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Constitutionality of Reparations for Native Americans: Confronting the Boarding Schools

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CONSTITUTIONALITY OF REPARATIONS FOR NATIVE AMERICANS: CONFRONTING THE BOARDING SCHOOLS

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I. INTRODUCTION

Crimes of violence and genocide against Native Americans—on land now considered the United States—existed long before the Jamestown colony was formed, African people were imported for slavery, and the United States declared itself free from England. While the harm done is nearly impossible to fully understand or catalogue, the U.S. government's creation of the Native American boarding schools was and still is a particularly gruesome chapter. These "schools" forced tens of thousands of children from their homes, caused the deaths of thousands, and resulted in the destruction of entire nations. In fact, the boarding schools were so horrific that they alone satisfy the definition of genocide, according to the United Nations Genocide Convention.[1]

This Note hopes to provide a springboard for advocates working to create change and obtain reparations in light of the U.S. Department of the Interior's investigation into the Native American boarding schools. It is reasonable to expect the investigation will produce far more horrifying results than non-Native people can imagine.[2] This Note will begin by explaining the historical context and experience of the boarding schools and their impact on survivors, communities, and descendants.[3] Next, this Note will provide a general explanation of reparations and their common forms,[4] followed by a discussion of the international and domestic legal landscape for reparations.[5] The discussion of the U.S. landscape will include an enumeration of the powers held by each branch of government to pass reparations and the respective standards of scrutiny to apply.[6] Finally, this Note will conclude with a look at the Department of the Interior's current investigation and the steps advocates should take to get the best reparations result.[7]

Before proceeding, it is important to address the use of language throughout this Note. It was written with the awareness that no one single term is universally accepted, and each term used to describe Indigenous or Native people is rife with political and cultural pain and history. The term "Indian" will appear on occasion in this Note as it is the formal term used throughout U.S. law. However, this author will use "Native," "Native people," or "Native American" to refer to American Indians, Native Americans, Native Hawaiians, and Alaska Natives whenever possible. The

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[1] *See* discussion *infra* Section IV.A.

[2] The Canadian investigation into only four boarding schools has produced over 1,000 remains of Indigenous children. These four schools represent only 2.5% of the more than 150 schools in Canada. Noelle E. C. Evans, *A Federal Probe into Indian Boarding School Gravesites Seeks to Bring Healing*, NAT'L PUB. RADIO (July 11, 2021), https://www.npr.org/2021/07/11/1013772743/indian-boarding-school-gravesites-federal-investigation [https://perma.cc/K4BU-TL37].

[3] *See* discussion *infra* Part II.

[4] *See* discussion *infra* Part III.

[5] *See* discussion *infra* Part IV.

[6] *Id.*

[7] *See* discussion *infra* Part V.

word "Tribe" is also problematic as it does not accurately describe the sovereign identity of Native Americans, but "Tribe" is a legal term that will appear in this Note to mean "Native nation." This author will use "nation" or "Native nation" whenever possible to properly identify their sovereignty. The term "nation" will not be used to refer to the United States.

Lastly, this author discloses her identity as a white[8] woman and acknowledges the strong likelihood that mistakes may be made in this Note because of her identity as non-Native. In advance, I apologize and hope this Note will still bear fruit for Native Americans and the fight for justice.

II. GOVERNMENT MISTREATMENT OF NATIVE AMERICANS: BOARDING SCHOOLS

A. Historical Context of the Boarding Schools

Native American boarding schools were a product of the Allotment and Assimilation Era of United States-Native American history. Since European settlers first came to North America, attitudes toward Native Americans have swung like a pendulum, creating diametrically opposed eras throughout U.S. history, either recognizing the sovereignty of Native nations or destroying them. The Allotment and Assimilation Era is part of this pendulum swing; people often consider the era as spanning from 1887 to 1928,[9] but there are no clear start or end dates. This era is considered the most devastating period for Native nations because of the rise in federal laws and policies intended to destroy Native cultures, families, and lands.

Allotment and Assimilation was preceded by the Reservation Era.[10] Beginning in 1848, the reservation system was implemented to contain Native nations within the boundaries of land reserved in treaties until Native people were fully assimilated into society.[11] The boarding schools were a

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[8] *See Terminology Style Guide*, NATIVE GOVERNANCE CTR., https://nativegov.org/resources/terminology-style-guide/ [https://perma.cc/2LZ3-99LS] (providing an explanation of when and how to use language to refer to Native Americans). The term "white" is not capitalized because it is not an identity, merely a descriptor; additionally, the capital "W" often aligns with white supremacy, which this author prefers to distinguish herself from in every possible way. *See also* Mike Laws, *Why We Capitalize 'Black' (and not 'white')*, COLUM. JOURNALISM REV. (June 16, 2020), https://www.cjr.org/analysis/capital-b-black-styleguide.php [https://perma.cc/J4FU-BK7K] (highlighting the connection to white supremacy).

[9] ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 104 (American Casebook Series ed., 4th ed. 2020).

[10] *See id.* at 78.

[11] Commissioner of Indian Affairs, William Medill, proposed the reservation system as a federal Indian policy to confine Native Americans on a small reservation of land that would be under the authority of a federal agent. *Id.* at 78–79. In a report to Congress, Medill stated: "[Indians] who have been colonized and confined within reasonable and fixed limits, are rapidly advancing in intelligence and morality, and in all the means and elements of national and individual prosperity." WILLIAM MEDILL, ANNUAL REPORT OF COMMISSIONER OF INDIAN AFFAIRS, S. EXEC. DOC. NO. 31-1 (1848), *as reprinted in* ANDERSON, *supra* note 9, at 80. The goal was that, in the end, Native Americans would be so civilized they would no longer need the "guidance" of the U.S. government. *Id.*

natural continuation of this policy, as their primary purpose was to enhance assimilation by starting with children at a very young age.[12] Although rhetoric circulated in the mid-1800s that the boarding schools, allotment, and assimilation were implemented to support Native Americans, the U.S. government's motives were far from pure.[13] Captain Richard H. Pratt, whose job in the U.S. cavalry was to keep peace with Native Americans,[14] was a proponent of the boarding schools. His famous quote quickly became the "motto" of the boarding schools: "Kill the Indian in order to save the man."[15] At the end of the Civil War, Congress faced a divided country and identified Native American assimilation as the way to model unity in the United States.[16]

B. The Boarding School Experience

The Indian Civilization Fund Act of 1819 ultimately paved the way for the boarding schools by providing funding for the education of Native children.[17] There is no clear record of when the first boarding school took in its first child, but by 1824, nearly 1,000 children were enrolled in thirty-two schools.[18] By 1830, that number jumped to 1,512 children and fifty-two schools.[19] At that time, twenty-nine U.S. states and territories had boarding schools.[20] In 1869, President Grant passed the so-called "Peace Policy,"

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[12] *See, e.g.*, DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION 31 (2d ed. 2020) ("The next Indian war would be ideological and psychological, and it would be waged against children.").

