others like him) was exploited and taken as a weakness.

Without warning or explanation, hordes of Union soldiers raided his property and used his bed sheets and his wife's underclothes to serve as sacks for hauling away Mr. Bacon's corn.[308] The soldiers shot his hogs and used his horses to take the meat with them.[309] As Mr. Bacon and those around him protested about being left without anything to sustain them, one soldier replied, "We are obliged to, we come to set you free, & we must have something to eat,

300. FONER, *supra* note 230, at 166.

301. *See* DYLAN C. PENNINGROTH, THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH, 45–109 (2003) (describing slave-owned property).

302. *Id*. at 45 (internal citations omitted).

303. *Id*. at 47–49.

304. *Id*. at 47–52.

305. *Id* at 1–6.

306. *Id*. at 1–2.

307. *Id*. at 2.

308. *Id*.

309. *Id*.

but you must go to '*Uncle Sam*.' Uncle Sam's pockets drag on the ground."[310] Property-owning slaves who had the presence of mind to request a receipt for the items consumed by the soldiers were dismayed to have the receipts torn up in their face by another soldier.[311] These newly freed slaves would have entered into freedom with their property intact but for the actions of these Union soldiers who took their property without compensation. They were told that this wrong could be righted by submitting claims to "Uncle Sam," yet Uncle Sam has repeatedly refused to provide relief. Reparation payments are the only just compensation for this clear malfeasance by the American government. America's failure to acknowledge and hold itself accountable for "the contemporary plight" of African Americans has not erased the past.[312] The disproportionate inability of African Americans to afford housing, food, clothing, and education can undoubtedly be traced back to this denial of just compensation.[313]

The elaborate control and "contentious and tragic relationship [with Native Americans caused by] America's expansionist impulse"[314] also describes the relationship between the United States and African Americans. While the government expelled Native Americans from their property, it simultaneously forced African Americans to develop and cultivate these properties. Just as the government codified its control over Native American resources via the General Allotment Act and the 1960 Act, it codified its control over African Americans and their affairs with the Freedmen's Bureau Bill. That control has continued long after the expiration of the Bill. The government's mismanagement of Native American land, timber, and money is comparable to its mismanagement of African American wages, labor, money, and land. Thus, the "elaborate control and domination" exercised by the government over African Americans and their resources has created a fiduciary relationship, the breach of which is properly compensated by monetary damages. Notwithstanding the distinctions between African Americans and Native Americans, there are compelling reasons to apply a similar presumption where the government has exerted control over the property of African Americans.

IV.
MAKING THE CASE FOR REPARATIONS

As discussed above, in the common law trust relationship between the United States and African Americans, the government occupies the role of the trustee, while a class of African Americans constitutes the intended beneficiaries. That class is comprised of individuals of African descent who have direct

310. *Id*.
311. *Id*.
312. *See* RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS, 222–24 (2000).
313. *See id*. at 8–9.
314. Cobell v. Norton, 240 F.3d 1081, 1086 (D.C. Cir. 2001).

evidence that one or more of their ancestors were enslaved in the United States prior to emancipation and alive during and after the Civil War.[315] This evidence can be gathered through lineage searches, family trees, public records, or judicially authenticated writings from an ancestor.[316] Once an individual has established that she is a descendant of those Africans or African Americans living in America during the relevant time period, all other persons living and related to that individual will also be members of the aggrieved class. The trust property consists of the lost wages and property of African Americans following the Thirteenth Amendment. The breach for which redress is required includes governmental commissions and omissions by the United States during and after the Civil War.

A. The Tucker Act as a Waiver of Sovereign Immunity for Claims Arising Out of Breach of a Trust Relationship

It is clear that the majority of America's judiciary believes its hands are tied on the subject of African American reparations. This tension has been unnecessarily caused by a self-servingly myopic legal analysis employed to analyze reparations claims. The historical relationship between the United States and African Americans is one in which the concerns and interests of African Americans have been ignored and exploited to benefit white America. Judicial decisions that have summarily dismissed African American claims have only served to reinforce the hierarchical nature of America's institutionalized system of racism. The application of the Tucker Act to African American reparations claims to satisfy jurisdictional requirements by waiving the government's immunity will allow our nation to begin the process of relieving this tension and remedying one of its most egregious acts.

The Tucker Act, framed appropriately, remains a potentially viable waiver of sovereign immunity for African American reparations claims. But there is little doubt that convincing an American court that the Tucker Act satisfies the jurisdictional requirement for a reparations claim will be an uphill battle. Objections to such claims based on statutes of limitations or causation will remain. An objection regarding the legislative intent of the statute may also be made, namely that Congress did not intend for the Tucker Act to make reparations available to African Americans, considering the country's racial

315. A useful comparison is the Black Farmers case, a successful class action racial discrimination suit that could be characterized as a rare example of a successful reparations claim. *See* Kindaka Jamal Sanders, *Re-Assembling Osiris: Rule 23, the Black Farmers Case, and Reparations*, 118 PENN ST. L. REV. 339, 365–67 (2013) (discussing class certification requirements as a model for reparations litigation to meet standing and causation requirements).

