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## A Corporate Law Rationale for Reparations

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# A CORPORATE LAW RATIONALE FOR REPARATIONS

SUSAN S. KUO\*

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**Abstract:** Should the United States pay reparations to African Americans? A majority of Americans object, arguing that they are not personally responsible for slavery or Jim Crow laws. Their objection is rooted in the principle of ethical individualism, which holds that people can be blamed only for their own actions. This Article contends that the ethical-individualism objection to reparations is misplaced because it assumes that what matters is the culpability of each citizen. This Article argues that like a corporation, the United States is a legal person. Consequently, seeking reparations from the United States does not turn on the guilt of its citizens any more than prosecuting a corporation turns on the guilt of its shareholders. This Article further contends that corporate law contains resources for evaluating reparations on the merits. In particular, although this Article assumes that legal claims against the United States are not justiciable, it uses the Department of Justice’s Corporate Charging Guidelines to develop a moral case for paying reparations.

## INTRODUCTION

On June 19, 2019, Congress held hearings on H.R. 40, a bill that would establish a “Commission to Study and Develop Reparation Proposals for African-Americans.”<sup>1</sup> After years of neglect, the topic of reparations has received renewed attention as a way for the nation to atone for slavery, Jim Crow laws,

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<sup>1</sup> *H.R. 40—Commission to Study and Develop Reparation Proposals for African-Americans Act*, CONGRESS.GOV (2019–2020), <https://www.congress.gov/bill/116th-congress/house-bill/40> [<https://perma.cc/23UY-9S78>]. Similar bills have been introduced in Congress every year since 1989 and have stalled in committee. See Sheryl Gay Stolberg, *At Historic Hearing, House Panel Explores Reparations*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/us/politics/slavery-reparations-hearing.html> [<https://perma.cc/PP8F-6Q8M>]. The June 19, 2019 hearings were the first ones held in more than a decade. See Richard Gonzales, *Congressional Hearing on Slavery Reparations Set for Wednesday*, NPR (June 18, 2019), <https://www.npr.org/2019/06/18/733880321/congressional-hearing-on-slavery-reparations-set-for-wednesday> [<https://perma.cc/BP3X-YC76>].

and other forms of racial oppression.<sup>2</sup> According to one scholar, “We have not had a conversation about reparations on this scale or level since the Reconstruction Era.”<sup>3</sup> The conversation is long overdue.

Notwithstanding the increased visibility of reparations arguments, a majority of Americans oppose any form of reparations.<sup>4</sup> Among conservatives, support is practically nonexistent.<sup>5</sup> Invoking the principle of ethical individualism, opponents ask, “Why should I pay for something I didn’t do?”<sup>6</sup> Those who were directly responsible, the slaveowners of previous centuries, are dead.<sup>7</sup> Consequently, ethical individualism allows Americans to express their regret for past wrongs without acknowledging any obligation to pay for them. For example, a congressional resolution both apologized “on behalf of the people of the United States, for the wrongs committed against [African Americans] and their ancestors who suffered under slavery and Jim Crow laws” and added a prominent disclaimer that “[n]othing in this resolution . . . authorizes or supports any claim against the United States.”<sup>8</sup>

This Article argues that the ethical-individualism objection is misplaced, not because the underlying principle is wrong or unimportant, but because the

<sup>2</sup> Perhaps galvanized by Ta-Nehisi Coates’s 2014 story, *The Case for Reparations*, the issue of reparations has moved from the margins of the nation’s public discourse on race. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), [https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/?gclid=CjwKCAiAINf-BRB\\_EiwA2osbxU3KXEgk4bHqL7AtzZQLGybRD4aup1oHPqIacAephfsXsTpPZ-IthoCL4QQAvD\\_BwE](https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/?gclid=CjwKCAiAINf-BRB_EiwA2osbxU3KXEgk4bHqL7AtzZQLGybRD4aup1oHPqIacAephfsXsTpPZ-IthoCL4QQAvD_BwE) [https://perma.cc/CVY9-7GQJ]; see Jonathan Capehart, Opinion, *How Ta-Nehisi Coates Turned Reparations from a Joke into a Policy Objective*, WASH. POST (Mar. 20, 2019), <https://www.washingtonpost.com/opinions/2019/03/20/how-ta-nehisi-coates-turned-reparations-punchline-into-policy-objective/> [https://perma.cc/WH5B-9WZF].

<sup>3</sup> Stolberg, *supra* note 1 (quoting Professor William A. Darity, Jr.).

<sup>4</sup> According to a recent poll, 67% of Americans oppose reparations that involve cash payments to African Americans descended from slaves. Mohamed Younis, *As Redress for Slavery, Americans Oppose Cash Payments*, GALLUP (July 29, 2019), <https://news.gallup.com/poll/261722/redress-slavery-americans-oppose-cash-reparations.aspx> [https://perma.cc/BFN9-AG57]. The same pool found that among non-Hispanic whites, 81% oppose the idea of reparation payments. *See id.*

<sup>5</sup> Although Democrats are almost evenly split, more than 90% of Republicans are against reparations. *See id.* This Article follows Professor Ariela Gross’s use of “the terms ‘conservative’ and ‘liberal’ in their conventional contemporary political senses.” Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF. L. REV. 283, 284 (2008).

<sup>6</sup> *See* John McWhorter, *Against Reparations*, in SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS 180, 191 (Raymond A. Winbush ed., 2003); David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043, 1047 (2010) (At bottom, “these objections are nothing more than the familiar ‘I didn’t do it. It wasn’t me.’”); Amy J. Sepinwall, *Responsibility for Historical Injustices: Reconciling the Case for Reparations*, 22 J.L. & POL. 183, 184 (2006).

<sup>7</sup> *See* David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. REV. 1375, 1378 (2004) (arguing that “a reparations claim made today based solely on the wrongs of chattel slavery faces serious problems”).

<sup>8</sup> S. Con. Res. 26, 111th Cong. (2009).

objection assumes that reparations must be rooted in the direct obligations of individual citizens. Yet, just as a corporation is distinct from its shareholders and responsible for its own wrongdoing, the United States is a legal person separate and apart from its citizens. Seeking reparations from the United States does not turn on the guilt of its citizens any more than prosecuting a corporation turns on the guilt of its shareholders.<sup>9</sup>

By demonstrating corporate law's relevance to the issue of U.S. reparations, this Article makes a novel contribution to the literature. Although other commentators have identified the analogy between a corporation and a nation, they have limited their focus to the most obvious point of potential similarity: that corporations and nations are long lived.<sup>10</sup> Missing from their analysis is an application of the corporate concept of legal personhood. Instead, they have largely assumed that the ethical-individualism objection must be satisfied with respect to each individual citizen.<sup>11</sup>

Thus, while some reparations scholars offer a corporate law comparison to explain why claims for reparations based on past wrongs are not untimely, they look for other reasons to hold individual citizens accountable for those wrongs. For example, one scholar contends that even if a collective entity such as the United States is implicated in wrongdoing, the responsibility of any particular stakeholders will be unclear because "there is always a diversity of relationships between group members and abuses."<sup>12</sup> Another scholar argues that although the U.S. *government* might be understood in corporate terms, reparations paid by *citizens* would need to be founded on some broader theory of collective, societal responsibility.<sup>13</sup> Similarly, two commentators distinguish ethi-

<sup>9</sup> See, e.g., Joshua C. Macey, *What Corporate Veil?*, 117 MICH. L. REV. 1195, 1210 (2019) (reviewing ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* (2018)) (observing that "corporate criminal liability is inconsistent with the associations-of-people view of the corporation and reflects the view that corporations are separate legal entities").

<sup>10</sup> See Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 519 n.94 (2003) (suggesting "analogy" between reparations and "shareholders' liability for a corporation's actions"); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CALIF. L. REV. 683, 723 n.153 (2004) (stating that "[a]n analogy to corporate identity may . . . be helpful . . . [because] [a] corporation retains the same identity from one day to the next, notwithstanding changeover in shareholders or employees"); Lyons, *supra* note 7, at 1385 ("Institutions, such as corporations and political organizations, can be held accountable and are capable of existing for many generations.").

<sup>11</sup> For example, one scholar highlights the "simple fact that groups do not act; only individuals act." David C. Gray, *Extraordinary Justice*, 62 ALA. L. REV. 55, 65 (2010); see also George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1529 (2002) ("The problem is essentially one of attribution.").

<sup>12</sup> See Gray, *supra* note 11, at 65.

<sup>13</sup> Forde-Mazrui, *supra* note 10, at 715 (stating that, unlike governments or corporations, "it may be questioned whether American 'society' is a collective entity to which any obligation may be ascribed").

cal theories that explain when a “corporate body” can “have moral obligations” from the extreme form of “ethical collectivism” they assert is necessary to account for obligations held by “a more loosely defined group such as a nation.”<sup>14</sup> Such arguments replicate the ethical-individualism objection within the structure of the corporation, but they do not resolve it.

This Article takes the corporate law analogy one crucial step further, contending that what matters is not only the lifespan of the entity but its *personhood*. The United States is a legal person built according to a corporate model as set forth in the nation’s founding charter, the U.S. Constitution. Notably, the Founders used corporate law as their template for precisely this purpose—to establish a nation distinct from the majoritarian preferences of the people taken as a whole.<sup>15</sup> Like a corporation, the nation can hold property, enter contracts, and incur legal obligations.<sup>16</sup> A corporation’s choices affect the value of the shareholders’ investments regardless of whether they agree with those choices or are even aware of them. For the same reason, when the United States acts, the consequences of those actions affect citizens who, in their capacity as taxpayers, are ultimately responsible for funding the government. To argue about whether individual citizens owe reparations is to miss the point.

Having used corporate law principles to rebut the ethical-individualism objection to U.S. reparations, this Article further contends that corporate law contains resources for evaluating reparations on the merits. In particular, this Article relies upon the Department of Justice’s (DOJ) Guidelines (Charging Guidelines) that U.S. attorneys consult when deciding whether to bring criminal charges against a corporation.<sup>17</sup> Key factors include the pervasiveness of wrongdoing, the timely acceptance of responsibility, the extent of restitution and remediation measures already undertaken, the likelihood that a prosecution of the corporation would disproportionately cause harm to shareholders, em-

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<sup>14</sup> Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 698–99 (2003).

<sup>15</sup> David Ciepley, *Is the U.S. Government a Corporation? The Corporate Origins of Modern Constitutionalism*, 111 AM. POL. SCI. REV. 418, 431 (2017) (“Corporate theory was used, first, to differentiate the people into two capacities—chartering sovereign and electing multitude—and then to exclude the former from the government by virtue of its act of chartering.”).

<sup>16</sup> The argument does not require us to take sides in ongoing debates regarding the U.S. constitutional rights of corporations because it is widely accepted that corporations act as persons when they engage with third parties and can be liable for wrongdoing. See Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1663 (arguing that the ability to own property, enter into contracts, and the like are “essential features necessary for corporations’ practical use”); see also discussion *infra* Part II.C.2.

<sup>17</sup> See U.S. Dep’t of Just., Just. Manual § 9-28.000 (2021), <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations> [<https://perma.cc/ETS4-L65A>] (principles of federal prosecution of business organizations).

ployees, or other stakeholders, and the feasibility of bringing claims against the individuals whose actions form the basis for entity liability.<sup>18</sup>

When applied to the United States and its treatment of African Americans, analysis of each of these factors weighs in favor of reparations. Notably, if a corporation authorized wrongdoing at the highest levels, failed to institute meaningful compliance procedures to ensure that the wrongdoing ceased and was not repeated, repeatedly denied or minimized the nature of its own wrongdoing, and refused to take steps to remediate the harms it had caused, a prosecutor would be hard pressed *not* to bring charges.<sup>19</sup> Although legal claims against the United States for reparations may not be justiciable in a court of law,<sup>20</sup> reparations can be authorized through the political process. In that regard, the Charging Guidelines are useful as a tool for assessing the nation's ongoing responsibilities. As *The New York Times* recently observed when launching *The 1619 Project*, the United States was built upon slavery and has never engaged in an honest reckoning with its past.<sup>21</sup>

This Article proceeds in three Parts. Part I surveys arguments for reparations, the objection that American taxpayers are not responsible for the sins of previous generations, and the standard responses to that objection.<sup>22</sup> Part II contends that corporate law has direct explanatory power because the United States is a legal person modeled on corporate precedent, and that the protested innocence of individual citizens should have no bearing on whether the United States owes reparations.<sup>23</sup> Part III uses the factors set forth in the DOJ's Charg-

<sup>18</sup> *Id.* § 9-28.300 (identifying “Factors to Be Considered”).

<sup>19</sup> According to one scholar, when the U.S. Supreme Court addresses the historical record, it mostly dismisses slavery as an aberration inconsistent with the nation's more permanent values rather than a wrong that needs to be addressed and overcome. See Justin Collings, *The Supreme Court and the Memory of Evil*, 71 STAN. L. REV. 265, 270 (2019) (distinguishing “parenthetical” and “redemptive” modes of analyses).

<sup>20</sup> See, e.g., *Cato v. United States*, 70 F.3d 1103, 1111 (9th Cir. 1995) (dismissing a reparations action brought against the United States as non-justiciable); Richard A. Epstein, *The Case Against Black Reparations*, 84 B.U. L. REV. 1177, 1183 (2004) (arguing that applicable statute of limitations would preclude successful reparations claims in court).

<sup>21</sup> Jake Silverstein, Editor's Note, *The 1619 Project*, N.Y. TIMES MAG., Aug. 18, 2019, at 4, 4–5 (“The goal of *The 1619 Project*, a major initiative from *The New York Times* that this issue of the magazine inaugurates, is to reframe American history by considering what it would mean to regard 1619 [the year African slaves first arrived in the British colony of Virginia] as our nation's birth year.”). Jake Silverstein concluded that “American history cannot be told truthfully without a clear vision of how inhuman and immoral the treatment of black Americans has been.” *Id.* at 5. In response to *The 1619 Project*, President Donald Trump threatened that schools that “teach this alternative narrative of American history could lose federal funding.” Ronn Blitzer, *Trump Warns Schools Teaching 1619 Project ‘Will Not Be Funded,’* FOX NEWS (Sept. 6, 2020), <https://www.foxnews.com/politics/trump-warns-schools-teaching-1> [<https://perma.cc/9SAZ-EKWX>].

<sup>22</sup> See discussion *infra* Part I.

<sup>23</sup> See discussion *infra* Part II.

ing Guidelines to support the case for reparations.<sup>24</sup> To be clear, this Article takes no position on the merits of any particular reparations program.<sup>25</sup> Rather, the corporate law framework this Article proposes clarifies why the United States is the relevant actor for purposes of reparations analysis and why the United States should recognize an unmet obligation. As for questions of design and implementation, we cannot know what form justice may take unless we are willing to seek it.

## I. REPARATIONS AND ETHICAL INDIVIDUALISM

Part I situates the Article's argument by providing background context concerning reparations and ethical individualism. Section A defines the concept of reparations and explains how U.S. reparations for African Americans fit within the ambit of reparations programs more generally.<sup>26</sup> Section B examines the ethical-individualism objection—that it would be wrong to place a financial burden on taxpayers who have no direct responsibility for slavery, Jim Crow laws, or other injustices.<sup>27</sup> Finally, Section C surveys a range of potential responses to ethical individualism.<sup>28</sup>

### A. Arguments for Reparations

To pay reparations is to admit that a wrong was done and to seek to make it right.<sup>29</sup> Reparation programs vary widely depending on the specific circumstances surrounding their deployment, but most have several features in common. First, reparations involve payments made “to a large group of claim-

<sup>24</sup> See discussion *infra* Part III.

<sup>25</sup> Similarly, H.R. 40, a bill, does not conclude that reparations are feasible and is limited to investigating the possibility. Alyssa Rosenberg, Opinion, *Culture Change and Ta-Nehisi Coates's 'The Case for Reparations,'* WASH. POST (May 22, 2014), <https://www.washingtonpost.com/news/act-four/wp/2014/05/22/culture-change-and-ta-nehisi-coates-the-case-for-reparations/> [<https://perma.cc/US8P-BYG9>]. Among other possibilities, reparations might “take the form of concrete benefits, such as cash payments, social welfare entitlements, or guaranteed access to education and employment.” Gray, *supra* note 6, at 1054 (footnote omitted). For an assessment of practical challenges that would need to be confronted, see generally Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531 (2001) (reviewing RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000)); see also Kyle D. Logue, *Reparations as Redistribution*, 84 B.U. L. REV. 1319, 1320–21 (2004) (arguing in favor of reparations, but observing that “[g]iven the historic scope of the injustice slavery represents, the potential size of a fully ‘reparative’ transfer could be astronomical”).

<sup>26</sup> See discussion *infra* Part I.A.

<sup>27</sup> See discussion *infra* Part I.B.

<sup>28</sup> See discussion *infra* Part I.C.