[13] *Cf. id.* (explaining how terms of war were used to talk about the schools and assimilation policies, while maintaining a face of sympathy and support for Native Americans). The all-out warfare waged against Native Americans was morally uncomfortable for the Christian U.S. government, so the idea was to continue the war against Native Americans by bringing in an "army of Christian school-teachers." *Id.*

[14] ADAMS, *supra* note 12, at 44.

[15] ANDERSON, *supra* note 9, at 123. Pratt wrote, "We make our greatest mistake in feeding our civilization to the Indians instead of feeding the Indians to our civilization. It is a great mistake to think that the Indian is born an inevitable savage. He is born a blanket, like the rest of us. Left in the surroundings of savagery, he grows to possess a savage language, superstition and life." *Id.*

[16] *See* Ann Piccard, *Death by Boarding School: "The Last Acceptable Racism" and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137, 151 (2013–2014) ("Congress was tired of war and dismayed by the lack of unity within the country, so it decided Natives would be forced to assimilate to white society and, more important, become good citizens of the United States.").

[17] *U.S. Indian Boarding School History*, NAT'L NATIVE AM. BOARDING SCH. HEALING COAL., https://boardingschoolhealing.org/education/us-indian-boarding-school-history/ [https://perma.cc/GV8J-75WF] [hereinafter HEALING COAL.].

[18] Brett Lee Shelton & Michael Johnson, *Trigger Points: Current State of Research on History, Impacts, and Healing Related to the United States' Indian Industrial/Boarding School Policy*, NATIVE AM. RTS. FUND 1, 6 (2019), https://www.narf.org/nill/documents/trigger-points.pdf [https://perma.cc/6NUU-QATT].

[19] *Id.*

[20] *Id.* at 19. In 1830, twenty-nine states and territories had boarding schools, but the number jumped to thirty after Alaska was purchased in 1867. *Id.*; *Topics in Chronicling America* –

which officially directed the removal of Native children from their homes for placement in full-time residential schools.[21] If Nations failed to voluntarily surrender their children, they were threatened with the loss of rations or annuities (ensuring certain starvation) and even jail.[22] In 1894, nineteen Hopi men were incarcerated in Alcatraz for failing to surrender their children and were held until they demonstrated a desire to cease interference with the United States' plan for assimilation.[23] Eventually, in 1891, Congress passed a law that made attendance at boarding schools compulsory for Native children.[24]

Unlike the more commonly held idea of "school," the primary purpose of these boarding schools was not to provide classes for reading, writing, math, science, etc. In fact, the boarding schools were designed to assimilate Native children "into American life," so the federal government directed that students spend at least half of their "education" time doing industrial work.[25] Many schools were formed after military models, with strict schedules, life in barracks, and corporal punishment[26] for any misbehavior to ensure elimination of "the Indian problem."[27] When boys entered the schools, they were immediately organized into military companies, forced to perform drills, and taught an industrial skill.[28] Girls were often sent to work as domestic caretakers in the community.[29] Students worked to support the school by preparing meals, tending the farm, and performing all housekeeping tasks; many were sent out to work as seasonal laborers on private farms or construction sites.[30] Often, the only academic classes were held early in the morning so most of the day could be left for

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From Territory to Statehood: Alaska and Hawaii, LIBR. OF CONG., https://www.loc.gov/rr/news/topics/FTTSAkHi.html [https://perma.cc/T7G3-AJZ5].

[21] Shelton & Johnson, *supra* note 18, at 7–9. Policy makers would "seize children, deliberately separating them . . . 'from all outside influence and contact with the tribe, which is positively necessary in order to teach them morality.'" *Id.* at 8.

[22] *Let All That Is Indian Within You Die!*, 38 NATIVE AM. RTS. FUND LEGAL REV. 1, 6 (2013), https://narf.org/nill/documents/nlr/nlr38-2.pdf [https://perma.cc/5HJP-X3ZK] [hereinafter *Let All*].

[23] *Id.*

[24] BRENDA J. CHILD, BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES, 1900–1940, at 13 (1998).

[25] Robert A. Trennert, *Peaceably if They Will, Forcibly if They Must: The Phoenix Indian School, 1890–1901*, 20 J. ARIZ. HIST. 297, 304 (1979) (explaining the history of the Phoenix Indian School).

[26] *Id.* Corporal punishment is a form of physical discipline when an adult deliberately inflicts pain upon a child as a response to the action (or inaction) of the child. *Corporal Punishment in Schools*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (2014), https://www.aacap.org/aacap/Policy_Statements/1988/Corporal_Punishment_in_Schools.aspx [https://perma.cc/GN2K-6XXF].

[27] *See* Trennert, *supra* note 25, at 314–15; Shelton & Johnson, *supra* note 18, at 10; *see also* Ivan F. Star Comes Out, *How Does Our Boarding School Experience Affect Us Today?* NATIVE SUN NEWS TODAY (Nov. 4, 2015), https://www.nativesunnews.today/articles/how-does-our-boarding-school-experience-affect-us-today/ [https://perma.cc/6WMX-3Y2X] (explaining how after attending boarding school, enlisting in the military was no change).

[28] Trennert, *supra* note 25, at 314–15.

[29] *Id.* at 310.