316. The prevalence of the Internet will make use of genealogical and family tree services easier and cheaper. Access to the Internet is a free service available at virtually all public libraries in the United States. *But cf.* Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2542–43 (2001) (arguing that technological advances do not solve the cost and access problems of genealogical research).

climate in 1887. Nevertheless, a plain reading of the statute grants jurisdiction to any plaintiff regarding claims founded upon the Constitution or Acts of Congress.[317]

The Civil Rights Act of 1886, the Thirteenth Amendment, and the Freedmen's Bureau Bill each meet the threshold requirement. As discussed above, no court has yet considered reparations claims based on the breach of common law trust suffered by African Americans. The Freedmen's Bureau Act granted legislative authority and formality to the nation's common law fiduciary duties formed shortly prior. It is clear that the government intended to exert domination and control over the work product, personhood, belongings, and property rights of African Americans when it established the Freedman's Bureau.[318]

Although no court has yet considered reparations claims brought under the Tucker Act, refusal by any court to recognize the jurisdictional applicability of the Tucker Act to African American reparations suits premised on a breach of trust theory would be plainly unjust. In fact, it would amount to denying judicial remedy to a certain group of American citizens, in direct contradiction to the Act's purpose to provide what "every civilized nation of the world has already done—the right to go into the courts to seek redress against the Government for their grievances."[319] To deny the viable claims of African Americans, who for centuries were subjected to inhumane treatment and laws, based upon a narrow interpretation of the Tucker Act would amount to a denial of rights and protection under the law sadly reminiscent of slavery and its aftermath.

The application of the Tucker Act to breaches of trust committed in violation of the government's fiduciary duties owed to African Americans (as detailed in the Freedmen's Bureau Act) is appropriate. The Tucker Act provides a jurisdictional waiver of sovereign immunity when combined with a right to relief. As discussed in Part IV.B below, the Freedmen's Bureau Bill imposed duties on the government whose breach creates a substantive right to money damages from the United States.

B. Breach of a Common Law Trust Relationship as Establishing a Right to an Accounting and Monetary Damages

The Freedmen's Bureau Bill was the primary means by which Congress exerted "elaborate control" over African Americans, similar to the statutes and regulations at issue in *Mitchell II*.[320] Although the bill does not expressly

317. 28 U.S.C. § 1491(a)(1) (2012).

318. *See* FONER, *supra* note 230, at 68–69 (describing how the Commission that recommended the Bureau's creation characterized its role towards African Americans as "benevolent guardianship").

319. *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 213–14 (1983).

320. For a discussion on the potential applicability of 25 U.S.C. § 1983 (2012) as a statutory source for reparations, see BITTKER, *supra* note 158, at 30–35.

authorize money damages, under the reasoning of *Mitchell II*, the government's control created a common law trust relationship and corresponding fiduciary relationship. The law of trusts clearly provides for judicial recognition of the presence of a common law trust relationship between a group of people and the government when elaborate control or supervision of that group is exercised by the government. Once that relationship is established, the award of damages for a breach of fiduciary duties in a suit for reparations is a straightforward application of traditional trust law principles. The provision of discovery and expert opinions in civil litigation will provide any trier of fact with the requisite numbers to calculate an appropriate remedy.

As provided by *Mitchell II*, *Cobell*, and *White Apache Mountain*, the form of reparations contemplated in this article consists of a formal accounting and monetary reimbursements with the central goal of redress. Those reimbursements could be made in the form of government-sponsored grants for education, investments, and/or direct payments. Regardless of the form or method of redress, these reparations should be made to a specific class of African Americans for loss of inheritances and familial wealth denied to eligible descendants as a result of the government's breach and mismanagement of African American labor, wages, and designated land.

CONCLUSION

The freedoms and rights guaranteed to all other citizens have not been granted to African Americans. Indeed, the very government entrusted with the duty to protect the life and liberty of all its citizens has instead prioritized its own interests and the interests of white America. In fact, since 1989, Congress has repeatedly refused to even pass legislation investigating the possibility of African American reparations.[321] All the while, African Americans have been denied judicial remedies from the government under the cloak of sovereign immunity. This treatment and denial of justice is unique to African Americans.

As a result, more than a century after the end of legalized slavery and nearly fifty years after the end of legalized segregation in the United States, the federal

321. Every year since 1989, Representative John Conyers of Michigan has put before Congress the Commission to Study Reparation Proposals for African-Americans Act. *See* H.R. 40, 113th Cong. (2013). The Act calls for a comprehensive assessment of the effects of slavery and discrimination on blacks, including the federal and state governments' roles in those effects. Congress should advance this bill out of committee, where it has sat for the last several decades. This study would serve as a first step by the government to acknowledge the injury it has caused and begin to make amends. Though this article strongly supports the position that judicial action is possible and equitable, the availability of judicial remedy does not relieve Congress of its moral and legal obligation to right the wrongs of the United States government. To that end, an explicit waiver of sovereign immunity and establishment of a payment fund, similar to that provided in the Civil Liberties Act of 1988, is long overdue.

government continues to abdicate its responsibility to rectify the harm its breach caused to African Americans.[322]

A reparations suit based on the common law trust relationship creates the possibility of avoiding the issue of sovereign immunity raised by previous lawsuits. None of the recent cases seeking reparations for African Americans have pursued a breach of duty action based on the common law trust relationship between the United States and a specific class of African Americans. The holdings in *Cobell*, *Mitchell II*, and *White Apache Mountain Tribe* provide judicial precedent for a waiver of sovereign immunity and a substantive right to monetary damages when a common law trust relationship exists. The logic underpinning these holdings warrants extending them to the government's common law trust relationship with African Americans. Such an action could provide a legal basis for a class of African American plaintiffs to request an accounting of the government's actions as required under the Freedmen's Bureau Bill.

The American court system should be provoked by its interests in equity and justice, using the backdrop of the Native American breach of trust and fiduciary duty cases, to provide redress for its bigoted, institutionalized racial hierarchy as it related to African Americans and *truly* begin the process of healing race relations in the United States.

322. Ogletree, *supra* note 16, at 290 (discussing how Representative John Conyers's bill to establish a commission to investigate reparations had failed to achieve widespread support, despite being filed annually for decades).