<sup>29</sup> See Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1056 (2003) (identifying “the goals of reparations as acceptance, acknowledgment, and accounting”).



ants.”<sup>30</sup> Second, it is characteristic of reparations that the conduct at issue was lawful at the time.<sup>31</sup> Third, reparations programs are created mainly as a last resort when the victims have no other available remedy at law.<sup>32</sup> Fourth, reparations are typically meant to correct past injustices rather than as a form of social engineering.<sup>33</sup>

Proposed U.S. reparations for African Americans fit each of those characteristics. Even if restricted to African Americans who are descended from slaves, reparations would involve a very large number of claimants.<sup>34</sup> Also, although the horrors of slavery were widely recognized during the colonial era, U.S. law authorized slavery. Furthermore, it appears that no independent mechanism exists at law for compensating African Americans.<sup>35</sup> Finally, whatever value reparations might have for reducing societal inequality going forward or for achieving racial reconciliation, they are generally defended as the repayment of a debt owed to African Americans.<sup>36</sup>

U.S. reparations for slavery would not be without precedent. In 1946, Congress authorized payment to Native Americans for stolen land and other wrongs.<sup>37</sup> Since then, the United States has paid reparations for the internment of Japanese Americans during World War II, for exposing people to radiation, and for conducting syphilis experiments on African Americans without their

<sup>30</sup> Posner & Vermeule, *supra* note 14, at 691.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (noting that typically “current law bars a compulsory remedy for the past wrong (by virtue of sovereign immunity, statutes of limitations, or similar rules)”).

<sup>33</sup> *Id.* (distinguishing “backward-looking grounds of corrective justice” from “forward-looking grounds such as the deterrence of future wrongdoing”). *Contra* Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1335 (2003) (arguing for a broader vision of reparations that is “more than just compensation for past debts”). Professor Eric Yamamoto and his coauthors contend that reparations offer a “vehicle for groups in conflict to rebuild their relationships through attitudinal changes and institutional restructuring.” *Id.*

<sup>34</sup> See Wesley Lowery, *Which Black Americans Should Get Reparations?*, WASH. POST (Sept. 18, 2019), [https://www.washingtonpost.com/national/which-americans-should-get-reparations/2019/09/18/271cf744-cab1-11e9-a4f3-c081a126de70\\_story.html](https://www.washingtonpost.com/national/which-americans-should-get-reparations/2019/09/18/271cf744-cab1-11e9-a4f3-c081a126de70_story.html) [<https://perma.cc/Y7EM-6CPT>].

<sup>35</sup> See *Cato v. United States*, 70 F.3d 1103, 1111 (9th Cir. 1995) (dismissing a complaint brought against the United States for slavery and racial discrimination against African Americans). In 1995, in *Cato v. United States*, the U.S. Court of Appeals for the Ninth Circuit concluded that “[w]hile plaintiff may be justified in seeking redress for past and present injustices, it is not within the jurisdiction of this Court to grant the requested relief.” *Id.* at 1105 (quoting Armstrong, J.).

<sup>36</sup> See Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 282 (2003) (“At its most basic level, reparations seeks something more than token acknowledgment of the centuries of suffering of African Americans at the hands of the state and federal governments, corporations, and individuals during the three centuries of chattel slavery and Jim Crow.”).

<sup>37</sup> See Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 468 (1994).

knowledge or consent.<sup>38</sup> Reparations paid to the descendants of slaves would involve a greater number of claimants, a greater time span between injury and recovery, and, very likely, a significantly expanded financial commitment.<sup>39</sup> In principle, though, the United States has already acknowledged the appropriateness of paying reparations to account for past wrongs.<sup>40</sup>

### B. Ethical Individualism

No one operating in good faith would contest the enormity of the wrongs committed against African Americans. Yet, the case for reparations requires more than the existence of a wrong. It is also necessary to find someone who we can ask to pay for the wrong and to ascertain what amount is owed and to whom it should be paid. Some commentators worry that the practical impediments to designing and implementing a reparations program are insurmountable, regardless of any theoretical merit.<sup>41</sup> The most forceful objection to reparations, however, derives its strength from the principle of ethical individualism—that those who are innocent of a violation cannot be held responsible for it.

If arguments for reparations assert the existence of a moral obligation, they must also establish a “relationship between the original wrongdoer and the possible payer of reparations.”<sup>42</sup> Opponents of reparations for African Americans deny the existence of any such relationship and contend that those alive today cannot be held responsible for slavery, Jim Crow laws, or any other form of racial oppression.<sup>43</sup> For example, then-Senate Majority Leader Mitch McConnell stated: “I don’t think reparations for something that happened 150

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<sup>38</sup> See Posner & Vermeule, *supra* note 14, at 696 tbl.1. Although the payment to heirs of the African Americans included in the syphilis study settled a class action lawsuit, the United States “settled for ‘unique reasons,’ namely that ‘the United States was rightfully and grievously embarrassed’ and that ‘it was in the best interest of the United States Government to close the last chapter of this sordid book as expeditiously and honorably as possible.’” *Id.* at 695 n.19 (quoting *Pollard v. United States*, 69 F.R.D. 646, 647, 649 (M.D. Ala. 1976)).

<sup>39</sup> The value of labor stolen from African Americans through slavery has been calculated to amount to trillions of dollars. See James Marketti, *Estimated Present Value of Income Diverted During Slavery*, in *THE WEALTH OF RACES: THE PRESENT VALUE OF BENEFITS FROM PAST INJUSTICES* 107, 107 (Richard F. America ed., 1990).

<sup>40</sup> See Lyons, *supra* note 7, at 1385 (“[T]he United States government has accepted accountability for the Tuskegee syphilis experiment and the World War II internment of Japanese Americans, and it has paid reparations accordingly.”).

<sup>41</sup> See Armstrong Williams, *Presumed Victims*, in *SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS*, *supra* note 6, at 165, 170 (arguing that “as a matter of sheer practicality, reparations raises more concerns than it assuages”).

<sup>42</sup> See Posner & Vermeule, *supra* note 14, at 698.

<sup>43</sup> See Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 *DEPAUL L. REV.* 1181, 1202 (2004) (“[T]he type of argument that has gained the most attention—and is advanced most seriously against reparations—is that the people currently asked to pay had nothing to do with the injustices of the past.”).

years ago—for [which] none of us currently living are responsible—is a good idea.”<sup>44</sup> Ethical individualism defines justice in terms of individual responsibility and argues that collective obligations are illegitimate.<sup>45</sup> Put simply, if justice must always be assessed on an individual basis, then “groups don’t matter.”<sup>46</sup>

Our legal system is largely committed to the principle of ethical individualism.<sup>47</sup> In “[t]he traditional common law paradigm of a legal claim, an individual wrongfully harmed by the specific actions of another in the recent past [seeks] to recover demonstrable personal losses.”<sup>48</sup> Thus, a basic goal of the tort system is that those who commit wrongs compensate their victims.<sup>49</sup> To avoid imposing wider compensatory obligations, tort law requires a showing of causation so that it links the victim and wrongdoer appropriately.<sup>50</sup> Class action lawsuits are a partial exception because they involve claims brought on behalf of multiple plaintiffs,<sup>51</sup> but they are permissible only when it would be impracticable to name each individual plaintiff and when all plaintiffs’ claims turn on common issues of law and fact.<sup>52</sup>

<sup>44</sup> Felicia Sonmez, *McConnell Says He’s Against Reparations for Slavery: ‘It Would Be Pretty Hard to Figure Out Who to Compensate,’* WASH. POST (June 18, 2019), [https://www.washingtonpost.com/politics/mcconnell-says-hes-against-reparations-for-slavery-it-would-be-pretty-hard-to-figure-out-who-to-compensate/2019/06/18/9602330c-9205-11e9-b58a-a6a9afaa0e3e\\_story.html](https://www.washingtonpost.com/politics/mcconnell-says-hes-against-reparations-for-slavery-it-would-be-pretty-hard-to-figure-out-who-to-compensate/2019/06/18/9602330c-9205-11e9-b58a-a6a9afaa0e3e_story.html) [<https://perma.cc/C6XT-FS9X>] (alteration in original) (quoting Sen. Majority Leader McConnell).

<sup>45</sup> For example, one theorist uses ethical individualism to reject the “argument that affirmative action is justified because of the past oppression of black Americans by white Americans.” Jon Elster, *Ethical Individualism and Presentism*, 76 THE MONIST 333, 333 (1993).

<sup>46</sup> *Id.*; see also Gray, *supra* note 6, at 1076 (asserting that there “is a conceptual error at the core of collective responsibility: groups do not act, only individuals act”).

<sup>47</sup> For that reason, “[a] strong tradition in the United States holds that individuals are not blameworthy for acts over which they have no control.” Posner & Vermeule, *supra* note 14, at 699.

<sup>48</sup> See Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 508 (1998). Taken together, “[c]oncepts such as the time-bar, proximate cause, and laches ensure that claims are fresh, capable of factual determination, and reasonably connected in time and space to the act of an individual wrongdoer.” Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 381 (1987) (footnotes omitted) (contending that “the sins of the past should not forever burden the innocent generations of the future”).

<sup>49</sup> See, e.g., Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 425 (1993) (“A judgment of liability simultaneously affirms both the entitlement of the plaintiff and the obligation of the defendant.”).

<sup>50</sup> *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928) (evaluating issues of proximate causation); Joel Feinberg, *Collective Responsibility*, 65 J. PHIL. 674, 674 (1968) (arguing that “in the standard case of responsibility for harm, there can be no liability without contributory fault”).

<sup>51</sup> See Paul R. Dubinsky, *Justice for the Collective: The Limits of the Human Rights Class Action*, 102 MICH. L. REV. 1152, 1152 (2004) (“As against the U.S. legal system’s strong orientation toward individual rights rather than group rights, the class action is a countercurrent.”).

<sup>52</sup> FED. R. CIV. P. 23(a)–(b). In 2011, in *Wal-Mart, Inc. v. Dukes*, the U.S. Supreme Court emphasized that the class action mechanism must, ultimately, resolve the individual claims of each participant. See 564 U.S. 338, 352 (2011) (“Without some glue holding the alleged reasons for all those

The ethical-individualism objection has rhetorical power because it forces proponents of reparations to “explain why nonwrongdoers—usually taxpayers or shareholders—should pay reparations.”<sup>53</sup> By highlighting the financial burdens to be imposed on putatively innocent taxpayers, opponents attack the moral impetus for reparations.<sup>54</sup> Thus, it should not be surprising that “[c]ontemporary whites asked to contribute directly or through taxes protest that they have never owned slaves and were born generations after the practice was abolished.”<sup>55</sup> When reparations are framed as a matter of individual responsibility for past wrongs, many people will respond by asserting their innocence.

Yet, the commonsense version of ethical individualism—“don’t blame me, I didn’t do it”—obscures conceptual difficulties that emerge when we attempt to give a more formal account of how ethical individualism pertains to U.S. reparations. Significantly, the ethical-individualism objection appears to combine two related concerns: (1) that reparations would impose financial penalties on a wide swath of blameless individuals based on a theory of group responsibility; and (2) that the injuries to be remedied occurred long ago and are not the responsibility of those now living.

Standing alone, stripped of its association with the idea that reparations are untimely, the ethical-individualism objection loses much of its luster. To insist that each individual’s responsibility must be assessed based on the individual’s own choices is to endorse an absurd conclusion—that a nation, business, or other collective organization can never incur responsibility when the ultimate financial consequences would be borne in part by individuals who are not themselves directly culpable. If that were the case, entities would act with practical impunity as long as some members were not involved in any particular endeavor.<sup>56</sup> Apart from the smallest groups, most organizations use a cen-

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decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored?*”).

<sup>53</sup> Posner & Vermeule, *supra* note 14, at 736. The analysis may include “prudential considerations.” *Id.*

<sup>54</sup> See, e.g., *id.* at 738 (“[O]ne cannot generally trace the benefits and harms of slavery down to particular individuals living today.”).

<sup>55</sup> Gray, *supra* note 6, at 1046 (footnote omitted). The objection is further “amplified by the fact that the proposed beneficiaries were never themselves slaves.” *Id.* This Article’s focus is the objection as it pertains to those who would pay reparations rather than the beneficiaries who would receive payments. To the extent that race remains a salient marker of difference in contemporary society, it may be that the descendants of slavery should properly include all who society treats them as such. See Ogletree, *supra* note 36, at 314 (“The social construction of people of African descent in America depends not simply upon the fact of personal or familial slavery. Rather, racial difference has been mediated through the stigma of slavery and Jim Crow and contained in perceptions lasting through the present time.”).

<sup>56</sup> More difficult philosophical questions regarding group responsibility arise when corporate liability is based upon the misconduct of rogue employees, especially if they are relatively low-level employees. United States corporate law ascribes responsibility to the entity, even for criminal viola-

tral, managerial governance structure and their decisions rarely involve total consensus.

Although the opposition to reparations for African Americans often stresses the passage of time, in theory ethical individualism would preclude reparations payments regardless of when the harms took place.<sup>57</sup> In the case of slavery, collective liability would be permissible only if all members of society supported the institution.<sup>58</sup> Of course, many Americans opposed slavery.<sup>59</sup> Thus, applying the principle of ethical individualism in its defense, a slave-owning nation could deny responsibility for its actions by gesturing to the existence of the abolitionists it once scorned.

In sum, the ethical-individualism objection to reparations turns out to be as much about the passage of time as it is about individual responsibility. Disaggregating the question of individual responsibility from temporal considerations reduces the intuitive appeal of ethical individualism and shifts much of the weight of the objection from an absolutist concern with collective responsibility to a more ambiguous question about how groups make decisions. Moreover, time limits for the redress of wrongs are bound to appear arbitrary. How many citizens must still be alive for a nation to remain morally accountable for its wrongful actions? A majority? Some? A single person? As applied to the question of U.S. reparations, therefore, the ethical-individualism objection

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tions, based on respondeat superior and some commentators have questioned whether a corporation can have the appropriate mental state. See, e.g., Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Criminal Liability*, 75 MINN. L. REV. 1095 (1991); Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141 (1983); V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355 (1999). The Founders established the United States as a slaveholding nation and many of its first Presidents, members of Congress, and federal judges were slaveowners. Therefore, concerns about respondeat superior as a basis for collective liability should have little application to the issue of reparations.

<sup>57</sup> See Sepinwall, *supra* note 6, at 185 (“The opposition to Black reparations thus focuses on the temporal dislocation between slavery and the present, but the argument loses none of its force when applied to more recent injustices.”). Professor Amy Sepinwall notes that if this argument were correct, it would block reparations programs that have been implemented elsewhere for the benefit of victims of the Holocaust and “Korean ‘comfort women.’” *Id.* at 183 (quoting George Hicks, *The Comfort Women Redress Movement*, in *WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES FOR HUMAN JUSTICE* 113, 124 (Roy L. Brooks ed., 1999)).

<sup>58</sup> *Id.* at 193 (“The individualist could assent to the claim about national liability only if every American wrongfully contributed to slavery.”).

<sup>59</sup> Thus, Professor Sepinwall draws the logical conclusion:

[I]f it would have been impermissible to hold the nation liable for making repair at the time that slavery ended, it would *a fortiori* be impermissible to hold the nation today to this duty, given that contemporary citizens would not even have had the opportunity to prevent or end slavery.

*Id.*

appears to depend on an incompletely specified relationship between collective liability and the passage of time.

### C. Responses to Ethical Individualism

Setting aside the threshold issue of whether ethical individualism is logically coherent when invoked as an objection to reparations, there are at least four possible responses. First, institutional racism in today's society is, at least in part, the residue of slavery and Jim Crow laws.<sup>60</sup> To the extent the harms are ongoing, reparations can be linked to the circumstances of contemporary Americans.<sup>61</sup> Second, the theft of African American labor created much of the nation's wealth, unjustly enriching U.S. citizens regardless of their individual culpability.<sup>62</sup> The payment of restitution does not require any finding that individuals alive today are responsible for past transgressions; only that they have benefited from them and that it would be unjust for them to retain the benefit. Third, to the extent individuals identify with their nation and take pride in its achievements, they should also feel shame for its transgressions and welcome a chance to repair the nation's tarnished honor.<sup>63</sup> A fourth response to ethical individualism asserts that reparations are a matter of collective rather than individual obligation.<sup>64</sup>

#### 1. Continuing Wrong

Perhaps the most direct response to the objection that today's citizens are innocent of the evils inflicted on African Americans is to argue that those evils may have changed shape, but that they are still with us today.<sup>65</sup> For example, critics have argued that mass incarceration of African Americans is a mecha-

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<sup>60</sup> See, e.g., MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* 9 (2017).

<sup>61</sup> *Id.* (stating "that 'the most striking fact about American economic history and politics is the brutal and systemic underdevelopment of black people'" (quoting MANNING MARABLE, *HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA: PROBLEMS IN RACE, POLITICAL ECONOMY, AND SOCIETY* 1 (Haymarket Books 2015) (1983))).

<sup>62</sup> See Lyons, *supra* note 7, at 1383.

<sup>63</sup> See Gray, *supra* note 6, at 1074 ("Moral taint relies on linking the pride one often feels for accomplishments of a group or its members to the shame one ought to feel for harms caused by a group or associates.").

<sup>64</sup> One commentator has identified a fifth alternative, treating reparations as a form of "extraordinary justice" immune from the ethical-individualism objection. *Id.* at 1050–51. Professor David Gray "argues that 'I didn't do it' is a non sequitur in debates about reparations where the fundamental question is 'How do we make it right?'" *Id.*

<sup>65</sup> See Lyons, *supra* note 7, at 1377 ("Most obstacles to validating reparations claims can be avoided by shifting our focus . . . from reparations for wrongs of the distant past to reparations for wrongs that continued under Jim Crow and persist today . . .").

nism for perpetuating “a state-sponsored racial caste system.”<sup>66</sup> From this perspective, “[w]hat has changed since the collapse of Jim Crow has less to do with the basic structure of our society than with the language we use to justify it.”<sup>67</sup> Those who have been incarcerated—disproportionately African American men<sup>68</sup>—are “subject to legalized discrimination for the rest of their lives.”<sup>69</sup> As a practical matter, little has changed.