[30] *See, e.g.*, *id.* at 304–07; Piccard, *supra* note 16, at 157.

work.[31] For the students, academic achievements were rather trivial: of the seven hundred students who attended the Phoenix Indian School in the first ten years of its operation, only four students received "diplomas" for completing the entire academic curriculum, and eleven graduated having completed the "domestic sciences" curriculum.[32]

While in the schools, all children were forced to abandon their Native identities.[33] The children were prevented from speaking their Native language and practicing their religion, and would be punished for "acting Native."[34] Upon arrival, their clothing was taken and destroyed so they could only wear "white" clothes.[35] Children were tied to chairs so their hair could be cut; in many Native communities "only unskilled warriors who were captured had their hair shingled by the enemy . . . short hair was worn by mourners, and shingled hair by cowards."[36] This was one way children were instilled with shame for their identity as Native Americans.[37]

Children were abused emotionally, psychologically, physically, sexually, and spiritually.[38] The "educators" frequently terrorized the students: some sprayed children with DDT[39] in order to "delouse" them and then prevented them from showering for days, some schools punished children by forcing them to sleep in coffins, still others taught history by showing the children a documentary about concentration camp gas chambers and then immediately ordering the children into group showers.[40] One survivor recalls a boy drowning during a school picnic and the teachers

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[31] Trennert, *supra* note 25, at 304; Piccard, *supra* note 16, at 157; Shelton & Johnson, *supra* note 18, at 10.

[32] Trennert, *supra* note 25, at 317.

[33] *See* Piccard, *supra* note 16, at 152.

[34] *See id.*

[35] *Id.*

[36] ANDERSON, *supra* note 9, at 124 (including an account from Zitkala-Sa, a Dakota woman from the Yankton Sioux Reservation).

[37] *See* Piccard, *supra* note 16, at 152. It is important to understand the importance of hair as a form of cultural identity for many Native Americans. In addition to indicating one's membership in a nation or community, it is also thought of as a physical extension of thoughts, prayers, dreams, aspirations, and history. *The Significance of Hair in Native American Culture*, SISTER SKY (Jan. 4, 2019), https://sistersky.com/blogs/sister-sky/the-significance-of-hair-in-native-american-culture [https://perma.cc/YQ4R-2LDX]. Cutting one's hair is a representation of the end, a death or trauma, and is held until the full moon when it is burned ceremonially with sweetgrass. *Id.* In some communities, a person must get permission to cut their hair and asking is not allowed unless there was a major life change such as a birth or death. Interview with Lani Petrulo, Program Adm'r, Native Am. L. & Sovereignty Inst., Mitchell Hamline Sch. L., in St. Paul, Minn. (Nov. 19, 2021).

[38] Piccard, *supra* note 16, at 152–67.

[39] DDT is a form of insecticide that has been banned in the United States since 1972 because it is known to cause vomiting, tremors, seizures, harm to the reproductive system, and is a carcinogen (a substance that causes cancer). *(DDT) Factsheet*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/biomonitoring/DDT_FactSheet.html [https://perma.cc/S5NM-2WXL].

[40] *Recounting of Sexual Torture by Priests and Nuns Spurs S.D. Bill*, LAST REAL INDIANS (Feb. 9, 2018), https://lastrealindians.com/news/2018/2/9/feb-9-2018-recounting-of-sexual-torture-by-priests-and-nuns-spurs-sd-bill [https://perma.cc/26EW-E24G] [hereinafter *Recounting*].

leaving his body to rot in the playroom for five days before it was removed.[41] If children attempted to run away, they were punished with "physical restraints, beatings, and isolation in unlighted cellars and unlighted and unventilated outbuildings designed as jails."[42] Another survivor recalls being raped by a priest and getting pregnant; the nuns forced her to undergo an abortion and the fetus was incinerated before her eyes.[43] Any children born to students while in the schools "disappeared" along with thousands of children enrolled in the schools who died as a result of disease, malnutrition, and abuse.[44] Burials took place anonymously in mass graves on the schools' grounds; the children's remains were never returned to their families, even to this day.[45]

Throughout the decades, Native Americans attempted to change what was happening, but to no avail.[46] Only after the creation of Native American rights organizations (led by white Americans), such as the Indian Welfare Committee and the American Indian Defense Association, did the federal government's "Indian policy" finally begin to change.[47] The Problem of Indian Administration (known as the "Meriam Report") was published by the Institute for Government Research (now known as the Brookings Institution) in 1928 and exposed the realities of life under federal Indian policies.[48] In spite of this, removal of children continued for another generation. A 1944 congressional report maintained the century-old educational goal of "training the Indian children to accept and appreciate the white man's way of life."[49] It was not until the passage of the Indian Self-Determination and Education Assistance Act in 1975 that nations were allowed to participate in the education of their own children.[50]

Over the course of approximately 150 years, the United States operated 367 schools in thirty states.[51] In 1900, over 20,000 children were

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[41] *Id.*

[42] *Let All*, *supra* note 22, at 7.

[43] *Recounting*, *supra* note 40.

[44] *Let All*, *supra* note 22, at 7.

[45] *Id.* Death was often caused by overcrowding, inadequate sanitation, undernourishment, overworking, and severe discipline. Piccard, *supra* note 16, at 160.

[46] In addition to resisting their children's kidnapping, Native people and nations wrote letters to boarding school officials, threatened to inform superiors, registered complaints with the Indian agents on reservations, and reported the abuse to Washington, D.C. CHILD, *supra* note 24, at 42.

[47] ADAMS, *supra* note 12, at 359–60.

[48] *See* Piccard, *supra* note 16, at 160; ANDERSON, *supra* note 9, at 127.

[49] Shelton & Johnson, *supra* note 18, at 15.

[50] ANDERSON, *supra* note 9, at 151. Although the education reform began, Native schools were still hindered by the Bureau of Indian Affairs (BIA) and the old practices of the boarding schools continued well into the 1990s. Shelton & Johnson, *supra* note 18, at 17. The BIA did not require background checks for job applicants and permitted known pedophiles to teach children, failed to investigate reports of abuse, and did not implement standard policies and procedures required in any other school in the United States. *Id.*

[51] *List of Indian Boarding Schools in the United States*, NAT'L NATIVE AM. BOARDING SCH. HEALING COAL. https://boardingschoolhealing.org/list/ [https://perma.cc/TK7B-VY2B] [hereinafter *List*]; c*f.* HEALING COAL., *supra* note 17 (stating that funding began in 1819 and the boarding schools continued to remove children from families into the 1960s, equaling roughly 150 years).

enrolled, and by 1925, the number increased to over 60,000.[52] It is unknown how many children in total were taken to the boarding schools: tens of thousands of children were removed from their homes by the federal government over the course of 150 years, and hundreds (likely thousands) of these children were never seen again.[53]