Likewise, the local property tax financing structure used in most public-school districts was designed in the South during the Jim Crow era for the purpose of “facilitating segregation and inequality.”<sup>70</sup> Given segregated patterns of home ownership, many school systems remain segregated by race.<sup>71</sup> Local funding of school districts means that schools with a majority African American population are often starved of resources. Because the disparity between those school districts and “overwhelmingly white, wealthy school districts” is not explicitly based on race, however, the funding disparities have survived court challenges.<sup>72</sup>

Even if one denies the claim that our current systems of mass incarceration and public education perpetuate white supremacy, it is impossible to argue in good faith that the Civil War marked the end of United States’ responsibility for the oppression of African Americans.<sup>73</sup> After a brief period of Reconstruction, whites re-imposed a brutal system of racial domination, denying African Americans economic, social, and political rights. When asked to uphold the

<sup>66</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS* 15 (rev. ed. 2011).

<sup>67</sup> *Id.* at 2. Mass incarceration of African Americans has its roots in the Jim Crow South where “entrepreneurs used the criminal justice system to re-enslave thousands of black men and work them, usually to death, in abhorrent labor camps.” BARADARAN, *supra* note 60, at 20.

<sup>68</sup> Although “[s]tudies show that people of all colors *use and sell* illegal drugs at remarkably similar rates[,] black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of white men.” ALEXANDER, *supra* note 66, at 7 (footnotes omitted). Indeed, “in major cities wracked by the drug war, as many as 80 percent of young African American men now have criminal records and are thus subject to legalized discrimination for the rest of their lives.” *Id.*

<sup>69</sup> *Id.* Professor Michelle Alexander concludes, “As a criminal you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow.” *Id.* at 2.

<sup>70</sup> CAMILLE WALSH, *RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869–1973*, at 175 (2018).

<sup>71</sup> BARADARAN, *supra* note 60, at 254 (stating that a “majority of American children today attend de facto segregated schools that have resegregated with the passage of time and the absence of court mandates”).

<sup>72</sup> WALSH, *supra* note 70, at 175 (arguing that “racially separate property tax bases have created dramatic disparities in the funding of white and black schools since the Civil War that *Brown* [v. *Board of Education*] did very little to change”). For example, in 1973, in *San Antonio Independent School District v. Rodriguez*, the U.S. Supreme Court ignored racial disparities between two school districts and held that social class did not trigger enhanced constitutional scrutiny. 411 U.S. 1, 58 (1973).

<sup>73</sup> See Lyons, *supra* note 7, at 1376 (“Chattel slavery was only the first stage of institutionalized racial subordination.”).

U.S. constitutional rights of African Americans, the U.S. Supreme Court instead endorsed their subordination.<sup>74</sup> For another century, this nation denied African Americans civil rights and relegated them to second class citizenship. Racist policing remains a serious concern today.<sup>75</sup>

Nevertheless, it is still possible for individual citizens to assert their innocence with respect to the harms inflicted upon African Americans throughout U.S. history.<sup>76</sup> For example, those who have immigrated more recently might claim to have had no personal involvement in U.S. racial strife. Moreover, African Americans would, in theory, be called upon to pay for their own reparations.<sup>77</sup> One response, that the next Section details, is that U.S. citizens all benefit in the aggregate from societal wealth that originates in slave labor. At a minimum, though, reflection upon the extent to which the abuse of African Americans continued long past the end of slavery and affects the distribution of opportunities in our own era should undercut the force of objections that today's citizens face unwarranted persecution for the misdeeds of those long dead.

## 2. Unjust Enrichment

Rather than confronting the ethical-individualism objection directly, advocates of reparations might deny the significance of culpability altogether by framing the obligation to pay reparations in terms of unjust enrichment.<sup>78</sup> According to restitution theory, if someone receives an unearned benefit, repay-

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<sup>74</sup> See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>75</sup> After we submitted this Article for publication, the deaths of Ahmaud Arbery, Breonna Taylor, and George Floyd led to nationwide Black Lives Matter protests. See Audra D.S. Burch et al., *How Black Lives Matter Reached Every Corner of America*, N.Y. TIMES (June 13, 2020), <https://www.nytimes.com/interactive/2020/06/13/us/george-floyd-protests-cities-photos.html> [<https://perma.cc/F87R-QE6Q>] (observing that “[w]ithin 24 hours of Mr. Floyd’s death, demonstrations were organized in a half-dozen U.S. cities, with protesters chanting the names of black people subjected to police brutality”).

<sup>76</sup> See Matsuda, *supra* note 48, at 379 (“Members of the dominant class continue to benefit from the wrongs of the past and the presumptions of inferiority imposed upon victims.”).

<sup>77</sup> In the aggregate, African Americans would benefit from reparations, even if they also contributed pro rata to those reparations as citizens. Although questions of implementation are beyond the scope of this Article, we observe that one benefit of including all citizens, including African Americans, is that it would signify that reparations are not a diminishment of their standing as citizens. See, e.g., Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 638 (1993) (“If society pays, it will do so at least in part with tax dollars, and African Americans pay taxes. There is a ring of propriety in having African Americans share in the benefits and burdens.”). Each African American taxpayer “will pay as a member of a society that benefited from the wrongs of the institution of slavery, and [each] will be compensated as a member of the injured group.” *Id.* at 639.

<sup>78</sup> See Lyons, *supra* note 7, at 1383 (“It is important that this argument neither assumes nor implies that those who owe restitution are morally responsible for the relevant inequities. It does not cast blame on those it would hold accountable.”).



ment may be required to the extent justice requires. For example, someone who receives a payment intended for another cannot retain the money.<sup>79</sup> In a 2009 case, the U.S. District Court for the District of Columbia observed that “[t]o succeed on a claim for unjust enrichment, the plaintiff need not show that the defendant is at fault, so long as he demonstrates that in spite of the defendant’s ‘innocence in receiving the benefit,’ his retention of that benefit would be unjust.”<sup>80</sup> If the toil of African Americans conferred an unearned benefit on today’s citizens, the question is whether it is just to retain the benefit without paying for it, not whether today’s citizens are responsible for wrongdoing.<sup>81</sup>

The nation’s wealth stems in large part from slavery. In Professor Mehrsa Baradaran’s book, *The Color of Money*, she explains the link:

Slavery, ‘America’s original sin,’ according to James Madison, created the foundation of modern American capitalism. It was slavery and the ‘blood drawn with the lash’ that opened the arteries of capital and commerce that led to U.S. economic dominance worldwide. The effects of the institution of slavery on American commerce were monumental—3.2 million slaves were worth \$1.3 billion in market value, almost equal to the entire gross national product.<sup>82</sup>

For this reason, slavery was tolerated in the United States despite its odiousness.<sup>83</sup> The oppression of African Americans was simply too profitable to abandon.

Opponents might argue that slavery was not illegal and that to garner any profits generated from it would “violate . . . the prohibition on retroactivity,

<sup>79</sup> RESTATEMENT (FIRST) OF RESTITUTION: MISTAKE AS TO PAYEE § 22 (AM. L. INST. 1937) (“A person who has paid money to or for the account of another not intended by him, is entitled to restitution from the payee or from the beneficiary of the payment, unless the payee or beneficiary is protected as a contracting party or as a bona fide purchaser.”).

<sup>80</sup> *Qatar Nat’l Bank v. Winmar, Inc.*, 650 F. Supp. 2d 1, 8 (D.D.C. 2009) (quoting *Standard Ins. Co. v. Burch*, 540 F. Supp. 2d 98, 105 (D.D.C. 2008)) (requiring a construction company to disgorge payments it received from a customer’s bank without the customer’s authorization).

<sup>81</sup> See Lyons, *supra* note 7, at 1382. Professor David Lyons argues:

The class of unjustly enriched, and therefore potentially accountable, third parties can be much wider than the class of wrongdoers. In the present context, that difference may be quite important, for no one who can be held responsible for slavery is still alive and relatively few are still alive who can be held responsible for sustaining Jim Crow, as compared with those who might be regarded as unjustly enriched by the effects of racial stratification.

*Id.*

<sup>82</sup> BARADARAN, *supra* note 60, at 10 (footnotes omitted) (first quoting ANDREW DELBANCO, *THE ABOLITIONIST IMAGINATION* 68–69 (2012); and then quoting Abraham Lincoln, *Second Inaugural Address*, AVALON PROJECT (Mar. 4, 1865), [https://avalon.law.yale.edu/19th\\_century/lincoln2.asp](https://avalon.law.yale.edu/19th_century/lincoln2.asp) [<https://papa.cc/X3SS-4X3L>]).

<sup>83</sup> See *id.*

according to which the legal status of actions and transactions must be determined by the applicable rules of their time.”<sup>84</sup> The moral depravity of slavery was routinely acknowledged, however, even by those who benefited from the institution, and so the choice to own other human beings and to profit from their labor cannot be excused as a mere product of the times and circumstances.<sup>85</sup> As a matter of economic incentives, moreover, it may be desirable to allow retroactive actions so that individuals are not tempted to rest on legal technicalities when they know or should know better.<sup>86</sup>

Another limitation of the unjust enrichment approach is that it ignores the harm suffered by the victims.<sup>87</sup> The restitutionary remedy is calculated according to the beneficiary’s gain. For example, “[r]eparations cannot be made solely on the basis of a wrong, like murder or torture, that did not measurably enrich the wrongdoer.”<sup>88</sup> Also, even if the wrongdoer did benefit, unjust enrichment carries with it certain “empirical difficulties.”<sup>89</sup> In particular, restitution ordinarily requires a showing with reasonable precision of what was lost, who lost, and who benefited.<sup>90</sup> The economic consequences of centuries of chattel slavery and legalized discrimination can only be approximated.<sup>91</sup> Given the time period at issue, any calculation of the value of African American labor and its causal relation to the current financial position of the United States and

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<sup>84</sup> Hanoch Dagan, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U. L. REV. 1139, 1166 (2004).

<sup>85</sup> *Id.* at 1172 (“However socially constructed our reality is, engaging voluntarily in a social and economic practice, such as slavery, which involves the degradation of the dignity of other human beings cannot be seriously characterized as a matter of luck or circumstance, especially in a context (as was the context throughout the sad history of U.S. slavery) where its moral propriety is constantly being challenged.” (footnotes omitted)).

<sup>86</sup> *Id.* at 1169 (arguing that by preserving the possibility of retroactivity, “the legal system can encourage [citizens] to anticipate new law and adjust their behavior in anticipation” (citing Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 513–14, 615–17 (1986) (applying an economic analysis to changes in public policy))).

<sup>87</sup> Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. REV. 1443, 1444 (2004) (contending that unjust enrichment “lacks the moral force necessary to resolve a controversial public dispute about moral rights and obligations among segments of society”).

<sup>88</sup> Posner & Vermeule, *supra* note 14, at 701.

<sup>89</sup> *Id.* at 702; see also Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies*, 56 B.C. L. REV. 1345, 1368 (2015) (noting that determining the “holdings that would have resulted without slavery in this country involves additional complications”).

<sup>90</sup> See generally Andrew Kull, *Rationalizing Restitution*, 83 CALIF. L. REV. 1191 (1995) (emphasizing that unjust enrichment is central to the remedy of restitution).

<sup>91</sup> See Sherwin, *supra* note 87, at 1445 (“If the initial injury can somehow be defined, the passage of time and the countless human acts and choices that have intervened lead to daunting problems in tracing the injury to current generations of African Americans and separating the harm of enslavement from the effects of more recent public and private acts.”).

its citizens will be debatable.<sup>92</sup> To the extent unjust enrichment circumvents the problem of moral culpability, therefore, it may exacerbate practical concerns regarding the design of a reparations program.

### 3. Moral Taint

Still another answer to ethical individualism is to assert that the objection concerns only the formal attribution of blame. Even if there are not sufficient grounds to hold them responsible based on their own actions, individuals may still feel a sense of shame because of some shared connection with the wrongdoers.<sup>93</sup> Moral taint turns on “the psychology of collective guilt.”<sup>94</sup> The same phenomenon can apply to a nation’s conduct: for individual citizens who are patriots, “[s]hame, and thus liability, follow . . . as a matter of psychological consistency.”<sup>95</sup> To acknowledge the shamefulness of slavery and Jim Crow, individuals might agree to pay reparations despite a lack of personal involvement in the wrongdoing.<sup>96</sup>

Critics have pointed out that the argument functions more on an emotional than a logical level.<sup>97</sup> Couching arguments for reparations in terms of moral taint can be effective as rhetoric, but, if ethical individualism is a valid concern, it cannot be the case that individual citizens bear responsibility for what others have done simply because they share a flag or an ethnic identity.<sup>98</sup> Indeed, arguments for collective obligation framed in terms of moral taint can shade uncomfortably close to group prejudice.<sup>99</sup> Also, although the psychological phenomenon of moral taint may be real, it is by its nature not the kind of argument that can be deployed against those who deny that they have any responsibility.

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<sup>92</sup> As Professor Emily Sherwin further observes, “The problem of linking past harm to present claimants is not only a problem of proof, but also one of logic because few if any current claimants would exist in a counterfactual world in which slavery did not occur.” *Id.*

<sup>93</sup> See Posner & Vermeule, *supra* note 14, at 709.

<sup>94</sup> *Id.* at 710.

<sup>95</sup> Sepinwall, *supra* note 6, at 198–99 & n.72 (“[T]here must be a group of objects and events . . . that are so prominently linked to American identity that virtually every American sees [themselves] as the author of at least some of them and feels pride or shame with regard to them.” (quoting Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 987 (1992))).

<sup>96</sup> See Posner & Vermeule, *supra* note 14, at 710 (“Some reparations programs might be explained as efforts to remove a moral taint.”).

<sup>97</sup> See, e.g., Lyons, *supra* note 7, at 1379 (“I am not confident that valid moral claims to compensation can be inherited, or that moral debts can be transmitted to one’s heirs, for that suggests the moral guilt of ancestors can be transmitted to their descendants.”).

<sup>98</sup> Posner & Vermeule, *supra* note 14, at 710 (“Most people reject the core ethical collectivist argument that a Jew, for example, is guilty of the wrongful act of other Jews . . .”).

<sup>99</sup> Gray, *supra* note 6, at 1079 (describing the “associational view of group responsibility” as “troubling”).

In the context of U.S. reparations, perhaps the most that one can say is that moral taint exerts a conditional form of obligation. Anyone who takes pride in this country's achievements should also be willing to acknowledge its shortcomings.<sup>100</sup> If patriotism is love of country, therefore, patriotism should take as its object the country that actually exists.<sup>101</sup> Rather than jettisoning the nation's history in favor of a sanitized, mythological version, those who are patriots should embrace the work necessary to perfect the nation they love.<sup>102</sup> That task cannot be accomplished without dealing with the legacy of slavery and Jim Crow. In this sense, reparations can be seen as a kind of patriotism: a nation willing to hold itself to a higher moral standard is one worth celebrating.

#### 4. Collective Responsibility

Finally, and in line with this Article's central claim that the United States is analogous to a corporation and responsible for its own wrongdoing, another way to surmount the ethical-individualism objection is to argue that rights and obligations can be incurred by groups as well as individuals.<sup>103</sup> As one commentator explains, "If society as a collective entity is morally responsible, then its members may be called upon, as an incident of membership—not personal blame—to share the cost incurred by society in meeting its moral obligations."<sup>104</sup> Crucially, however, "the case for holding American society responsible for past discrimination depends on the plausibility of recognizing American society as a collective and continuing nation, the obligations of which fairly pass through time and generations."<sup>105</sup> Put simply, can we link current citizens to past wrongs? In this regard, theories of collective responsibility vary widely.

In looser, more informal groups, individual liability depends on conscious, voluntary participation. For example, if a person agrees with others to do something illegal and one of those individuals takes a step toward accom-

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<sup>100</sup> See Coates, *supra* note 2 ("The last slaveholder has been dead for a very long time. The last soldier to endure Valley Forge has been dead much longer. To proudly claim the veteran and disown the slaveholder is patriotism à la carte.")

<sup>101</sup> See ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 2 (2006) ("We do not celebrate our democratic traditions more faithfully by identifying them incorrectly.")

<sup>102</sup> This account of patriotism is not only more constructive than love-it-or-leave-it expressions of wounded outrage, but it is more inclusive.

<sup>103</sup> See CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE 138 (2000) ("When we act together, we are each accountable for what all do, because we are each authors of our collective acts.") Individuals often view arguments for collective responsibility with hostility within our political and legal systems because collective responsibility conflicts with the individualism at the heart of classical liberalism. See Morton J. Horwitz, Commentary, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599, 608 (1979).

<sup>104</sup> Forde-Mazrui, *supra* note 10, at 725.

<sup>105</sup> *Id.* at 726.

plishing the illegal objective, *all* of the members of the conspiracy are liable.<sup>106</sup> It is not a defense that someone else performed the overt act because each individual had agreed to participate.<sup>107</sup> Yet, the conspiracy extends no further than the zone of conscious participation; it does not reach bystanders or family members, let alone descendants of the original conspirators. Nor can an individual be held criminally responsible, except perhaps as an accomplice after the fact, for wrongs committed before the individual joined the conspiracy.