C. Historical Trauma and Direct Impact

Violent colonization of Native Americans, especially the boarding school system, produced a phenomenon known as "historical trauma" or "intergenerational trauma," defined as a "cumulative emotional and psychological wounding across generations, including one's own lifespan."[54] Simply put, the events occurred in the past but interact with the present: the impacts transfer from generation to generation and continue to accumulate through psychological, genetic, environmental, psychosocial, social, and economic means.[55] Children raised in boarding schools were forced to "Americanize," but the so-called "curriculum" failed to provide any model of family; without growing up with a loving and nurturing community, the children did not know how to be parents themselves.[56] Often, the only parenting behavior boarding school children learned was from the relationship with their teachers, which was incredibly abusive.[57]

These experiences left children with low self-esteem and isolated from their families. The students were "Americanized," having learned the "white man's ways," but were unable to fully rejoin their families and were excluded from white society because of their identity as Native.[58] The culture and traditions of their families were foreign to them and they were left out, unsure of how to relate.[59] One Lakota man, Ivan Star Comes Out, described

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[52] HEALING COAL., *supra* note 17.

[53] *Id.; see also Joint Submission to the UNWGEID 118th Session on the Obstacles in the United States of America to Implementation of the Declaration on the Protection of All Persons from Enforced Disappearance; and on Individual Disappearances*, OFF. HIGH COMM'R FOR HUMAN RTS (Apr. 12, 2019), https://secureservercdn.net/198.71.233.187/ee8.a33.myftpupload.com/wp-content/uploads/2019/05/WGEID-Filing_Final-Submission_04122019.pdf [https://perma.cc/LFB3-VUXX] (calling for a formal investigation and account on the disappeared children, of which the total number is unknown).

[54] Piccard, *supra* note 16, at 162.

[55] Shelton & Johnson, *supra* note 18, at 2.

[56] Piccard, *supra* note 16, at 161 n.111. *See* Shelton & Johnson, *supra* note 18, at 39 (discussing how parenting behaviors are learned from reenacting parenting techniques from childhood). *See also* Maria Yellow Horse Brave Heart, *The Historical Trauma Response Among Natives and Its Relationship with Substance Abuse: A Lakota Illustration*, 35 J. OF PSYCHOACTIVE DRUGS 7, 9 (2003) ("Boarding school survivor parents lack healthy traditional Native role models of parenting within a culturally indigenous normative environment. This places parents at risk for parental incompetence. Traumatic childhood experiences may result in emotional unavailability of parents for their own children.").

[57] Shelton & Johnson, *supra* note 18, at 39.

[58] *See* Piccard, *supra* note 16, at 163; ANDERSON, *supra* note 9, at 125.

[59] Star Comes Out, *supra* note 27 (describing his experience of returning to his reservation after attending boarding school).

his experience:

> I did not know the Lakota ceremonies . . . I did not know who my relatives were and also did not know how to live in that ancient manner within a tiospaye and I had no knowledge of my family and tiospaye history. I was a white boy on the inside. Consequently, I spent most if not all of my adult life actually relearning "how to be Lakota."[60]

Trauma felt by boarding school students (and their descendants) often manifests itself through alcoholism, drug abuse, suicide, domestic violence, and premature death.[61] Studies on the subject have shown that the trauma incurred by separation from one's family and forced assimilation increases psychological distress.[62] Psychological distress encompasses a variety of conditions, like post-traumatic stress disorder (PTSD), anxiety, and depression, that then increases the likelihood of alcohol and substance use and dependency, as well as suicidal ideation and attempts.[63] Psychological distress and chemical dependency are often co-occurring disorders,[64] both of which occur in Native American populations at higher rates than any other population in the United States.[65] Native Americans who attended boarding schools were fourteen percent more likely to develop alcohol use or dependence, up to forty-one percent more likely to abuse drugs, and twenty-seven percent more likely to have attempted suicide than Native Americans who did not attend a boarding school.[66]

The trauma and its effects experienced by boarding school survivors are passed onto their children in many ways: observed and learned behaviors, unconscious transmission, communication patterns, biological and neurobiological risk factors, and epigenetics.[67] Native children raised by

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[60] *Id.* "Tiospaye" is a Lakota word that refers to the wide, extended families that can be formed through adoption, marriage, and birth; it also encompasses the idea of ongoing, re-emerging, and new relationships. Jose Barreiro, *On Pine Ridge: Tiospaye Talk*, INDIAN COUNTRY TODAY (Sept. 12, 2018), https://indiancountrytoday.com/archive/on-pine-ridge-tiospaye-talk [https://perma.cc/VP3H-GLC7].

[61] Piccard, *supra* note 16, at 152.

[62] Shelton & Johnson, *supra* note 18, at 43.

[63] *Id.*

[64] *Id.* at 44.

[65] *Id.*

[66] *See* Teresa Evans-Campbell, Karina L. Walters, Cynthia R. Pearson & Christopher D. Campbell, *Indian Boarding School Experience, Substance Use, and Mental Health Among Urban Two-Spirit American Indian/Alaska Natives*, 48 AM. J. DRUG & ALCOHOL ABUSE 421, 424–25 (Sept. 2012) (explaining the ties between the boarding schools and mental and chemical health).

[67] Shelton & Johnson, *supra* note 18, at 44–45. The authors provide examples of how some of these "pathways" are used to conduct the trauma between generations. *Id.* Unconscious transmission is a product of colonizers limiting the traditional practices a community can use to deal with grief, causing decades of unresolved and disenfranchised grief. *Id.* at 45. Communication includes a "conspiracy of silence" among survivors. *Id.* Additionally, extremely stressful events can transform how a person's body reads their DNA, including suppression of characteristics such as trauma responses and management. *Id.* A more

Native people who were forced to attend a boarding school are twelve percent more likely to experience chronic anxiety, seven percent more likely to experience PTSD symptoms, nine percent more likely to have had suicidal thoughts, and eleven percent more likely to have attempted suicide than Native children raised by someone who did not attend boarding school.[68] Another Lakota man told the story of growing up with a parent who was a survivor of the boarding schools:

> I've never bonded with any parental figures in my home. At seven years old I could be gone for days at a time and no one would look for me. I've never been to a boarding school. All the abuse we talk about happened in my home. Maybe if it had happened by strangers it wouldn't have been so bad—the sexual abuse, the neglect. Then I could blame it all on another race.[69]

This is only one reflection of growing up as the child of a boarding school survivor. The statistics and stories demonstrate how the effects of the boarding schools continue to echo through Native communities today.

D. Ripple Effects

In addition to the intergenerational trauma within families (demonstrated through heartbreaking statistics of increased drug and alcohol dependence, violence, and abuse), the effects of the boarding schools are even broader. After nearly 150 years of boarding school education and abuse, there is now a bitter distrust within Native communities toward the U.S. school system. Curriculum in U.S. schools teaches history at the expense of Native people—disregarding Native heritage, language, and culture; aligning with the dispossession of Native lands; and continuing the legacy of the schools used to destroy Native families and assimilate children—demonstrating that schools are "a

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complete review of the role trauma plays in development is beyond the scope of this Note, but many sources are available to learn more. *See generally* Mary Annette Pember, *Trauma May Be Woven into DNA of Native Americans*, INDIAN COUNTRY TODAY (Sept. 13, 2018), https://indiancountrytoday.com/archive/trauma-may-be-woven-into-dna-of-native-americans [https://perma.cc/LS84-G9W5] ("The science of epigenetics . . . suggests that our genes can carry memories of trauma experienced by our ancestors and can influence how we react to trauma and stress."); *Adverse Childhood Experiences and the Lifelong Consequences of Trauma*, AM. ACAD. PEDIATRICS (2014), https://cdn.ymaws.com/www.ncpeds.org/resource/collection/69DEAA33-A258-493B-A63F-E0BFAB6BD2CB/ttb_aces_consequences.pdf [https://perma.cc/NDD5-LPPD] (explaining the long-term health consequences for children exposed to trauma); Jack P. Shonkoff & Andrew S. Garner, *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, AM. ACAD. PEDIATRICS (2012) ("[S]tress-induced changes in the architecture of different regions of the developing brain . . . can have potentially permanent effects on a range of important functions, such as regulating stress physiology, learning new skills, and developing the capacity to make healthy adaptations to future adversity.").

[68] Evans-Campbell, *supra* note 66, at 425–26.

[69] Piccard, *supra* note 16, at 162 n.115.

battleground of sovereigns."[70]

The purpose of education is to ensure that people share common knowledge rooted in logic that builds a career and more firmly embeds them into society.[71] Given the reality that U.S. schools are a "battleground of sovereigns" and the U.S. government's repeated failure to fulfill its trust responsibility for Native Americans, is it any wonder the education system has failed Native American children?[72] According to the National Assessment of Education Progress, Native American reading scores are roughly thirty points behind white students, as high as forty points behind Asian/Pacific Islander students, and several points behind both Black and Hispanic students.[73] There are some successful models of schools that have managed to close the education gap between Native and non-Native students, and this is accomplished by combining and honoring language and cultural aspects of Native communities within the required lessons.[74] However, most public schools still perpetuate assimilative goals by focusing on specific kinds of knowledge and individualism, while ignoring Native heritage.[75] Most American history textbooks leave out or minimize anything that reflects poorly on the United States, which includes nearly all interactions between the United States and Native nations, so the elimination of Native history from American history textbooks effectively prohibits cultural integration or acceptance of alternative perspectives.[76]

The education gap is one example of how historical trauma caused by the United States has ensured Native Americans are left behind. A study in 2010 revealed 0.9% of the U.S. population identified as Native, and 1.7% identified as being Native in addition to another race.[77] Of Native youth, only 17% attend post-secondary education compared to 60% for the total U.S. population.[78] Approximately 26.8% of Native Americans live in poverty, and the median household income for Native Americans in 2017

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[70] Bryan McKinley, Jones Brayboy & K. Tsainina Lomawaima, *Why Don't More Indians Do Better in School? The Battle Between U.S. Schooling & American Indian/Alaska Native Education*, 147 DÆDALUS 82, 83 (2018) (explaining the curriculum of the Department of Education and how it harms Native identity).

[71] *Id.*

[72] *Cf. id.* (explaining that the federal government has a trust relationship with Native Americans that dates back to treaties and the case *Cherokee Nation v. Georgia*, which first characterized the "ward-guardian" relationship between the U.S. government and Native Americans. 30 U.S. 1, 17 (1831)). The boarding schools are one example of how the United States has breached that trust, and there are hundreds more. *See* discussion *supra* Sections II.A–B. *See also* McKinley, *supra* note 70, at 87 (explaining how Native children fight assimilation in schools every day, even in recent years).

[73] McKinley, *supra* note 70, at 88.

[74] *Id.* at 91.

[75] *Id.* at 91–92.

[76] *See* Rose Weston, Note, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 ARIZ. J. INT'L & COMP. L. 1017, 1041 (2001) (advocating for and explaining a truth commission model to address Native genocide).

[77] *Demographics*, NAT'L CONG. AM. INDIANS, https://www.ncai.org/about-tribes/demographics [https://perma.cc/Z5Z6-9T4Q].

[78] *Id.*

was $40,315, which is $17,000 below the nation as a whole.[79] Furthermore, less than 1% of Native Americans own their home.[80]

Statistics paint a bleak picture of Native realities. Although it is impossible to quantify the extent of the boarding school system's contribution to the current statistics—as one traumatic experience cannot be severed from all others—the well-known effects of that trauma (for the victims and their descendants) point to extensive correlation between the harm done and the current statistics. Moreover, the failure of the United States to provide any adequate remedy for the cultural genocide of Native Americans has exacerbated the problem. The Department of the Interior's investigation provides a unique opportunity for the U.S. government to try and make corrections. As the following section will explain, one part of reparations is the collection of data and information to justify the reparations; the Department of the Interior's investigation should provide what is needed to begin this important process.