General partnership law likewise depends on the voluntary association of each individual, without which the partnership would not exist.<sup>108</sup> Under the default rules of partnership, the exit of any partner triggers the dissolution of the partnership.<sup>109</sup> Thus, the liability each partner has for debts of the partnership arises by virtue of that partner's choice to participate. Also, each partner's responsibility for partnership debts begins at the moment the partner joins and does not extend backward in time.<sup>110</sup> Thus, the associational view of collective liability does not provide a complete answer to the ethical-individualism objection to reparations because it fails to connect contemporary citizens to past wrongs.<sup>111</sup>

Although corporations are a more formal type of collective entity than a general partnership, some scholars assert that voluntary association remains an essential ingredient: “[a] person can be blamed for the wrongful acts of others when he voluntarily enters certain relationships with these others.”<sup>112</sup> Notably, this view conflates corporations with partnerships and would not assign responsibility to shareholders for reasons different than would apply to “any

<sup>106</sup> See Julia Cheung et al., *Federal Criminal Conspiracy*, 31 AM. CRIM. L. REV. 591, 595 (1994).

<sup>107</sup> See *id.* at 621–22.

<sup>108</sup> The definition of a partnership is the voluntary “association of two or more persons to carry on as co-owners a business for profit.” REVISED UNIF. P’SHP ACT § 202(a) (UNIF. L. COMM’N, amended 2013).

<sup>109</sup> Mark Anderson, *Entity Exit: Rights, Remedies, and Bounded Rationality*, 17 HOUS. BUS. & TAX L.J. 1, 5 (2016).

<sup>110</sup> See REVISED UNIF. P’SHP ACT § 306(b).

<sup>111</sup> Professor Sepinwall recognizes this difficulty and seeks to overcome it by noting that the continuation of a group depends on new members choosing to associate themselves with the group. For this reason, she argues that current members can be held responsible for prior wrongs committed by the group. See Sepinwall, *supra* note 6, at 215 (“Contemporary citizens incur the nation’s debts, including its debt for slavery, then, because they extend the nation itself.”). This Article’s argument differs because it contends that the nation is in all relevant respects an incorporated entity and has individual responsibility for wrongdoing apart from the involvement of citizens, past, present, or future. As taxpayers, citizens pay for reparations, but they are not the subject of blame, individual or collective. See discussion *infra* Part III.

<sup>112</sup> Posner & Vermeule, *supra* note 14, at 703 (“People enter relationships in order to obtain the benefits of collective action; in the process they become blameworthy for the harms that occur as a result of collective action.”); see also Brophy, *supra* note 43, at 1202 (“Corporations, which are really a collection of individual shareholders, are liable for the acts of their employees.”).

group that consists of volunteers.”<sup>113</sup> Moreover, a methodology for determining collective obligations on a going-forward basis does not provide logical support for reparations based on past wrongs.

If framed in terms of each individual’s voluntary association, there is still “a distribution problem, which theories of collective responsibility cannot resolve.”<sup>114</sup> Moving the analysis inside a corporate structure does not answer the ethical-individualism objection.<sup>115</sup> Therefore, if collective responsibility is understood in terms of voluntary association, it appears to follow that “reliance on the corporate fiction to make blameless people pay for the collective wrongs of earlier shareholders is a doubtful ploy.”<sup>116</sup> That is, the corporate analogy for reparations falls short if it cannot explain why today’s citizens are responsible.<sup>117</sup>

Alternatively, though, one might answer the ethical-individualism objection by asserting that the entity should be recognized as a person with independent moral responsibility for its actions.<sup>118</sup> According to this view of corporate liability, the responsibility of individual shareholders is not relevant to the analysis. Although “[s]hareholders, employees, and other members are . . . harmed as a consequence, . . . their claims are incidental and derivative.”<sup>119</sup> Unlike theories based on voluntary association, shareholders’ obligation to shoulder their share of financial burdens does not turn on when the corporation incurred any particular liability as long as the corporation remains obligated to

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<sup>113</sup> Posner & Vermeule, *supra* note 14, at 704. As one scholar points out, concepts of collective responsibility that depend on voluntary association “crucially rest upon individualist understandings of responsibility, and so fail to be collective in the requisite sense.” Sepinwall, *supra* note 6, at 190.

<sup>114</sup> Gray, *supra* note 11, at 65.

<sup>115</sup> See, e.g., *id.* (arguing that although corporate law may contain mechanisms for attribution, it remains a fundamental problem that “it may not always be clear that an individual’s conduct can be attributed to a group”).

<sup>116</sup> Posner & Vermeule, *supra* note 14, at 705 (canvassing responses to ethical individualism and distinguishing theories of corporate law that attribute moral agency to the corporation from theories that reject corporate liability separate from individual participation and culpability); see also Sepinwall, *supra* note 6, at 190 (concluding that an unfortunate implication of the associational view is that “accounts of collective responsibility cannot be extended to historical injustices, like slavery, for it is clear that current citizens have no ability to control the 150-year-old actions of the United States”).

<sup>117</sup> Gray, *supra* note 11, at 65 (“Just because the conduct of some individuals may rightly be attributed to a corporation or group does not mean that the consequences for that conduct can rightly fall upon all members in the form of obligations to contribute to reparations programs.”).

<sup>118</sup> Posner & Vermeule, *supra* note 14, at 704 (“Once we take this step, we can demand that corporations pay when they commit wrongs . . .”). Professors Eric Posner and Adrian Vermeule summarize the possibilities regarding corporate responsibility, but their goal is descriptive—to clarify the possible lines of argument for and against reparations. See *id.* They do not endorse any particular theory, nor do they provide reasons for preferring one view of corporate liability over another. See *id.*

<sup>119</sup> *Id.*

satisfy the liability.<sup>120</sup> The benefits and detriments of share ownership are distributed to shareholders pro rata according to stock holdings.

## II. UNITED STATES, INC.

This Part argues that the latter understanding of the corporation is correct; unlike a conspiracy, or, for that matter, a general business partnership, a corporation is characterized by its legal personhood.<sup>121</sup> Consequently, there is no requirement that each individual be connected to the wrongdoing to bear a share of the collective responsibility for it. This Part further contends that the United States resembles an incorporated venture in ways that are pertinent to the reparations debate.<sup>122</sup> In particular, corporate law introduces the concept of legal personhood, and legal personhood provides the key to answering the ethical-individualism objection to reparations.

The most distinctive feature of corporate law is that it imbues the corporation with legal personhood.<sup>123</sup> Although extending constitutional rights to corporations based on their personhood has engendered enormous controversy,<sup>124</sup> and some commentators have questioned whether corporations are the type of moral persons that can form the mens rea necessary to violate the criminal law,<sup>125</sup> those controversies should not blind us to the well-established and non-

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<sup>120</sup> See Ogletree, *supra* note 29, at 1069 (“I believe that suing a corporation is much different than suing a person. Legally, corporations are immortal . . . . And where that company owes its present profitability to its slave trading, that company should . . . make some form of restitution.”).

<sup>121</sup> See discussion *infra* Part II.

<sup>122</sup> See discussion *infra* Part II.

<sup>123</sup> See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.”). For this reason, as Chief Justice Marshall observed, a key feature of corporate personhood is that it facilitates the continuity of operations over time without need to account for changes in stock ownership. See *id.* (“Among the most important [characteristics of the corporation] are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual.”). Or, put differently, “[i]t is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use.” *Id.*

<sup>124</sup> See, e.g., Mark Tushnet, *Corporations and Free Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 253, 256 (David Kairys ed., 1982) (observing that corporations hijacked the Fourteenth Amendment of the U.S. Constitution for their own benefit: “[t]hus, the Court converted an amendment primarily designed to protect the rights of blacks into an amendment whose major effect, for the next seventy years, was to protect the rights of corporations”); Pollman, *supra* note 16, at 1647 (“Mapping the panoply of corporate rights and the rationale for them has become increasingly complex, and what the doctrine of corporate personhood stands for has become obscured.”).

<sup>125</sup> See Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 *STAN. L. REV.* 555, 599–601 (1996); Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 *TENN. L. REV.* 793, 797 (1996); Andrew Weissman & David Newman, *Rethinking Corporate Criminal Liability*, 82 *IND. L.J.* 411, 124 (2007).

controversial conception of corporate personhood, according to which corporations can own property, enter into contracts, sue, and be sued.<sup>126</sup> Nor is it necessary to decide whether the corporation is best understood as a real person,<sup>127</sup> an artificial person that is a concession of the state, or a nexus of contracts among private parties.<sup>128</sup> What matters is that, by statute, a corporation is authorized to act as a person in its relations with others and to incur obligations to those with whom it interacts.<sup>129</sup>

Unpacking the nature of corporate personhood is important because it furnishes a direct response to the two interwoven objections of ethical individualism: (1) that group liability for reparations is not appropriate because individual members may be innocent; and (2) that those alive today are not responsible for the actions of earlier generations. This Part's argument proceeds in four steps. Section A explains why corporate personhood provides a convincing answer to ethical individualism.<sup>130</sup> Section B contends that when assessing its collective responsibility for past wrongs, the United States is best understood as a corporation.<sup>131</sup> Section C distinguishes partnerships, which depend upon the voluntary association of individual participants.<sup>132</sup> Section D argues that corporate law also rebuts a meta-version of the ethical-individualism objection, that the United States is no longer the same person it was in the pre-Civil War era and cannot be liable for the misdeeds of a predecessor regime.<sup>133</sup>

### A. Consequences of Personhood

In a corporation, individual innocence is irrelevant because the responsible person is the entity itself. As holders of a residual claim to the corporation's

<sup>126</sup> See, e.g., JAMES D. COX ET AL., CORPORATIONS § 1.2, at 3 (1997) ("The corporation holds property, enters into contracts, executes conveyances, and conducts litigation in a legal capacity separate and distinct from its shareholders."); Pollman, *supra* note 16, at 1663 ("That corporations have a 'legal personality' allowing them to contract, own property, sue and be sued is not controversial.").

<sup>127</sup> For advocacy of this view, see Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 261 (1911) ("A corporation exists as an objectively real entity . . . the law merely recognizes and gives legal effect to the existence of this entity."); see also Steven A. Bank, *Entity Theory as Myth in the Origins of the Corporate Income Tax*, 43 WM. & MARY L. REV. 447, 495 (2001).

<sup>128</sup> See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1462 (1989); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976).

<sup>129</sup> The controversy regarding corporate constitutional rights is, among other things, a conflict between federal and state control. As Justice Black observed in 1938, dissenting from the extension of Fourteenth Amendment rights to corporations in *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 (1938), "granting new and revolutionary rights to corporations" would "deprive the states of their long-recognized power to regulate corporations." *Id.* at 86, 89 (Black, J., dissenting).

<sup>130</sup> See discussion *infra* Part II.A.

<sup>131</sup> See discussion *infra* Part II.B.

<sup>132</sup> See discussion *infra* Part II.C.

<sup>133</sup> See discussion *infra* Part II.D.



assets, shareholders hope the corporation will earn profits and increase in value; equally, however, they run the risk that the corporation may suffer losses instead.<sup>134</sup> Indeed, shareholders cannot deny their responsibility, “even if the current shareholders—the ones who must pay through devaluation of their shares—are different from the shareholders at the time the wrong was committed.”<sup>135</sup> It follows that the lifespan of a corporation is measured separately from the lives of its individual stockholders. Unlike a natural person, a corporation has no predetermined lifespan and can, in theory, live forever.<sup>136</sup>

Some commentators have raised concerns rooted in ethical individualism regarding the imposition of liability in the corporate context, especially criminal sanctions, because those sanctions inevitably flow through to shareholders and employees.<sup>137</sup> Corporate personhood is, after all, a legal fiction. Regardless of whether the corporation is a legal person for certain practical purposes, one might ask how as a normative matter can a legal fiction circumvent the problem of punishing blameless individuals? There are several answers, each which seems to pertain to the question of U.S. reparations.

First, holding a corporation liable does not stigmatize its shareholders or employees.<sup>138</sup> Their moral blamelessness remains unquestioned, even if the corporation is convicted of a crime. The financial consequences might be more accurately characterized as a form of indirect responsibility, akin to an indemnification agreement.<sup>139</sup> To this extent, entity liability does not conflict with the precepts of ethical individualism. Likewise, if the United States were to pay reparations to African Americans, that would not be a statement that anyone alive today owned slaves or was responsible for Jim Crow laws.

Second, shareholders may be held to their investment decision and employees to the ordinary risks of working life. Even those who inherit stock are not required to keep it. That is, “employees and stockholders accede to a distributional scheme in which profits and losses from corporate activities are

<sup>134</sup> As long as there is no fraud that would warrant disregarding the corporate form, the maximum exposure for each shareholder is the full amount of their investment in the corporation. The financial exposure of a citizen is different because the government has the power to levy taxes.

<sup>135</sup> Posner & Vermeule, *supra* note 14, at 704.

<sup>136</sup> See Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 773 (2012) (stating that a “defining attribute of the corporation is perpetual existence”). For this reason, one commentator argued that corporations that owe their “present profitability to [their] slave trading . . . should acknowledge that fact and make some form of restitution.” Ogletree, *supra* note 29, at 1069 (observing that because corporations have an indefinite lifespan, “a company that is around in 2002 can be the same company that was around in 1602”).

<sup>137</sup> Fisse, *supra* note 56, at 1175.

<sup>138</sup> *Id.* (contending that “cost-bearing associates are not themselves subject to the stigma of conviction and criminal punishment—they are not convicts but rather corporate distributives”).

<sup>139</sup> See Posner & Vermeule, *supra* note 14, at 704 (explaining that on this theory of direct, entity responsibility, shareholders only indirectly benefit or face harm).

distributed on the basis of position in the company or type of investment rather than degree of deserved praise or blame.”<sup>140</sup> It is part of the bargain that corporate losses reduce the value of their financial and human-capital investments, just as corporate gains may enhance them. Accordingly, even very recent immigrants to the United States must accept their share of responsibility for the nation’s obligations, just as they are entitled to benefit from the privileges of citizenship.<sup>141</sup>

Third, and perhaps most significant, the alternative would be to hold collective organizations harmless regardless of the harm they cause. As one commentator argues, “[N]ot to internalize the social costs of corporate crime through punishment of the corporations responsible is to adopt a system which allows the wrong-doing corporation and its associates to enjoy a disproportionately large allocation of resources at society’s expense.”<sup>142</sup> The ethical-individualism objection proves too much because it would make corporate liability an impossibility in all but the rarest circumstances involving widespread shareholder complicity. Likewise, the United States should not be able to avoid responsibility for its actions by identifying citizens who have dissented from them.<sup>143</sup>

It might be objected, however, that the corporate personhood analogy for U.S. reparations has already failed an important test because courts have rejected legal claims against corporations that allegedly profited from slavery. For example, in 2004, in *In re African-American Slave Descendants*, a consolidated action against eighteen corporations,<sup>144</sup> civil rights lawyers brought “a claim for reparations rooted in the historic injustices and the immorality of the institution of human chattel slavery in the United States.”<sup>145</sup> More specifically, the plaintiffs’ theory was that the defendant corporations (or their predecessor entities) had been in continuous existence and could be asked to pay for their own wrongful acts.<sup>146</sup> Yet, the U.S. District Court for the Northern District of

<sup>140</sup> Fisse, *supra* note 56, at 1175.

<sup>141</sup> The government acts with the consent of the governed in a free society because citizens are “participants in an on-going political system, committed to uphold that system and abide by its rules.” MICHAEL WALZER, *OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP*, at xiii (1970).

<sup>142</sup> Fisse, *supra* note 56, at 1175–76.

<sup>143</sup> See WALZER, *supra* note 141, at xiii (“When we elect representatives, we certainly consent to their authority (and we do so whether we have supported the winner or not) . . .”).

<sup>144</sup> See Keith N. Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209, 1210 (2004); Robert F. Worth, *Companies Are Sued for Slave Reparations*, N.Y. TIMES, Mar. 27, 2002 (§ 2), at 2.

<sup>145</sup> *In re Afr.-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1033 (N.D. Ill. 2004).

<sup>146</sup> For example, in 2004, in *In re African-American Slave Descendants Litigation*, the plaintiffs alleged that the CSX railroad company was “a successor-in-interest to numerous predecessor railroad lines that were constructed or run, at least in part, by slave labor.” *Id.* at 1040 (quoting First Consolidated and Amended Complaint and Jury Demand ¶ 131, *id.* (MDL No. 1491, No. 02 CV 7764)).

Illinois held that the plaintiffs, a class including the descendants of African American slaves, lacked standing.<sup>147</sup> The court further concluded as a prudential matter that the consolidated complaint set forth a generalized grievance better suited to resolution by the legislature than by a court and that reparations are a “political question.”<sup>148</sup> Finally, the court held that reparations claims against the defendant corporations were barred by the applicable statutes of limitations.<sup>149</sup>

Notably, though, the Illinois court’s rejection of class action litigation against the defendant corporations for their complicity in slavery focused on issues of law, not whether the corporations bore moral responsibility. In dismissing the class litigation, the court was careful not to disparage the plaintiffs’ underlying theory of corporate identity. Subsequently, in a number of cases, corporations and other long-lived institutions have taken up the question voluntarily and have instituted reparations of their own accord. For example, Georgetown University has created a program to give preferential admissions to descendants of 272 slaves that Georgetown sold in 1838 to secure funding for its early operations.<sup>150</sup> More recently, students attending Georgetown University voted overwhelmingly in favor of a reparations fund that would be paid by student fees of \$27.20 per semester.<sup>151</sup>

<sup>147</sup> *Id.* at 1047.

<sup>148</sup> *Id.* at 1053–54. Yet, as others have observed, “the court could as easily have addressed the issues of remoteness and attenuation through doctrines such as duty and proximate causation, thereby managing its institutional capacity without unnecessarily and undesirably abdicating its responsibility to uphold and apply tort law’s normative principles.” Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 *YALE L.J.* 350, 384 n.113 (2011).