III. ABOUT REPARATIONS AND NATIVE AMERICANS

A. General Review

Payment of reparations is one method to remedy harm done to another. In a legal sense, reparations are claims for damages based on the wrongfulness of an act.[81] However, repayment for harms on the level such as those perpetrated by the United States against Native Americans who attended the boarding schools are immeasurable: no action will bring back the children who died or repair the intergenerational and cultural damage caused by these "schools."[82] Nevertheless, reparations of this magnitude would consist of four elements: (1) payment to a group; (2) for wrongs that were permissible under prevailing law when committed; (3) in which current law bars a compulsory remedy for the past wrong; and (4) the requested reparations are justified on grounds of corrective justice rather than deterrence.[83] The payment referred to in element one is not limited to monetary compensation. Examples of current laws prohibiting remedy

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[79] *Id.*

[80] *Id.*

[81] Piccard, *supra* note 16, at 170 n.152 (citing David C. Gray, *Extraordinary Justice* 62 ALA. L. REV. 55, 58 n.15 (2010)).

[82] *Id.* at 164–65. It is important to remember that very little research has been done into the discovery of U.S. boarding school harms, but Canada has begun this process. *See* Ian Mosby & Erin Millions, *Canada's Residential Schools Were a Horror*, SCI. AM. (Aug. 1, 2021), https://www.scientificamerican.com/article/canadas-residential-schools-were-a-horror/ [https://perma.cc/W3U8-Z5K4]. Canada had 139 federally run Native American boarding schools (modeled after the United States), and researchers have uncovered over 1,300 unmarked graves between four of the schools they have searched so far. *Id.* Recall that, in the United States, there were 367 boarding schools run by the federal government. *See supra* text accompanying note 49.

[83] Jack Davis, Note, *The Public Use of Reparations: How Land-Based Reparations Can Satisfy the Public Use Requirement of the Takings Clause*, 104 MINN. L. REV. 2105, 2112 (2020) (arguing the takings clause could be used to provide reparations for Black Americans).

mentioned in element three include defenses such as sovereign immunity or statute of limitations; therefore, a government body should pass legislation that circumvents these defenses.[84]

To begin this process, a demand for reparations must be prepared to articulate the relationships between the original offender and original victim, the original offender and the possible present payer, and the original victim and possible present beneficiary.[85] However, for any reparations to be truly effective, there must be a formal acknowledgement of the past harm, current injury, and a commitment to support the victims' healing.[86] In this case, Native Americans must be allowed to define the remedy, and the obligation of the United States must continue until all past injustices no longer seep into the present.[87]

The federal government's attempts at recompense over the past few decades have not come close to acknowledging the expansive genocide perpetrated against Native Americans, nor the effects and consequences of the boarding schools. In 2010, the Defense Appropriations Act was passed and included in Title 8, "General Provisions," a section apologizing for the harms perpetrated against Native Americans. However, it is a very limited apology.

> The United States, acting through Congress . . . recognizes that there have been years of official depredations, ill-conceived policies, and the breaking of covenants by the Federal Government regarding Indian tribes; apologizes on behalf of the people of the United States to all Native Peoples for the many instances of violence, maltreatment, and neglect inflicted on Native Peoples by citizens of the United States; expresses its regret for the ramifications of former wrongs and its commitment to build on the positive relationships of the past and present to move toward a brighter future . . . urges the President to acknowledge the wrongs of the United States against Indian tribes . . . . Nothing in this section—authorizes or supports any claim against the United States . . . .[88]

The Act fails to mention any specific harms, including the boarding schools, the present and continuing harm inflicted on Native communities through newer policies, as well as the residual effects of prior harms.[89] The U.S. government has passed some legislation, such as the Native American

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[84] *Id.*
[85] *Id.* at 2113.
[86] Piccard, *supra* note 16, at 170.
[87] *Id.*
[88] Department of Defense Appropriations Act, Pub. L. No. 111-118, § 8113(a–b), 123 Stat. 3409, 3453 (2010).
[89] *See* Piccard, *supra* note 16, at 165.

Graves Protection and Repatriation Act (NAGPRA),[90] as a gesture toward healing. However, the reality is that there are many hurdles to reclaiming Native American remains and sacred objects buried long ago: museums are often able to overcome the Act, and even if the descendants do reclaim their ancestor's remains or funerary objects, the descendants are often unable to adhere to religious or cultural burial rites because they no longer reside on their traditional homelands.[91]

Some legal writers refer to two federal actions in particular as "reparations" for Native Americans: the Alaska Native Claims Settlement Act (ANCSA) and the Supreme Court's ruling in *United States v. Sioux Nation of Indians*.[92] However, neither of these supposed reparations are even considered a gesture of good will by the affected nations, let alone a form of reparations.[93]

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[90] Native American Grave Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2018). This Act is a human rights law that requires museums and federal agencies to return human remains, funerary objects, sacred objects, and cultural patrimony to the descendant of the individual, the nation, or appropriate organization. *NAGPRA Compliance*, ASS'N AM. INDIAN AFF., https://www.indian-affairs.org/nagpra-compliance.html [https://perma.cc/DRP8-3FR4]. It also requires any prospective investigation or archeology of a possible burial ground to preserve the site and consult with the relevant nation. FRANCIS P. MCMANAMON, *NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT*, ARCHAEOLOGICAL METHOD AND THEORY: AN ENCYCLOPEDIA (Linda Ellis ed., 2000), *reprinted in Archaeology Program*, NAT'L PARK SERV., https://www.nps.gov/archeology/tools/laws/nagpra.htm [https://perma.cc/X4SU-RJF6].

[91] *See* Piccard, *supra* note 16, at 170; Native American Grave Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2018); *Facilitating Respectful Return*, NAT'L PARK SERV., https://www.nps.gov/subjects/nagpra/index.htm [https://perma.cc/G7KZ-99VL]. Native Americans lost access to their loved ones' graves at multiple points throughout centuries of U.S. policymaking, including when Native Americans were forced off their land during the Removal Era following the Indian Removal Act of 1830. *See* ANDERSON, *supra* note 9, at 52. Native Americans were forced off their land on the East Coast and given lands west of the Appalachians "in exchange," but even their newly promised lands were eliminated yet again through the General Allotment Act of 1887. *See id.* at 104. The General Allotment Act divided up reservation land by parcels given to each head of household and the remaining land was sold to intrepid settlers or for resource extraction. *See id.*; Petrulo, *supra* note 37.

[92] 43 U.S.C. §§ 1601–1629 (2018); United States v. Sioux Nation of Indians, 100 S. Ct. 2716 (1980).