<sup>149</sup> *Afr.-Am. Slave Descendants Litig.*, 304 F. Supp. 2d at 1070 (“If cognizable claims ever existed, those claims were owned by former slaves themselves, and became time-barred when the statutes of limitations expired in the nineteenth century.”).

<sup>150</sup> See Molly Olmstead, *Georgetown Students Vote to Add Fee for Slavery Reparations to Tuition*, SLATE (Apr. 12, 2019), <https://slate.com/news-and-politics/2019/04/georgetown-students-reparations-fund-vote.html> [<https://perma.cc/3YKP-FB72>].

<sup>151</sup> See *id.* If approved by Georgetown University’s board of trustees, the fee would represent “the first time an American university financially addresses its past as a slave-owning institution.” *Id.*; Jesús A. Rodríguez, *This Could Be the First Slavery Reparations Policy in America*, POLITICO MAG. (Apr. 9, 2019), <https://www.politico.com/magazine/story/2019/04/09/georgetown-university-reparations-slave-trade-226581> [<https://perma.cc/LX8R-3NZS>]. In voting to approve the reparations fund, students rejected an ethical-individualism objection that argued current students could not be responsible for the Georgetown’s past actions. See Samuel Dubke & Hayley Grande, *Viewpoint: Vote ‘No’ on GU272 Referendum*, THE HOYA (Feb. 16, 2019), <https://thehoya.com/viewpoint-vote-no-gu272-referendum/> [<https://perma.cc/T2JM-49AK>] (“While we agree that the Georgetown of today would not exist if not for the sale of 272 slaves in 1838, current students are not to blame for the past sins of the institution, and a financial contribution cannot reconcile this past debt on behalf of the university.”). As one reporter observed, “Georgetown isn’t the only institution grappling with its past. At a growing number of schools, scholars have delved into the more fraught aspects of their universities’ histories, and administrators have acknowledged the roles their institutions played in the horrors of slavery and its lasting legacy.” Susan Svrluga, *Georgetown Students Vote on Reparations for the Descendants of*

To summarize, this Article has argued that the entity status of the corporation is a way of harnessing collective economic power through an established governance structure. Investors benefit when the corporation increases in value and cannot complain that they have been treated unfairly if corporate wrongdoing reduces the value of their investment. Although the passage of time may render certain claims non-justiciable as a legal matter, impediments to legal recovery do not affect the moral basis for reparations. If, as Section B argues, the United States has independent, corporate status as an entity, its liability for wrongdoing must be assessed based on its own actions apart from any contribution from particular citizens. In other words, our claim is that the United States *is* the individual for purposes of ethical-individualism analysis.<sup>152</sup>

### B. The U.S. Corporate Charter

As a matter of political classification, the United States is a representative democracy; as a practical matter, though, the United States resembles a corporation.<sup>153</sup> To support that assertion, this Article shows that the United States relies upon the same “governance technology” as a corporation,<sup>154</sup> that the Founders used corporate law as the principal template for the Constitution,<sup>155</sup> and that “key members of the founding generation” readily characterized the United States as a corporation.<sup>156</sup> Through corporate law, the Founders were able to meet their overriding objective, creating a political entity grounded in popular consent but legally distinct from the People and the vicissitudes of untempered rule by a majority of citizens.<sup>157</sup>

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*Slaves*, WASH. POST (Apr. 11, 2019), [https://www.washingtonpost.com/local/education/georgetown-students-vote-on-reparations-for-the-descendants-of-slaves/2019/04/11/ddd69f2a-5c99-11e9-842d-7d3ed7eb3957\\_story.html](https://www.washingtonpost.com/local/education/georgetown-students-vote-on-reparations-for-the-descendants-of-slaves/2019/04/11/ddd69f2a-5c99-11e9-842d-7d3ed7eb3957_story.html) [<https://perma.cc/V334-GHPV>].

<sup>152</sup> For historical context regarding the implications of corporate personhood, see generally W. Robert Thomas, *How and Why Corporations Became (and Remain) Persons Under the Criminal Law*, 45 FLA. ST. U. L. REV. 479 (2018).

<sup>153</sup> See, e.g., Ciepley, *supra* note 15, at 419. Professor David Ciepley explains:

[T]he Constitution is neither a contract among individuals to form a people, nor a contract between a people and a ruler. Social contract theory simply does not capture the true lineage, or structure, or purposes of the American Constitution. Instead, the Constitution should be seen as a popularly issued corporate charter . . . .

*Id.* (footnote omitted).

<sup>154</sup> *Id.* at 434 (emphasis omitted).

<sup>155</sup> *Id.* at 419.

<sup>156</sup> *Id.* at 432.

<sup>157</sup> *Id.* at 431 (arguing that the Founders used corporate law to distinguish the People acting in their capacities as a “chartering sovereign and electing multitude”). As citizens, the People are not entitled to exercise the plenary power of sovereignty, which they have delegated. *Id.*

## 1. Functional Similarities

Corporations have several defining characteristics that are relevant for our purposes. First, a corporation has perpetual life and is not limited to the lifespan of its shareholders. Second, authority is delegated to corporations by state law for defined purposes and exists only to the extent delegated. Accordingly, a corporation lacks plenary powers but can enact by-laws consistent with its delegated authority.<sup>158</sup> Third, a corporation is run by its elected board of directors, not by its shareholders.<sup>159</sup> Finally, a corporation has its own assets and can hold property, enter into contracts, and otherwise transact business as a legal person.<sup>160</sup>

The United States follows these same principles of corporate design.<sup>161</sup> Like a corporation, the United States is capable of continuing in perpetuity: “[i]nstitutions, such as corporations and political organizations, can be held accountable and are capable of existing for many generations.”<sup>162</sup> Consequently, “a government can retain a morally relevant identity for a very substantial period of time.”<sup>163</sup> Corporate law also explains why the U.S. government wields authority only to the extent it has been delegated that power, and not as an independent sovereign.<sup>164</sup> The British model of political authority vested the full powers of sovereignty in the government, but the Founders gave the U.S.

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<sup>158</sup> It is well established that “[c]orporations are creatures of state law.” *Burks v. Lasker*, 441 U.S. 471, 478 (1979) (first quoting *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977); and then quoting *Cort v. Ash*, 422 U.S. 66, 84 (1975)).

<sup>159</sup> See STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 9 (2002) (“Although shareholders nominally ‘own’ the corporation, they have virtually no decisionmaking powers—just the right to elect the firm’s directors and to vote on an exceedingly limited—albeit not unimportant—number of corporate actions.”). For an important, early statement regarding the separation of ownership and control, see generally ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

<sup>160</sup> See MODEL BUS. CORP. ACT § 3.02 (AM. BAR ASS’N 2016) (stating that a corporation “has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs”).

<sup>161</sup> John Mikhail, *Is the Constitution a Power of Attorney or a Corporate Charter? A Commentary on “A Great Power of Attorney”*: Understanding the Fiduciary Constitution by Gary Lawson and Guy Seidman, 17 *GEO. J.L. & PUB. POL’Y* 407, 421 (2019) (“[T]he United States possesses all of the tacit corporate powers identified by Blackstone, Wilson, and other writers, including perpetual succession; the power to sue and be sued; the power to acquire, hold, and convey property; the power to operate under a common seal; and the power to enact by-laws.”); see also James D. Nelson, *Corporate Disestablishment*, 105 *VA. L. REV.* 595, 626 (2019) (noting the “structural similarities between corporate and state power”).

<sup>162</sup> Lyons, *supra* note 7, at 1385.

<sup>163</sup> *Id.*

<sup>164</sup> Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1436 (1987) (stating that “government entities were sovereign only in a limited and derivative sense, exercising authority only within the boundaries set by the sovereign People”).

government the powers of a corporation, which are limited because they derive from a separate sovereign.<sup>165</sup>

The limited nature of the government's power confines its ability to write laws. Just as a corporation has the authority to issue by-laws that bind its constituents subject to the constraints of corporate law authority delegated from the state, the U.S. government can enact laws only up to the limits of its constitutional powers.<sup>166</sup> Laws that exceed the powers vested in government by the U.S. Constitution are invalid.<sup>167</sup> The boundaries of the lawmaking power are set through judicial review, an innovation that borrowed from corporate law precedent and would not have been relevant in the British context where the government's powers were not subject to formal limitation. Thus, the institution of judicial review in the United States as a check on legislative authority supports the conclusion that the United States is a corporation.<sup>168</sup>

The constitutional structure of our representative democracy further strengthens the corporate law analogy. In the United States, the exercise of political power is channeled into designated offices, akin to a corporation's board of directors and officers. Following corporate law, the Founders vested "authority in the office, not in the officeholder; the officeholder serving, not as a direct agent of the sovereign, but as a dual fiduciary, to the electorate and to the purposes and procedures established by the sovereign's charter."<sup>169</sup> It is also notable that citizens and shareholders have no direct participatory role in government. In a corporation, shareholders elect the board of directors; in the United States, citizens elect local, state, and federal representatives. With the

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<sup>165</sup> See *id.* at 1434 ("Just as corporate officials lacked lawful authority to go beyond the scope of their corporate charter, so conduct by government officials that transgressed substantive 'constitutional' limitations was null and void."). In the British system, although the People were sovereign in theory, the entirety of their power was delegated to the King, Lords, and Parliament, so that there were no limits on government power. See *id.* at 1432 ("Since the King-in-Parliament was itself the virtual embodiment of the British Constitution and the British People, how could any principle, however venerable, supersede that body's sovereign will? Talk of 'void' parliamentary enactments was nonsense—or treason.").

<sup>166</sup> The power to enact by-laws "distinguishes a corporation from 'a mere voluntary assembly,' which cannot frame rules 'which would have any binding force, for want of a coercive power to create a sufficient obligation.'" Ciepley, *supra* note 15, at 420 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*293).

<sup>167</sup> See THE FEDERALIST NO. 78, at 465–66 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid.").

<sup>168</sup> Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 504 (2006) (arguing that "judicial review arose from a longstanding English corporate practice under which a corporation's ordinances were reviewed for repugnancy to the laws of England").

<sup>169</sup> Ciepley, *supra* note 15, at 434.

exception of a few state laws that provide for direct democracy initiatives,<sup>170</sup> neither citizens nor shareholders have the right to instruct their representatives on how to vote.<sup>171</sup> Thus, the people's theoretical capacity to exercise sovereignty to establish or revise the architecture of government does not translate into day-to-day control of how the government operates.<sup>172</sup>

To be clear, it is not our contention that democracy works the same way in a corporation as it does in local, state, or national politics.<sup>173</sup> There are many significant differences, beginning with the fact that voting power in a corporation is allocated based on capital investment rather than per person.<sup>174</sup> Also, corporations are primarily oriented toward profit-seeking ventures,<sup>175</sup> whereas the nation's objectives are more open-ended and require elected officials to grapple with the pluralistic values of the citizens whose votes they seek. We contend only that U.S. democracy resembles a corporation in that it is characterized by a limited delegation of power by charter policed through the institution of judicial review, an establishment of offices through which elected representatives exercise power, and the creation of a legal person, the United States, separate from the individual citizens of any particular era.

## 2. Corporate Law as Precedent

It is no accident that the United States resembles a corporation. Strong evidence supports the conclusion that the Founders used corporate law as their

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<sup>170</sup> See Sherman Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 434–35 (1998).

<sup>171</sup> See MODEL BUS. CORP. ACT § 8.01(b) (AM. BAR ASS'N 2016) (“[T]he business and affairs of the corporation shall be managed by or under the direction . . . of the board of directors.”).

<sup>172</sup> The citizens of the United States form a “[P]eople” when they convene through established procedures to modify the constitutional compact. See Ciepley, *supra* note 15, at 425 (“Only when gathered in general assembly at the proper time and place do the members assume their corporate capacity . . . . At all other times, the members are but a multitude of individuals and remain bound by the reigning rules of the body until such time as they are duly changed.” (citation omitted)).

<sup>173</sup> For criticism of arguments that equate the private and the public spheres, see generally Tom C. W. Lin, *CEOs and Presidents*, 47 U.C. DAVIS L. REV. 1351 (2014); Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 WASH. & LEE L. REV. 1389 (2006).

<sup>174</sup> See David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of “One Share, One Vote,”* 56 CORNELL L. REV. 1, 19 (1970).

<sup>175</sup> The extent to which corporations are required to maximize profits regardless of other considerations is the subject of perennial debate. For a classic exchange of views, compare A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) (arguing that corporations are only accountable to shareholders), with E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932) (asserting that corporations have obligations to society as well as their shareholders). See generally Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385 (2008); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189 (2002).

template when devising a form of government for the American colonies.<sup>176</sup> First, corporate law had already been used for this purpose. Under British rule, several of the first American colonies were chartered as corporations.<sup>177</sup> The Virginia Company and the Massachusetts Bay Company, in particular, had written constitutions that were corporate in form—“[u]nlike bare bills of rights or contractual agreements with rulers, such as the Magna Carta, a corporate charter establishes a government.”<sup>178</sup> As one commentator explains:

The colonial experience during the seventeenth and eighteenth centuries had prepared the ground for revolutionary ideas. In many colonies, written “constitutions” prescribed substantive limits on the powers of the colonial government. Several of these colonial “constitutions” had originally been designed as corporate charters.<sup>179</sup>

Notably, “the colonists of Massachusetts Bay could, without changing a word, repurpose their company charter as a colonial constitution.”<sup>180</sup> Thus, corporate law principles informed the American experience of constitutional governance.<sup>181</sup>

Second, “the individuals who did most of the actual drafting were ‘immersed in the conventions and usages of corporate law’ and drew on this background when framing the Constitution.”<sup>182</sup> For example, James Wilson, whose task was to prepare drafts of the Constitution for the Committee of Detail, had handled the charters for several corporations and was familiar with the language and structure of a corporate charter.<sup>183</sup> His drafts of the Constitution “reveal that Wilson was preoccupied with the corporate status of the United States

<sup>176</sup> See Amar, *supra* note 164, at 1432–36 (explaining the “corporate analogy” that the Founders relied upon, which distinguished the limited government that they established from the plenary powers of the British Crown); Ciepley, *supra* note 15, at 426 (“[T]he framers began with a commitment to charter-limited government—something of which there is no trace in any recognized social contract theorist, but which descended, rather, from the tradition of chartering corporations.”).

<sup>177</sup> See generally COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY (Donald S. Lutz ed., 1998).

<sup>178</sup> Ciepley, *supra* note 15, at 424.

<sup>179</sup> Amar, *supra* note 164, at 1432–33. Mikhail, *supra* note 161, at 424 (“[M]any founding-era Americans were intimately acquainted with the history and charters of the colonies, cities, towns, guilds, churches, universities, trading companies, and other corporations which formed the basic governing units in their lives.”).

<sup>180</sup> Ciepley, *supra* note 15, at 424 (citing EDMUND S. MORGAN, A PURITAN DILEMMA: THE STORY OF JOHN WINTHROP 78–81 (Pearson 3d. ed. 2006) (1958)).

<sup>181</sup> See *id.* (arguing that from corporate charters “grew the American and modern understanding of what a constitution is and what it does”).

<sup>182</sup> Mikhail, *supra* note 161, at 424 (quoting Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, in THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 144, 145 (2010)).

<sup>183</sup> *Id.* at 424–25.



and considered the act of naming that corporate entity to be of great importance.”<sup>184</sup> During that era, the words “constitution” and “charter” were often used interchangeably, and several of the Founders referred to the U.S. Constitution as a charter.<sup>185</sup>

Finally, contemporaneous authorities recognized the United States as a corporation. For example, Chief Justice John Marshall declared that “[t]he United States of America’ is the true name of that grand corporation which the American people have formed, and the charter will, I trust, long remain in full force and vigour.”<sup>186</sup> Accordingly, consistent with the Founders’ vision, the legal, moral, and political obligations of the United States are corporate in nature and can be assessed without regard to the involvement of individual citizens, past or present.<sup>187</sup>

### C. Distinguishing Voluntary Associations

It may seem unnecessary to distinguish corporations from other types of businesses. After all, every form of business entity can hold property, enter contracts, and is subject to sanction for wrongdoing. Also, because a business entity has only a metaphysical existence as an attribute of legal rules rather than physical embodiment, the choices and conduct that form the basis for liability must be traceable to human beings.<sup>188</sup> As long as those people are connected to the business as agents, their actions will become the responsibility of the business. To this extent, collective liability works the same way regardless of the form of business organization.

There are, however, important differences between the legal personhood of a corporation and the contingent, associational vitality of a partnership. Unfortunately, commentators using business law as an analogy for U.S. reparations have not always marked the differences between these two forms of collective organization, inadvertently weakening the case for reparations by describing the United States as a voluntary association. The concept of voluntary

<sup>184</sup> *Id.* at 425.

<sup>185</sup> *Id.* at 426 (first quoting Constitution of the Bank of New York (1784), reprinted in 3 PAPERS OF ALEXANDER HAMILTON 514–18 (Harold C. Syrett ed., 1962); then quoting THE FEDERALIST NO. 49, at 339 (James Madison) (Jacob E. Cooke ed., 1961); and then quoting George Washington, Pres. of the U.S., First Inaugural Address (Apr. 30, 1789), <https://founders.archives.gov/documents/Washington/05-02-02-0130-0003> [<https://perma.cc/UA5T-8Z32>]).