[93] *See generally* Meghan Sullivan, *Alaska Natives' Complicated Identities*, INDIAN COUNTRY TODAY (July 15, 2021), https://indiancountrytoday.com/news/alaska-natives-complicated-identities [https://perma.cc/NV7Z-H79X] (explaining how not all Alaska Natives are able to obtain membership in the corporations, may not be enrolled in the right corporation, and not all Native villages gained access to land under ANCSA); Meghan Sullivan, *The Modern Treaty: Protecting Alaska Native Land, Values*, INDIAN COUNTRY TODAY (June 7, 2021), https://indiancountrytoday.com/news/the-modern-treaty-protecting-alaska-native-land-values [https://perma.cc/WZ66-3APU] (explaining the responsibility of Alaska Natives as stewards of the land since time immemorial); Paul Ongtooguk, *ANCSA at 40: Where Are We and Where Are We Going?*, ANCHORAGE DAILY NEWS (June 29, 2016), https://www.adn.com/commentary/article/ancsa-40-where-are-we-and-where-are-we-going/2012/03/17/ [https://perma.cc/68AE-N779] (stating ANCSA created a pathway to assimilation and abandonment of culture). *See also* discussion *infra*, notes 101–02 (explaining the Sioux Nation's rejection of the settlement).

First, ANCSA[94] was passed in a political climate hoping to gain access to Alaska's Prudhoe Bay and the newly discovered oil it contained.[95] It allowed Alaska Native villages to reserve 44 million acres of land in exchange for selling the remaining 272 million acres they used to occupy.[96] It did provide some payment to the Alaska Native villages for the loss of their land.[97] However, in the 1998 U.S. Supreme Court case, *Alaska v. Native Village of Venetie Tribal Government*, it was determined that none of the lands reserved for the Native villages were considered "Indian Country" and thus could not be protected as such by the federal government.[98] Rather than ANCSA being any form of repayment to Native Americans, it is land piracy.[99] When the land reserved is less than fourteen percent of what was formerly possessed, and the land taken is mined for resources and desecrated, the "reparation" is a far cry from justice.[100] For Alaska Natives, subsistence is at the core of their identity and is a spiritual and cultural way to continue their heritage.[101] The land must be protected at all costs, and that onus is on the Native people.[102] The divestment of land that happened through ANCSA cut to the core of this responsibility. Viewed through the lens of Alaska Natives, ANCSA and its resulting effects are possibly as far away from reparations as the government could get.

The second commonly cited "reparation"[103] stems from the Supreme Court's ruling in *United States v. Sioux Nation of Indians*.[104] In

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[94] 43 U.S.C. §§ 1601–1629 (2018).
[95] ANDERSON, *supra* note 9, at 295.
[96] *Id.*
[97] *Id.*
[98] Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 526 (1998).
[99] Some legal scholars have considered ANCSA to be a form of reparations as it established a trust fund for Alaska Natives that held any profits from resource extraction. *See, e.g.*, Ryan Fortson, *Part 3: Models of Reparations for Slavery: Correcting the Harms of Slavery: Collective Liability, the Limited Prospects of Success for a Class Action Suit for Slavery Reparations, and the Reconceptualization of White Racial Identity*, 6 AFR.-AM. L. & POL'Y REP. 71, 107 (2004) (discussing the need to provide reparations for Black Americans and slave descendants). Fortson justified this "award" of land as proper by citing to the plenary power of Congress over Native Americans and providing payment in response to the takings. *Id.* at 109. However, Fortson appears not to have recognized the legal fiction that is Congressional plenary power over Native Americans. Plenary power does not derive its existence in any governing document, and in this author's opinion it is merely a fiction of convenience for the U.S. government to exploit Native people, communities, and land for its own gain. *See* United States v. Lara, 541 U.S. 193, 224–26 (2004) (Thomas, J., concurring) (explaining that the U.S. Supreme Court has failed to find any source of power that would permit a finding of Congressional authority as employed by its supposed plenary power).
[100] *See* discussion *supra* notes 89–92.
[101] Rosita Worl, *Reconstructing Sovereignty in Alaska*, CULTURAL SURVIVAL QUARTERLY: 25-3 FROM OUR READERS (Apr. 2, 2010), https://www.culturalsurvival.org/publications/cultural-survival-quarterly/reconstructing-sovereignty-alaska [https://perma.cc/2FXS-W7ZG].
[102] *Id.*
[103] *See, e.g.*, Davis, *supra* note 83, at 2127 (claiming that the payment can be considered a quasi-reparations scheme to inspire reparations for slavery).
[104] 448 U.S. 371 (1980). "Sioux" refers to the Lakota people, but this is not the name that the nations or people gave themselves. Because this term (Sioux) relates to the lawsuit—and the

that case, the Sioux Nation brought suit against the U.S. government alleging unlawful abrogation of the Fort Laramie Treaty of 1868, which reserved the Black Hills (among other things) for the Sioux Nation.[105] The Court determined the 1877 Act that divested the Sioux Nation of the Black Hills constituted a "taking" of land by the government, as that land was set aside for the exclusive occupation of the Sioux Nation; therefore, just compensation, including interest, must be paid.[106] However, the land was and still is far more valuable to the Sioux Nation than the over $1.3 billion settlement still unclaimed in the U.S. Treasury.[107] The various Plains nations hold the Black Hills as a sacred place, akin to Jerusalem or Mecca,[108] and want the land returned in addition to monetary compensation for the denial of access and use, which the United States promised in the Fort Laramie Treaty of 1868.[109]

If there is any thread of truth that either ANCSA or the *United States v. Sioux Nation of Indians* ruling were intended as mechanisms for reparations, then they demonstrate that reparations written without the full participation of the victims are not reparations at all.

B. Types of Reparations: Monetary

Reparations are traditionally paid via monetary compensation or land acquisition (and sometimes both). Monetary reparations are a more traditional legal remedy as American courts often determine awards in terms of money.[110] Whenever monetary damages are awarded by a court, the goal is to return the aggrieved party to the position they would have been in without the injustice.[111] Land reparations, as they relate to Native Americans, would be comparable to specific performance.[112]

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party name is "Sioux Nation of Indians" and involved multiple nations within the Lakota—I am using the term "Sioux Nation" here. However, it is important to acknowledge that "Sioux" is rarely (if ever) the proper identifier.