<sup>186</sup> *Dixon v. United States*, 7 F. Cas. 761, 763 (C.C.D. Va. 1811) (No. 3934).

<sup>187</sup> Subject to the right of the people to convene for purposes of amending the Constitution, the authority vested in the three branches of government comes from the Constitution. Mikhail, *supra* note 161, at 433 (citing U.S. CONST. art. I, § 8).

<sup>188</sup> According to the principle of “methodological individualism,” any collective activity should be reducible to the motivations of individual participants. PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 2 (1984).

association, however, does not accurately represent the relationship of shareholders to a corporation or citizens to their government.<sup>189</sup>

### 1. The Impermanence of Partnerships

Although corporations and partnerships both involve the coordination of individual capital and labor, they are otherwise distinct organizational choices. One is an artificial person, legally separate from its shareholders who play only a peripheral role; the other is a voluntary association subject to the will of each of its partners. Appreciating the differences between these two types of business associations helps clarify why the U.S. obligation to pay reparations can be assessed without reference to the culpability (or lifespan) of individual U.S. citizens.<sup>190</sup>

A partnership comparison may have appeal because individual partners in general partnerships are personally liable for the debts of the partnership,<sup>191</sup> but an argument for U.S. reparations cannot be built upon a partnership foundation. First, voluntary association is a strained analogy for inherited citizenship.<sup>192</sup> Under the default rules, a partnership dissolution is triggered whenever a partner dies, leaves, or otherwise ceases to be involved in the carrying on of the partnership's business. The partnership form is not designed for multi-generational ownership. Second, partners are not directly liable for partnership debts *before* their association with a partnership. As the Revised Uniform Partnership Act puts it, "A person admitted as a partner into an existing partnership is not personally liable for any partnership obligation incurred before the person's admission as a partner."<sup>193</sup> Consequently, a partnership model of voluntary association reinforces the ethical-individualism objection to reparations for African Americans.

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<sup>189</sup> Professors Posner and Vermeule observe that there is a difference between individual liability premised on voluntary association with a corporate entity and liability that is "incidental and derivative" of corporate liability. See Posner & Vermeule, *supra* note 14, at 704. They simply catalogue the distinction, however, without arguing which version, if either, is accurate. See *id.*

<sup>190</sup> Limited liability companies fall somewhere in the middle. They resemble partnerships in most respects, but they appeal to investors because they combine the flexibility of the partnership with the investor protection of the corporate form. See Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451, 519 (noting that "new LLCs [are] being formed in the United States at twice the rate at which new corporations are being formed").

<sup>191</sup> See REVISED UNIF. P'SHIP ACT § 306(a) (UNIF. L. COMM'N 2013) ("Except as otherwise provided in subsections (b) and (c), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.")

<sup>192</sup> See Gray, *supra* note 6, at 1078 (noting that for "states, racial groups, or ethnic groups[,] . . . membership is a matter of birth"). In a corporation, too, shares can be inherited.

<sup>193</sup> REVISED UNIF. P'SHIP ACT § 306(b).

Unlike a general partnership, a corporation is permanent and operates according to formal governance rules.<sup>194</sup> When a corporation makes a decision, it does not simply seek to tally the preferences of its members; for most decisions, a corporation's board of directors has complete authority.<sup>195</sup> Similarly, although citizens elect representatives, the authority invested in representatives is not defined by the will of the voters. In both cases, those who occupy official offices are invested with authority to be exercised for the chartered purposes of the entity itself. Only in an attenuated fashion does the legitimacy of corporate or government action depend upon shareholder or citizen consent.<sup>196</sup>

A corporate theory of collective obligation differs from a voluntary association because it “holds that corporations and other corporate bodies can be considered persons for moral purposes.”<sup>197</sup> The principle of ethical individualism is satisfied, not because each shareholder has personal responsibility for corporate actions, but because the corporation is the individual whose responsibility is at issue.<sup>198</sup> It is true that “[s]hareholders, employees, and other members are benefited or harmed as a consequence, but their claims are incidental and derivative.”<sup>199</sup> If the corporation is the moral agent, it follows that shareholders cannot object to liability “even if the current shareholders—the ones who must pay through devaluation of their shares—are different from the shareholders at the time the wrong was committed.”<sup>200</sup>

## 2. *Citizens United* and *Hobby Lobby*

Admittedly, there is a necessary caveat to our argument that corporations and partnerships are distinct and that the voluntary association concept pertains only to partnerships: the U.S. Supreme Court's recent First Amendment juris-

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<sup>194</sup> See Robert B. Thompson, *The Law's Limits on Contracts in a Corporation*, 15 J. CORP. L. 377, 384 (1990) (observing that corporate law involves a combination of mandatory rules and contractual flexibility, and that is, “legal rules define the rights of directors and shareholders, thereby providing the boundaries within which private ordering can occur”).

<sup>195</sup> See MODEL BUS. CORP. ACT § 8.01(b) (AM. BAR ASS'N 2016) (“[T]he business and affairs of the corporation shall be managed by or under the direction . . . of the board of directors.”).

<sup>196</sup> See, e.g., Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 377 (2018) (explaining that even where the board of directors ostensibly share power, as with the power to adopt and amend by-laws, the board of directors can often override shareholder preferences).

<sup>197</sup> Posner & Vermeule, *supra* note 14, at 704.

<sup>198</sup> Although it is beyond the scope of our present argument, we assume that there must be some ability for a shareholder (or citizen) to exit and to avoid future affiliation with a collective entity. A non-coercion principle along these lines, however, would not be tantamount to requiring a voluntary associational choice.

<sup>199</sup> Posner & Vermeule, *supra* note 14, at 704.

<sup>200</sup> *Id.*

prudence, including *Citizens United v. Federal Election Commission*<sup>201</sup> and *Burwell v. Hobby Lobby Stores, Inc.*,<sup>202</sup> has muddied the waters, suggesting that corporations can hold political and religious convictions because they are a mere conduit for the views of their owners.

In 2014, in Justice Alito's majority opinion for the Supreme Court in *Hobby Lobby*, he described the corporation using the language of voluntary association:

A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.<sup>203</sup>

It is hard to square this analysis with the concept of a corporation as a distinct legal person. From a purely doctrinal standpoint, one might defend the result in *Hobby Lobby* by pointing out that the narrow issue was whether the corporation was entitled to raise an objection under the Religious Freedom Restoration Act (RFRA), which applies to "persons." Although RFRA does not define the term "person," the Dictionary Act contains a more general definition applicable to federal statutes, which includes "corporations."<sup>204</sup> Also, whether it would be reasonable to find religious concerns applicable to larger, public corporations, *Hobby Lobby* concerned "closely held corporations, each owned and controlled by members of a single family."<sup>205</sup> Thus, if viewed narrowly, the Court's opinion in *Hobby Lobby* was "clear and straightforward."<sup>206</sup>

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<sup>201</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>202</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

<sup>203</sup> *Id.* at 706–07.

<sup>204</sup> *Id.* at 707 (quoting Dictionary Act, 1 U.S.C. § 1 (2012)).

<sup>205</sup> *Id.* at 717; see also Matthew I. Hall & Benjamin Means, *The Prudential Third-Party Standing of Family-Owned Corporations*, 162 U. PA. L. REV. ONLINE 151, 154 (2014), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1123&context=penn\\_law\\_review\\_online](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1123&context=penn_law_review_online) [<https://perma.cc/MU3P-2HY8>] ("As family-owned businesses, the corporations are 'extension[s] of family relationships,' and there is every reason to expect that the corporations will serve as effective advocates for their owners." (alteration in original) (footnote omitted) (quoting Benjamin Means, *Nonmarket Values in Family Businesses*, 54 WM. & MARY L. REV. 1185, 1194 (2013))). Thus, even if the U.S. Supreme Court's recent jurisprudence in *Burwell v. Hobby Lobby Stores, Inc.* is correct, it may not apply to public corporations. The United States, a nation of over 300 million people, fits a public not private model of the corporation.

<sup>206</sup> Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 162 (2014).

Yet, the Supreme Court's holding in an earlier case in 2010, *Citizens United*,<sup>207</sup> cannot be explained away as a matter of statutory interpretation. In that decision, the Court overturned decades of election law jurisprudence and invalidated restrictions on a corporation's use of its general treasury funds to promote political speech.<sup>208</sup> The Court's majority held that the First Amendment precluded such restrictions. Several commentators assert that *Citizens United* "is grounded on the erroneous theory that corporations are 'associations of citizens' rather than what they actually are: independent legal entities that are conceptually distinct from those who own their stock."<sup>209</sup> Others have opined more broadly that the Court's recent "decisions are the culmination of a decades-long attack on the reification of the corporation and an assault on the very notion of corporate interests separate from the narrowly defined interests of a company's immediate owners."<sup>210</sup>

Whether or not the Supreme Court's recent jurisprudence concerning corporate constitutional rights is defensible on the merits, however, it appears to be limited in scope. When the issue is corporate rights, "especially . . . relating to political rights, the justices have conceptualized the corporation not as a person, akin to a natural human being, but as an association, akin to a voluntary membership group."<sup>211</sup> In the area of constitutional rights, the Court ignores corporate personhood to protect the interests of shareholders.<sup>212</sup> Yet, in all other areas, the Court has been consistent in its recognition of the corporation as an independent legal person.<sup>213</sup>

For example, diversity jurisdiction for corporations is based upon the location of their principal place of business.<sup>214</sup> By contrast, partnerships and lim-

<sup>207</sup> *Citizens United v. FEC*, 558 U.S. 310, 372 (2010).

<sup>208</sup> *Id.*

<sup>209</sup> Macey & Strine, *supra* note 190, at 453 (quoting *Citizens United*, 558 U.S. at 356); see Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1742 (2015) (arguing for a pragmatic approach to assessing corporate rights based on underlying interests rather than grand theories).

<sup>210</sup> June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963, 964 (2017).

<sup>211</sup> Adam Winkler, *Citizens United, Personhood, and the Corporation in Politics*, in CORPORATIONS AND AMERICAN DEMOCRACY 359, 361 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

<sup>212</sup> *Id.* ("If corporations are refused constitutional protection, the Court reasons, the individuals who associate together in the corporation are denied their rights."). Put differently, "[c]orporations do not have rights because they are people. They have rights because they are associations of people." *Id.*

<sup>213</sup> See Macey, *supra* note 9, at 1199 ("[T]he Supreme Court's existential theory of the corporation in constitutional rights cases is radically at odds with the existential theory of the corporation it adopts in every other area of the law."). The lack of consistency may be troubling, but it remains the case that "in virtually all nonconstitutional cases involving corporations, the Supreme Court assumes that corporations are separate juridical entities." Macey, *supra* note 9, at 1208; see Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 32 (2014) (observing that the Supreme Court's methodology is incoherent).

<sup>214</sup> See *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010); Macey & Strine, *supra* note 190, at 488 ("Treating the corporation as an association of shareholders is inconsistent with the well understood

ited liability companies are understood to be voluntary associations and their presence for purposes of diversity jurisdiction includes the places where their individual partners or members reside.<sup>215</sup> The Court's "view of diversity jurisdiction would not make sense if a corporation were an association of the people who own and operate it."<sup>216</sup> Instead, for jurisdictional purposes, the corporation is recognized as a distinct person.

The principle of double taxation in corporate tax further confirms that corporations are separate entities.<sup>217</sup> As one commentator describes:

Since Congress passed the federal income tax in 1909, corporations often have had to pay "double taxation" because the corporation pays taxes at the corporate level when it earns profits, and then its shareholders pay a second tax when profits are distributed as dividends that are subject to the individual income tax.<sup>218</sup>

The double-tax system would lack a rational basis if corporations were merely associations with no independent existence as legal persons.<sup>219</sup> Notably, taxes work differently for partnership-type associations—the entity files an informational return and the individual owners pay a single tax.<sup>220</sup>

Perhaps most pertinent for this Article's argument, the Supreme Court's jurisprudence concerning corporate criminal liability also proceeds on the assumption that corporations are persons and therefore subject to criminal sanction for wrongdoing.<sup>221</sup> If a corporation can violate the criminal law, and can be pun-

legal rule that corporations are separate juridical entities in their own right for purposes of establishing jurisdiction for federal courts on the grounds of diversity of citizenship.").

<sup>215</sup> See 13F CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3630.1, at 223 (3d ed. 2009) (stating that "the Supreme Court has held that the state citizenship of all members of an unincorporated association will be taken into account in determining the association's citizenship when a question of diversity jurisdiction arises").

<sup>216</sup> Macey, *supra* note 9, at 1208 (observing that "if the Court truly embraced the associational view consistently across its corporate jurisprudence, then a corporation would be 'present' for purposes of diversity jurisdiction in every state where its shareholders reside").

<sup>217</sup> See Macey & Strine, *supra* note 190, at 490 ("The corporate income tax reflects the view that a corporation is a legal entity separate and distinct from its shareholders.").

<sup>218</sup> Macey, *supra* note 9, at 1209 (footnote omitted).

<sup>219</sup> The Internal Revenue Code in Subchapter S recognizes a narrow exception for closely held corporations that resemble partnerships in their operations, but this only underscores the basic distinction between corporations and voluntary associations like partnerships. See I.R.C. § 1361; Macey, *supra* note 9, at 1209.

<sup>220</sup> See Macey & Strine, *supra* note 190, at 490 ("In the world of business, as a general rule, juridical entities pay taxes and associations of investors do not.").

<sup>221</sup> See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 499 (1909) (holding that a railroad corporation could be criminally responsible for violating a statute). The rationale for extending criminal law concepts from human beings to artificial, corporate persons was not well specified, see Blair & Pollman, *supra* note 209, at 1718, but the Supreme Court was clear that corporations are persons, not merely associations of investors.

ished for its transgression separate from the culpability of any of its agents, then it is a person in the eyes of the law.<sup>222</sup> The Supreme Court's recent jurisprudence concerning corporate constitutional rights may not be a model of clarity, but, viewed in full context, it does not seem to call into question the longstanding principle that corporations are legal persons distinct from their shareholders.

#### *D. Regime Change and Successor Liability*

Even if opponents of reparations were willing to concede that the United States shares with corporations the attribute of legal personhood, they might still invoke ethical individualism to argue that reparations should not be paid. That is, the ethical-individualism objection to reparations can be asserted at the level of the nation state.<sup>223</sup> In international law, scholarship concerning transitional justice seeks to ascertain whether a new regime should have legal or moral obligations to redress harms done by a predecessor regime.<sup>224</sup> If the passage of the Thirteenth and Fourteenth Amendments constituted a new “founding moment,”<sup>225</sup> then perhaps any claims for reparations today must be relegated to the purview of transitional justice. For this reason, some scholars view efforts to recover payments from the current U.S. regime to account for the misdeeds of an earlier regime as problematic.<sup>226</sup>

Although some contend that the United States cannot be held responsible for wrongdoing from an earlier era—that the United States is in some fundamental sense a different person—corporate jurisprudence regarding successor liability exposes the weakness of the argument. A corporation is a permanent entity and cannot shed its liabilities to creditors simply by amending its charter. When the United States extended citizenship rights to African Americans through the Thirteenth and Fourteenth Amendments, it did not purport to dissolve the Union it had just spent blood and treasure to preserve. There has been

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<sup>222</sup> See Macey, *supra* note 9, at 1210 (“Under the associational view of the corporation, it would not be possible to hold corporations criminally responsible for the actions of their agents, because only the individuals who make up the corporation—and not the corporation itself—would be capable of committing a crime.”).

<sup>223</sup> See Forde-Mazrui, *supra* note 10, at 723 (“Whether America today is responsible for national obligations incurred in the past raises the question of identity through time, that is, whether America is a continuing entity, such that practices attributable to the nation at one point in time are fairly attributable to the nation at a subsequent point in time.”).

<sup>224</sup> See Gray, *supra* note 11, at 66 (“[T]ransitional regimes are defined in opposition to abuses perpetrated by their forebears. It is therefore hard to make the case that transitional and post-transitional regimes are the same ‘person’ as the prior regime.” (footnote omitted)).

<sup>225</sup> For a general analysis of how radical constitutional change can affect national continuity, see generally *FOUNDING MOMENTS IN CONSTITUTIONALISM* (Richard Albert et al. eds., 2019).

<sup>226</sup> See Gray, *supra* note 6, at 1092 (arguing in favor of a special exception to ethical individualism for reparations claims in the context of transitional justice).

no “event since the Founding that officially dissolved and reconstituted the American nation.”<sup>227</sup> The United States is 244 years old.

Moreover, regardless of whether it is possible to identify a U.S. entity distinct from the old pre-Civil War regime, corporate law rules of successor liability provide that obligations cannot be shirked by transferring ownership across entities.<sup>228</sup> In statutory mergers, all liabilities are assumed by the new entity automatically along with the target’s assets. Even when an acquirer uses an asset-purchase structure to pick and choose which liabilities to accept, the law protects third parties with existing claims by requiring that sufficient funds be reserved by the parties to handle the foreseeable claims of external creditors.<sup>229</sup> The claims African Americans could assert for their centuries of enslavement were readily apparent at the end of the Civil War. Accordingly, for reasons that corporate law makes plain, the United States should not be able to avoid its obligations to African Americans, no matter when the obligations were incurred.

Finally, even if one could characterize the post-Civil War changes as a “second founding” or locate such an event in the civil rights legislation of the 1960s, or at any other point in our nation’s history, it would be discordant for the United States to rely on its newfound willingness to acknowledge the humanity of African Americans as grounds for dismissing claims for justice asserted by African Americans for previous wrongdoing.<sup>230</sup> By extending rights to former slaves and broadening the reach of equal protection, the United States did not purport to disclaim financial responsibility for having denied those citizenship rights previously. The extension of rights to African Americans does not supply a reason for denying African Americans access to justice for wrongs done to them.

### III. CHARGING GUIDELINES FOR REPARATIONS

So far, this Article has argued that the U.S. government shares much of its DNA with corporations and that the most important overlapping concept—

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<sup>227</sup> Forde-Mazrui, *supra* note 10, at 724 (“The most plausible candidate for such an event, the Civil War, officially preserved America as one nation, producing only amendments to the continuing constitutional charter.”).

<sup>228</sup> See Mihailis E. Diamantis, *Successor Identity*, 36 YALE J. ON REGUL. 1, 4 (2019) (“A corporation that acquires, merges with, consolidates with, or spins off from a criminal corporation automatically inherits a criminal taint and is liable for punishment.”). Professor Mihailis Diamantis argues in favor of a more limited rule of successor liability. *Id.*

<sup>229</sup> See, e.g., *Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811, 825 (N.J. 1981) (stating that “where one corporation acquires all or substantially all of the manufacturing assets of another corporation . . . and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line”).

<sup>230</sup> See generally ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2017).



legal personhood—helps to neutralize the ethical-individualism objection to reparations. Whether or not citizens are personally responsible for slavery or Jim Crow laws is a distraction because the United States is the relevant actor, and the issue is whether the United States should pay reparations.

This Part contends that corporate law also helps evaluate the strength of the substantive case for reparations.<sup>231</sup> In particular, the DOJ's Charging Guidelines, which the DOJ promulgated to guide the exercise of prosecutorial discretion in cases involving corporate crime, help focus the reparations discussion on key considerations. When applied to the question of reparations, the Charging Guidelines can be used to unpack the significance of our nation's belated, partial, and often disingenuous response to its own history of enslavement and oppression of African Americans.

### A. Pervasiveness of Wrongdoing

Under the DOJ's Charging Guidelines, prosecutors are encouraged to consider how widespread wrongful actions were and whether senior management was implicated: “[a]lthough acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged.”<sup>232</sup> The harms that reparations would address were not fleeting, nor were they the handiwork of rogue actors in the system. To the contrary, “[f]or two hundred years, the federal government embraced policies that supported slavery and Jim Crow.”<sup>233</sup> These wrongs were lasting and pervasive.

The U.S. Constitution itself reinforced slavery in three specific clauses. First, it effectively endorsed the continuation of the slave trade, overturning the possible will of future majorities by prohibiting any restrictions on the importation of slaves until 1808.<sup>234</sup> Second, the three-fifths compromise discounted the number of enslaved persons: “northerners had agreed to levy higher taxes on their own constituents to compensate southerners—who had the audacity to claim to be ‘principled agst. slavery’—for the ‘incumbrance’ of owning large

<sup>231</sup> See discussion *infra* Part III.

<sup>232</sup> U.S. Dep't of Just., *supra* note 17, § 9-28.500(B).

<sup>233</sup> Lyons, *supra* note 7, at 1377 (asserting that the United States “endorsed, in effect, a *Racial Subjugation Project*”); Ogletree, *supra* note 36, at 311 (“From the inception of this nation until 1967, the federal government sponsored a system of racial discrimination based first upon slavery and then upon Jim Crow segregation.” (footnote omitted)).

<sup>234</sup> See U.S. CONST. art I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . . .”); Walter Berns, *The Constitution and the Migration of Slaves*, 78 YALE L.J. 198 (1968).

numbers of human beings.”<sup>235</sup> Third, the fugitive slave clause required that slaves who escaped into free states were to be “delivered up on Claim of the Party” who could assert ownership.<sup>236</sup> In 1856, in *Dred Scott v. Sandford*, the U.S. Supreme Court held that African Americans were categorically excluded from the Declaration of Independence’s statement that “all men are created equal.”<sup>237</sup>

Some argue that “[i]t is hard to assign blame to the U.S. government, which is the institution that destroyed slavery at great cost.”<sup>238</sup> Yet, even if the Civil War represented a principled stand against slavery, the United States was complicit in the institution of slavery from its founding.<sup>239</sup> In the early years of the Republic, slave owners occupied many of the highest positions in government, including the presidency.<sup>240</sup> To do justice to the nation’s founding ideals, we should be willing to acknowledge the extent that the slaveholding founders fell short of the ideals they espoused.<sup>241</sup>

The sheer scope of slavery in the United States could not have been achieved without support at all levels of government. To insist on assigning culpability only to individual actors is to understate the horror of what transpired. In the wake of the Holocaust, lawyers seeking to devise mechanisms for bringing the perpetrators to justice confronted the gap between pervasive group conduct and the law’s focus on individual guilt or innocence. As one commentator explains, a “mass atrocity” has features that distinguish it from ordinary wrongdoing:

Specifically, a bureaucratic state can organize such crimes with unprecedented efficacy—employing sophisticated technologies, lasting several years, covering an entire country, perpetrated by many thousands, victimizing millions—and harnessing the legal system to

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<sup>235</sup> EINHORN, *supra* note 101, at 144–45. As Professor Robin Einhorn explains, “[T]he Constitution requires that ‘direct taxes’ be apportioned to the states by population.” *Id.* at 158 (quoting U.S. CONST. art. I, § 2, cl. 3) (citing U.S. CONST. art. I, § 9, cl. 4).

<sup>236</sup> U.S. CONST. art. IV, § 2, cl. 3. Congress endorsed the same principle through the Fugitive Slave Act of 1793, ch. 7, § 3, 1 Stat. 302, 302–03 (repealed 1864), which authorized slaveowners to seize escaped slaves, no matter what jurisdiction they were in.

<sup>237</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 410 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

<sup>238</sup> Posner & Vermeule, *supra* note 14, at 738.

<sup>239</sup> See Lyons, *supra* note 7, at 1377 (“At crucial junctures in our history, the government chose not to prevent or repair those wrongs.”).

<sup>240</sup> EINHORN, *supra* note 101, at 1 (stating that George Washington, Thomas Jefferson, James Madison, and Andrew Jackson owned slaves and “defended the ownership of human beings—even when they believed that society would be better off if it acknowledged that ‘all men are created equal; that they are endowed by their Creator with certain unalienable rights,’ and so on”).

<sup>241</sup> No matter how noble a corporation’s environmental mission statement might be, a prosecutor deciding whether to pursue charges against the corporation would rightly be more concerned with the corporation’s actual record of environmental degradation than with its virtue signaling.

these ends. Such wrongs are radically different from the garden-variety crime in response to which standard legal doctrines were developed. These differences rise to a level that may not be merely numerical, but categorical, requiring reassessment of the individualistic categories in which criminal law customarily thinks and judges.<sup>242</sup>

Nor was racial oppression merely a regional phenomenon. For example, “Jim Crow laws mandating segregation in practically all spheres of life began in the North and West well before the Civil War.”<sup>243</sup> Also, contrary to the view that the Civil War should be viewed as the payment of reparations for all that went before, the United States was not yet through with the business of racial oppression. After John Wilkes Booth assassinated President Lincoln, his successor, Andrew Johnson, took steps to undermine racial equality and proclaimed “that America would remain a ‘white man’s government.’”<sup>244</sup> President Johnson blocked the transfer of land to former slaves, leaving them with little means to accumulate wealth.<sup>245</sup> This was by design.<sup>246</sup> The law protected white supremacy.<sup>247</sup>

### B. *Timely Acceptance of Responsibility*

In assessing a corporation’s level of culpability, federal prosecutors consider whether a corporation has accepted full responsibility for the harms it has caused and put appropriate compliance mechanisms in place to avoid their recurrence.<sup>248</sup> Thus, the Charging Guidelines recognize that there is a difference between a single instance of wrongful behavior and a repeated pattern of mis-

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<sup>242</sup> Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1765 (2005).

<sup>243</sup> BARADARAN, *supra* note 60, at 11 (stating that the ideology of white supremacy was “avowed across the country and not just in the slaveholding South”).

<sup>244</sup> *Id.* at 17 (quoting ANDREW JOHNSON, 10 THE PAPERS OF ANDREW JOHNSON, FEBRUARY–JULY 1866, at 174–75 (1992)).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 19 (“By the end of the Reconstruction era, most freedmen were left landless, voteless, and with practically every profession blocked to them—their only choice was to grow cotton.”).

<sup>247</sup> See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 51 (1993) (describing how federal regulations “institutionalized racial discrimination [in] urban housing markets”).

<sup>248</sup> See U.S. Dep’t of Just., *supra* note 17, § 9-28.800(A)–(B) (noting that “the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents” (citing *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972) (holding that the defendant corporation “could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks”))).

conduct: “[a] corporation, like a natural person, is expected to learn from its mistakes.”<sup>249</sup>

Applied to the United States and its record on slavery, the analysis illuminates the extent that the United States has failed to accept or learn from its history. To the contrary, the United States allowed Reconstruction to fail, cooperated with the re-imposition of a brutal racial hierarchy in the South, and, more generally, failed to take responsibility for slavery, Jim Crow, and other forms of racial oppression. For example, Congress repeatedly refused to enact anti-lynching legislation despite its awareness of “the stakes—thousands of human lives taken in brutally cruel and excruciatingly painful ways.”<sup>250</sup> Congress’s inaction in the face of this evil was “culpable ignorance.”<sup>251</sup>

Yet, critics of reparations maintain “that the American people, in some collective or corporate capacity, have already atoned for slavery on the fields of Antietam and Gettysburg.”<sup>252</sup> Others have pointed to the civil rights legislation of the 1960s as a final reckoning with the nation’s history: “[t]he story was that the civil rights laws had permanently altered race relations in America, dividing history into a racist past and a color-blind present.”<sup>253</sup> Unfortunately, this account ignores a “long history of injustice and its effects, which in fact had not abated in the least” and “pushed the burden of economic disparity squarely onto the black population.”<sup>254</sup> Wishful thinking is not a meaningful substitute for acceptance of responsibility.

Even when the law appeared to be on African Americans’ side, the courts denied them legal protection. In particular, the Supreme Court’s refusal to enforce the Equal Protection Clause of the Fourteenth Amendment contributed to the end of the Reconstruction Era and left African Americans vulnerable to “Jim Crow[,] . . . the dead and heavy hand of slavery pushing down a new generation of blacks born free.”<sup>255</sup> The most infamous of a series of U.S. Su-

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<sup>249</sup> *Id.* § 9-28.600(B) (“A history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance programs.”).

<sup>250</sup> Lyons, *supra* note 7, at 1403.

<sup>251</sup> *Id.*

<sup>252</sup> Posner & Vermeule, *supra* note 14, at 730.

<sup>253</sup> BARADARAN, *supra* note 60, at 215. Recently, President Donald Trump “instructed federal agencies to end racial sensitivity trainings that address topics like white privilege and critical race theory, calling them ‘divisive, anti-American propaganda.’” Matthew S. Schwartz, *Trump Tells Agencies to End Trainings on ‘White Privilege’ and ‘Critical Race Theory’*, NPR (Sept. 5, 2020), <https://www.npr.org/2020/09/05/910053496/trump-tells-agencies-to-end-trainings-on-white-privilege-and-critical-race-theor> [<https://perma.cc/GL38-3KQW>] (quoting Memorandum from Russell Vought to Heads of Executive Departments and Agencies (Sept. 4, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf> [<https://perma.cc/7WZ9-DJVP>]).

<sup>254</sup> BARADARAN, *supra* note 60, at 215.

<sup>255</sup> *Id.* at 38. As Professor Baradaran observes, “Blacks lived in a police state in the South with the tacit approval of the Supreme Court.” *Id.* at 39.

preme Court decisions was *Plessy v. Ferguson* in 1896,<sup>256</sup> wherein the Supreme Court endorsed “separate but equal,” the equation used to justify “Jim Crow laws and segregation for half a century.”<sup>257</sup> It is hard to claim that the Civil War settled all debts when the United States continued to oppress African Americans for a century afterward.<sup>258</sup>

In 2009, Congress issued a resolution stating that “African-Americans continue to suffer from the consequences of slavery and Jim Crow laws—long after both systems were formally abolished—through enormous damage and loss, both tangible and intangible, including the loss of human dignity and liberty.”<sup>259</sup> Not only was the resolution too late, but it was also too little, as it explicitly denied any responsibility for the harms it identified: “[n]othing in this resolution . . . authorizes or supports any claim against the United States.”<sup>260</sup> In the same breath that it acknowledged the damage done to African Americans, Congress made clear that the United States was unwilling to accept any consequences.

It may be that the passage of time has rendered legal claims premised on the harms of slavery, Jim Crow, or other racial violence unsustainable.<sup>261</sup> Some scholars claim that temporal concerns should also diminish the impetus for reparations as a practical matter.<sup>262</sup> From a moral perspective, however, it is notable that local, state, and federal authorities have long refused to take full responsibility for harms imposed on African Americans.<sup>263</sup> For example, after race riots near Tulsa, Oklahoma on May 3, 1921, killed hundreds of African Americans and left thousands homeless, the government blocked any remedy for the survivors: those who sought judicial recourse “were stymied by a judicial system infected by the Ku Klux Klan and undermined by local and state

<sup>256</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>257</sup> BARADARAN, *supra* note 60, at 38 (quoting *Plessy*, 163 U.S. 537 at 552).

<sup>258</sup> For an account of the U.S. Supreme Court’s role in undermining the promise of Reconstruction, see generally Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part I: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444 (1982).

<sup>259</sup> S. Con. Res. 26, 111th Cong. (2009).

<sup>260</sup> *Id.*

<sup>261</sup> See Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 72 (2005) (identifying the problem and arguing that it is unfair “to apply outmoded notions of the statute of limitations”).

<sup>262</sup> One commentator envisions that the “marvelous inevitability of interracial mixture” will someday render concerns about racial justice quaint. See McWhorter, *supra* note 6, at 196.

<sup>263</sup> One exception to this general rule is that compensation was paid to African American men who, as part of the Tuskegee Syphilis Study, were exposed to the syphilis virus without their knowledge or consent and were denied appropriate treatment. Although the settlement fund of \$9 million was established to settle a class action lawsuit and not as reparations, the case was settled because “the United States was rightfully and grievously embarrassed.” *Pollard v. United States*, 69 F.R.D. 646, 649 (M.D. Ala. 1976).

government that hid evidence and promised restitution that never came.”<sup>264</sup> For eighty years, evidence showing the “government’s complicity in the riot” was kept hidden.<sup>265</sup>

The “timely acceptance of responsibility” factor also helps address the objection that reparations for African Americans would create a slippery slope problem—no past wrong is ever too far removed to address.<sup>266</sup> One answer is that, even when statutes of limitation apply, they may be equitably tolled—for example, “a continuing wrong does not start the clock running under a statute of limitation until the wrong culminates in an act of finality.”<sup>267</sup> Thus, if the objection is raised that the harms complained of happened too far in the past to be actionable, and that it is not reasonable to ask societies to identify and redress every wrong across the centuries of recorded history, the answer with respect to African Americans is that the United States never tried to repair the harm it had caused and so the harm never stopped.<sup>268</sup>

The viability of legal reparations claims is beyond the scope of this Article, but it suffices for our purposes to show that the United States has long sought to minimize its record of slavery and racial oppression. For a prosecutor, a corporate defendant’s failure to take responsibility for its actions would support a decision to bring charges. For the same reason, those weighing the merits of reparations should conclude that the nation’s long delay in confronting the legacy of slavery is a reason to pay reparations, not a justification for shirking them.

### C. Restitution and Remediation

In exercising their discretion regarding whether to bring charges, prosecutors further consider whether the corporation has taken voluntary steps to fully compensate victims, thereby demonstrating its commitment to abide by the law.<sup>269</sup> The United States benefited directly and indirectly from slavery,<sup>270</sup> but

<sup>264</sup> Malveaux, *supra* note 261, at 69 (footnotes omitted).

<sup>265</sup> *Id.* at 69–70 (explaining once the information finally became public, “the government conceded moral culpability, [but] it refused to provide reparations to riot victims or their descendants” (footnote omitted)).

<sup>266</sup> Matsuda, *supra* note 48, at 381 (“At what point should we lay to rest the sins of the past and concede to these classical legal doctrines?”).

<sup>267</sup> *Id.*

<sup>268</sup> Acknowledging the objection that no one can demand reparations for the Norman Conquest, one commentator argues that the “outer limit should be the ability to identify a victim class that continues to suffer a stigmatized position enhanced or promoted by the wrongful act in question.” *Id.* at 385.

<sup>269</sup> See U.S. Dep’t of Just., *supra* note 17, § 9-28.1000(A) (“Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation’s willingness to make restitution and steps already taken to do so.”).

it has never compensated African Americans for their enslavement and the century of segregation and officially sanctioned discrimination that followed. Notably, “[f]orty acres and a mule,” the reparation promised by General Sherman to former American slaves and codified by Section Four of the Freedmen’s Bureau Act, was not even paid.”<sup>271</sup> Perhaps even more grotesque, in the immediate aftermath of slavery, the United States paid reparations, not to former slaves but to slaveowners for loss of their property.<sup>272</sup>

The Reconstruction Era offered a false promise of equality. The Thirteenth Amendment, which Congress ratified on December 6, 1865, declared that “[n]either slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”<sup>273</sup> Three years later, the Fourteenth Amendment followed, guaranteeing that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>274</sup> During the brief period that followed, African Americans registered to vote, served in state assemblies and Congress, and entered the legal profession.<sup>275</sup>

Far from repairing the harm done over previous centuries of slavery, the short interval of Reconstruction was followed by the imposition of Jim Crow laws and other laws discriminating against African Americans. According to one commentator, “The failure of the nation to offer reparations to the freed slaves blighted their emancipation and demeaned the abuses they had suf-

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<sup>270</sup> See, e.g., Ogletree, *supra* note 36, at 282 (“[M]any of our greatest public monuments, including the White House, the Capitol, and the Jefferson Memorial, were built by slaves.” (citing ROBINSON, *supra* note 25, at 214–18)).

<sup>271</sup> Gray, *supra* note 6, at 1049 (footnotes omitted) (first quoting William T. Sherman, Special Field Order No. 15 (Jan. 16, 1865), reprinted in THE FORTY ACRES DOCUMENTS: WHAT DID THE UNITED STATES REALLY PROMISE THE PEOPLE FREED FROM SLAVERY? 51 (1994); and then quoting Gregory Kane, *Why the Reparations Movement Should Fail*, 3 U. MD. L.J. RACE RELIGION GENDER & CLASS 189, 195 (2003)) (citing Act of March 3, 1865, ch. 90, 13 Stat. 507 (lapsed 1869), quoted in *Berry v. United States*, No. C-94-0796, 1994 WL 374537, at \*1 n.1 (N.D. Cal. July 1, 1994)); see also ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877, at 51–54, 70–71 (1988). Nor were later efforts to provide capital to African Americans successful. See BARADARAN, *supra* note 60, at 151 (observing that “[i]f giving blacks land the year after their emancipation from slavery proved unenforceable, one hundred years later, financial grants didn’t stand a chance”). According to one commentator, reparations are owed, “not for deprivations that slavery itself produced, but instead for those resulting from the insult unleashed by the nation’s continued failure to offer repair.” Sepinwall, *supra* note 6, at 218.

<sup>272</sup> See Ogletree, *supra* note 29, at 1069 (“[T]he only reparations for slavery that the government ever paid were to Southern whites to compensate them for the loss of their slaves.”).

<sup>273</sup> U.S. CONST. amend. XIII, § 1.

<sup>274</sup> *Id.* amend. XIV, § 1.

<sup>275</sup> See generally W. LEWIS BURKE, ALL FOR CIVIL RIGHTS: AFRICAN AMERICAN LAWYERS IN SOUTH CAROLINA, 1868–1968 (2017).

ferred.”<sup>276</sup> The federal government limited the ability of African Americans to build wealth. Through redlining, which rendered areas African Americans lived uninsurable, the government denied access to property ownership and wealth. Additionally, “New Deal programs that would have sent aid to build housing in the urban ghetto were instead used to create white suburbs that reinforced and perpetuated racial segregation for the rest of the century.”<sup>277</sup> Thus, for African Americans, the New Deal served largely to further entrench white supremacy.

A few commentators contend that more recent civil rights legislation, affirmative action programs, and even welfare are, in effect, reparations.<sup>278</sup> For example, instead of being taxpayer funded, affirmative action’s cost is paid by “marginal candidates from nonpreferred groups.”<sup>279</sup> Yet, the Civil Rights Act of 1964 was justified, not by a theory of reparations for African Americans, but by the belief that discrimination harmed America by keeping talented people from contributing to the fullest of their abilities.<sup>280</sup> The principal beneficiaries of the legislation have been white women.<sup>281</sup>

Nor do modern day affirmative action programs qualify as reparations. The Supreme Court has rejected the rationale that affirmative action compensates for disadvantages created by slavery and segregation and permits affirmative action only in service of the nebulous notion of diversity, which, in theory, benefits white students and serves their interests.<sup>282</sup> More generally, the Court’s strict colorblind approach to equality shows a refusal to accept responsibility for how present-day inequalities of wealth and status were created and perpetuated. The only acceptable legal justification for affirmative action is forward-looking: the inclusion of diverse perspectives to create a superior edu-

<sup>276</sup> Sepinwall, *supra* note 6, at 226.

<sup>277</sup> BARADARAN, *supra* note 60, at 4.

<sup>278</sup> See, e.g., McWhorter, *supra* note 6, at 191 (“[F]or almost forty years America has been granting blacks what any outside observer would rightly call reparations.”).

<sup>279</sup> Posner & Vermeule, *supra* note 14, at 712.

<sup>280</sup> Albert Mosely, *Affirmative Action as a Form of Reparations*, 33 U. MEM. L. REV. 353, 358 (2003) (“Affirmative action, as embodied in the Civil Rights Act of 1964, has done a good job of utilizing underused, overlooked, and excluded talents, but the Act’s primary rationale was not to compensate the progeny of slaves for past wrongs.”).

<sup>281</sup> Kimberlé W. Crenshaw, “Framing Affirmative Action,” 105 MICH. L. REV. FIRST IMPRESSIONS 123, 129 (2006) [https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1093&context=mlr\\_fi](https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1093&context=mlr_fi) [<https://perma.cc/C7M7-2J3P>] (stating that “the primary beneficiaries of affirmative action have been Euro-American women”).

<sup>282</sup> See *Shaw v. Hunt*, 517 U.S. 899, 918 (1996); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 284 (1986); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).



educational experience for all students.<sup>283</sup> In any case, providing educational benefits to a relatively small group of African Americans would leave many without redress and would fail to benefit those who are most vulnerable.<sup>284</sup>

#### D. Collateral Consequences

The exposure of innocent people to collateral consequences is not a unique feature of corporate liability. For example, when parents are sent to jail, their children may suffer harm.<sup>285</sup> The Charging Guidelines state that stakeholder consequences do not affect the appropriateness of holding entities responsible for their actions.<sup>286</sup> The Charging Guidelines, however, further provide that “[i]n the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation’s employees, investors, pensioners, and customers, many of whom may . . . have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it.”<sup>287</sup> Accordingly, the Charging Guidelines recognize the possibility of exceptional cases in which individual members of the collective would be unfairly burdened.

Corporate law contains instructive examples of what might qualify as an unfair burden. For example, if a corporation makes a fraudulent misstatement and investors purchase stock in reliance on that misstatement, the investors suffer twice: first, when the fraud is uncovered and the corporation’s stock price adjusts downward to reflect the undistorted value of the corporation’s assets, and, second, when the corporation’s assets are further reduced by whatever fine the government imposes.<sup>288</sup> Meanwhile, those “who sold at inflated

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<sup>283</sup> *Bakke*, 438 U.S. at 312; cf. Posner & Vermeule, *supra* note 14, at 712 (contending that a “backward-looking justification is . . . essential to describing [affirmative action] as a reparations scheme”).

<sup>284</sup> Tuneen E. Chisolm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 703 (1999) (“Affirmative action has been helpful in forcing access for a small number of individuals to certain educational and economic venues, but it does not effectively level the playing field for African Americans as a collective race.”).

<sup>285</sup> See Dan Levin, *As More Mothers Fill Prisons, Children Suffer a ‘Primal Wound,’* N.Y. TIMES (Dec. 28, 2019), <https://www.nytimes.com/2019/12/28/us/prison-mothers-children.html?action=click&module=News&pgtype=Homepage> [<https://perma.cc/686H-4ZJB>] (“Studies show that children in many ways share the sentences with their parents: They face increased risks of psychological and behavioral problems, insufficient sleep and poor nutrition, and higher odds of entering the criminal justice system themselves.”).

<sup>286</sup> See U.S. Dep’t of Just., *supra* note 17, § 9-28.1100(B) (“Almost every conviction of a corporation, like almost every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation.”).

<sup>287</sup> *Id.*

<sup>288</sup> See Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 698–700.

prices” and have “bailed out prior to any judgment or settlement . . . will escape without bearing any cost when liability is later imposed exclusively on their former corporation.”<sup>289</sup> For this reason, the Securities and Exchange Commission has announced a policy to avoid imposing punitive penalties on corporations “[w]here shareholders have been victimized by the violative conduct.”<sup>290</sup> In that situation, policy considerations might dictate a reduced or waived fine because the financial penalty would be borne by those who were victimized by the original fraud.

Taxpayers are more vulnerable than shareholders because they cannot diversify their risk.<sup>291</sup> Applied to the question of reparations, however, it is plain that today’s citizenry would not be revictimized by reparations. U.S. citizens “are not themselves the primary victims of the offense.”<sup>292</sup> To the contrary, Americans alive today benefit in the aggregate from wealth stolen from African American slaves.<sup>293</sup> Moreover, wealth inequality between racial groups can be traced to slavery and the de jure discrimination that followed. For example, disparities in school funding persist because local budgetary responsibility was designed to ensure that white people would not have to pay to educate black children.<sup>294</sup> After emancipation, “[f]or blacks, the path toward wealth was closed by segregation, government policies, and economic reality.”<sup>295</sup> As citizens, we are all implicated by our membership in an entity enriched and distorted by injustice.<sup>296</sup>

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<sup>289</sup> John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1558 (2006). Professor John Coffee further observes that diversified shareholders may have “purchased stock at times that are both inside and outside the class period” and “are effectively making wealth transfers to themselves . . . shifting money from one pocket to another, minus the high transaction costs of securities litigation.” *Id.*

<sup>290</sup> Press Release, U.S. Sec. & Exch. Comm’n, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), <http://www.sec.gov/news/press/2006-4.htm> [<https://perma.cc/3QJN-9T8R>]. The Securities and Exchange Commission further stated that it would consider “[t]he degree to which the penalty will recompense or further harm the injured shareholders.” *Id.* (emphasis omitted).

<sup>291</sup> Shareholders “can eliminate firm-specific risk through diversification.” Urska Velikonja, *The Cost of Securities Fraud*, 54 WM. & MARY L. REV. 1887, 1893 (2013).

<sup>292</sup> Coffee, *supra* note 289, at 1562 (distinguishing entity liability in cases involving external harms). The descendants of slaves are citizens, but they would also benefit from reparations.

<sup>293</sup> See Joe Feagin, Opinion, *A Legal and Moral Case for Reparations*, TIME (May 28, 2014), <http://time.com/132034/a-legal-and-moral-basis-for-reparations/> [<https://perma.cc/7M5C-T8WW>] (contending that societal wealth has the character of unjust enrichment, at least if we “extend the idea of restitution for unjust enrichment to the conditions of large-scale group oppression”).

<sup>294</sup> See WALSH, *supra* note 70, at 175.

<sup>295</sup> BARADARAN, *supra* note 60, at 5.

<sup>296</sup> Nor should the absence of an investment decision for those born here be grounds for evading responsibility. Whether one inherits stock or citizenship, one takes the benefits and burdens that pertain.

The existence of collateral consequences could be a relevant factor, however, when setting an upper bound for reparations. According to some calculations, the repayment of debt owed African Americans reaches into the trillions of dollars.<sup>297</sup> If so, repayment in full would disrupt our nation's economy and the lives of individual citizens. Corporate law does not provide a definitive answer but offers some context for thinking about this issue. For instance, when federal prosecutors charged the accounting firm Arthur Andersen with criminal violations in connection with its audit of Enron, the consequence was the destruction of the entire Arthur Andersen firm along with thousands of jobs.<sup>298</sup> Although the government acted to deter accounting fraud, the scale of the resulting losses raises the concern that the prosecution did more harm than good.<sup>299</sup> For similar reasons, reparations harsh enough to derail the nation's economy might not be warranted, even if the calculation of the debt owed to African Americans was otherwise convincing.

### *E. Availability of Individual Prosecution*

When federal prosecutors decide whether to charge a corporation with a criminal violation, they may also consider whether charging the individuals whose actions exposed the corporation to liability would better serve the public interest.<sup>300</sup> Prosecution of those directly involved in wrongdoing avoids any concerns regarding the collateral losses suffered by other stakeholders and may provide a stronger level of deterrence.

In the context of reparations, however, there is no viable alternative to U.S. reparations. None of the architects of slavery are alive to face repercussions for their actions, and more than a half century has passed since the enactment of civil rights legislation. Also, even if slaveowners were still living, they could raise an argument familiar in the context of transitional justice efforts: "that they relied on existing law, which told them that targeted abuses against a particular group were right, necessary, or at least not illegal."<sup>301</sup> Ac-

<sup>297</sup> See Logue, *supra* note 25, at 1320–21.

<sup>298</sup> See Linda Greenhouse, *Justices Reject Auditor Verdict in Enron Scandal*, N.Y. TIMES (June 1, 2005), <https://www.nytimes.com/2005/06/01/business/justices-reject-auditor-verdict-in-enron-scandal.html#:~:text=WASHINGTON%2C%20May%2031%20%2D%20With%20a,the%20nation's%20biggest%20corporate%20scandals> [https://perma.cc/RQP5-PJN2] ("The government gave the corporation a death sentence and the corporation died." (quoting Professor Ellen Podgor)).

<sup>299</sup> See Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 109 (2006) ("On balance, the public benefits generated by prosecuting Andersen criminally were minimal . . .").

<sup>300</sup> See U.S. Dep't of Just., *supra* note 17, § 9-28.1300(A) ("In deciding whether to charge a corporation, prosecutors should consider whether charges against the individuals responsible for the corporation's malfeasance will adequately satisfy the goals of federal prosecution.").

<sup>301</sup> Gray, *supra* note 6, at 1048.

cordingly, slaveowners would seek to “displace responsibility to the state or protest that imposing liability would violate prohibitions against ex post facto enforcement of law.”<sup>302</sup>

If there were individuals available to punish, it might be sufficient to respond that those who owned slaves knew or should have known the wrongful nature of their actions and ran the risk that they might later be held to account.<sup>303</sup> Individual prosecutions, however, would not suffice to repair the harm because the full monstrosity of slavery is that the dehumanization of African Americans was *lawful*, built into our nation’s founding documents. Even after emancipation, “the federal government is morally accountable for its support of a deeply entrenched racial hierarchy and its failure to repair the consequences of slavery and Jim Crow.”<sup>304</sup> A prosecutor using the Charging Guidelines would likely conclude that nothing short of entity responsibility would suffice to repair the harm caused.

Moreover, practically speaking, an effort to force individual citizens to pay for reparations would target the descendants of original wrongdoers, thereby raising the ethical-individualism concern in its strongest form. We do not ordinarily visit the sins of parents on their children, let alone descendants separated by many generations. It remains possible, of course, for individuals to accept a duty to pay reparations based on their own family history. As one commentator explains, “with the internet revolution unveiling more family histories and efforts at a federal reparations movement stalled, there is a small but growing group of descendants of slave-owners conducting private efforts at atonement.”<sup>305</sup> Those individual efforts can supplement, but they should not supplant a national accounting of the debt owed to African Americans.

## CONCLUSION

In recent years, debate has intensified as to whether the United States should pay reparations to African Americans. According to proponents, justice requires no less.<sup>306</sup> For centuries, African Americans provided unpaid labor for the benefit of others. The consequences of that injustice are still with us today.

<sup>302</sup> *Id.*

<sup>303</sup> Southern representatives to the drafting of the U.S. Constitution often claimed to be against slavery in principle. See EINHORN, *supra* note 101, at 143 (noting that “when southerners demanded favorable tax treatment to offset the losses they sustained as a result of owning human beings . . . [they] accompanied these demands with pious antislavery rhetoric”).

<sup>304</sup> Lyons, *supra* note 7, at 1386.

<sup>305</sup> John W. Miller, *My Ancestor Owned 41 Slaves: What Do I Owe Their Descendants?*, AM. MAG.: JESUIT REV. (Nov. 28, 2018), <https://www.americamagazine.org/arts-culture/2018/11/28/my-ancestor-owned-41-slaves-what-do-i-owe-their-descendants> [<https://perma.cc/4TH6-AGSR>].

<sup>306</sup> See generally, e.g., BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (2d ed. 2003); ROBINSON, *supra* note 25.

No longer can slavery be excused with polite fictions about kindhearted slave-owners or treated as an equation balanced by bloodshed and emancipation.

And yet, the majority of Americans oppose reparations.<sup>307</sup> If pressed to explain their position, many would echo then-Senate Majority Leader McConnell's statement that there is no basis for reparations because "none of us currently living are responsible."<sup>308</sup> According to this view, the injustices of the past cannot be addressed because the individuals involved—the enslavers and the enslaved—are beyond the reach of earthly justice. This Article has used corporate law to demonstrate that the objection obscures the direct responsibility of the United States.

Like a corporation, the United States is not just an aggregation of citizens, but a permanent entity capable of acting as a person on the world stage. Assertions that individual citizens are innocent should be dismissed as irrelevant to the question of reparations. The United States was founded as a slave-owning nation, the United States built its economic might on the backs of those it enslaved, and it is the United States that must decide whether to confront its own history and to make amends for it.

In closing, we cannot help but appreciate the irony of invoking corporate law to strengthen claims for justice lodged on behalf of the descendants of African American slaves. In the wake of the Civil War, corporations used the Thirteenth and Fourteenth Amendments of the U.S. Constitution, which Congress enacted to protect newly freed slaves, to secure rights for themselves.<sup>309</sup> African Americans did not fully benefit from those constitutional protections for another century. It would be fitting, therefore, if corporate law provided the rationale necessary for reparations to win wider acceptance.

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<sup>307</sup> See Younis, *supra* note 4.

<sup>308</sup> Sonmez, *supra* note 44 (quoting Sen. Majority Leader McConnell).

<sup>309</sup> See generally WINKLER, *supra* note 9.

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