[105] *Id.* at 374. As a result of the federal government's abandonment of its responsibility to protect the Sioux Nation and reserved lands from enterprising settlers, the Great Sioux War eventually escalated to what is known as the Battle of Little Bighorn. *Id.* at 380. Even though the Sioux Nation won the battle, the U.S. government won the war by restricting all access to food unless the Sioux people relinquished the Black Hills. *Id.* at 381.

[106] *Id.* at 424.

[107] *Why the Sioux Are Refusing $1.3 Billion*, PBS: CANVAS (Aug. 24, 2011), https://www.pbs.org/newshour/arts/north_america-july-dec11-blackhills_08-23 [https://perma.cc/3RL3-25Q8] [hereinafter PBS].

[108] Tim Giago & Nanwica Kciji, *The Black Hills Are Not for Sale*, INDIANZ.COM (July 6, 2020), https://www.indianz.com/News/2020/07/06/tim-giago-the-black-hills-are-not-for-sa.asp [https://perma.cc/BN5B-YKBB].

[109] *Id.*

[110] *See* Colleen P. Murphy, *Money as a "Specific" Remedy*, 58 ALA. L. REV. 119, 120 (2006).

[111] Piccard, *supra* note 16, at 175.

[112] In contract law, specific performance is granted by a court when monetary damages are inadequate to fix the harm and is commonly awarded when the dispute involves real property. *Specific Performance*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/specific_performance [https://perma.cc/68NV-W5P2]. Although the breach of a treaty is not equivalent to the breach of a contract, specific performance as a concept is certainly applicable here.

Monetary reparations are gaining more attention as both private and public entities have begun the process of providing reparations for descendants of people that the U.S. or its institutions enslaved and other victims of discriminatory laws and practices. Private entities, such as Georgetown University, are creating reparations programs to remedy their past reliance on slavery by using their current profits and power to eliminate the wealth gap created by slavery.[113] The Jesuits, a religious order of the Roman Catholic Church, have partnered with and pledged to provide reparations to enslaved people whose ancestors were forcibly owned and sold by the Jesuits to finance churches.[114] Even government entities have gotten on board, most notably the City of Evanston, Illinois, which established a reparations program in November 2019.[115] Eligible applicants for reparations are those who lived in the city, or are descendants of those who lived in the city, between 1919 and 1969 and identify as Black or African American.[116] The City of Evanston is using reparations to support home ownership, home improvement, and mortgage assistance to rectify the harms perpetrated by discriminatory housing laws enacted by the city between 1919 and 1969.[117] To avoid imposing tax burdens, the city pays the funds directly to the financial institution or vendor rather than the resident.[118] Evanston's program is the first of its kind in the nation and paves the way for many other governments to follow.

C. Types of Reparations: Land-Based

Land-based reparations are more desirable for Native Americans for many reasons (some of which are addressed throughout this Note),[119] but they are far less common in the United States. The first possible path to

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[113] V.P. Franklin, *Georgetown Students Demonstrate How Reparations Can Be Made to African-American Students*, AM. CIV. LIBERTIES UNION: NEWS & COMMENT. (May 22, 2020), https://www.aclu.org/news/racial-justice/georgetown-students-demonstrate-how-reparations-can-be-made-to-african-american-students/ [https://perma.cc/WG3E-558Y].

[114] Rachel L. Swarns, *Catholic Order Pledges $100 Million to Atone for Slave Labor and Sales*, N.Y. TIMES (Mar. 15, 2021), https://www.nytimes.com/2021/03/15/us/jesuits-georgetown-reparations-slavery.html [https://perma.cc/Q4JM-4CC4].

[115] *Evanston Local Reparations*, CITY OF EVANSTON, https://www.cityofevanston.org/government/city-council/reparations [https://perma.cc/ZU8C-MMPX]. It is important to note that the City of Evanston developed this reparations program in partnership with the Equity and Empowerment Commission for the city, the City Council, and the community (including community conversations in community meetings and town halls). *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] There are many Indigenous-led campaigns and organizations working to restore land to Native nations. *See, e.g.*, *NDN Collective Landback Campaign Launching on Indigenous People's Day 2020*, NDN COLLECTIVE, https://ndncollective.org/ndn-collective-landback-campaign-launching-on-indigenous-peoples-day-2020/ [https://perma.cc/DQH3-ELUJ]; *Supporting Indigenous Sovereignty*, INDIGENOUS CLIMATE ACTION, https://www.indigenousclimateaction.com/pathways/sovereignty-and-self-determination [https://perma.cc/YK8M-HKU3].

land-based reparations would be the return of land the U.S. government holds in trust to the nations.[120] The land trust system was adopted after the General Allotment Act was passed and divested Native nations of two-thirds of their original reserved land.[121] In 1887 (prior to the General Allotment Act), treaties reserved 138 million acres for Native nations, and by 1934, only forty-eight million acres remained for Native nations.[122] Much of this land was taken from the nations by fraudulent sales, tax payments, and through government-brokered sales—all of which were founded on a legal doctrine with no evidentiary basis: plenary power.[123] The federal government put the land into trust to prevent such a divestiture from happening again; the trust system today still imposes certain federal restrictions while also (supposedly) keeping the land free from state interference.[124] The release of lands from federal restrictions would be one form of land reparations as it would recognize Native nations' ability to self-govern as the sovereign powers they are.

The second path for land-based reparations would involve the U.S. government upholding, or recognizing, the original boundaries created through treaties with each nation.[125] Treaty-making began shortly after colonizers first came to North America, but it was rife with duplicity, first from European kings and then the U.S. government.[126] Eventually, treaties became more about the nations ceding land to the United States in exchange for peace and support; these treaties included provisions ensuring each nation's reserved land would be "their permanent home" and "no future

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[120] Native nations are sovereigns, the United States recognizes this throughout court opinions, laws, treaties, and history. This author is unaware of any other sovereign nation in the world whose land is held in trust by another sovereign.

[121] ANDERSON, *supra* note 9, at 107.

[122] *Id.*

[123] *Id.* at 108. In 1903, the U.S. Supreme Court held that Native nations (here, the Kiowa Nation) do not need to consent to the loss of their land and formally announced Congress's unilateral power to abrogate a treaty. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) ("[I]t was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians."). Plenary power is the complete power over a particular area with no limitations. *Plenary Power*, CORNELL L. SCH.: LEGAL INFO. INSTIT., https://www.law.cornell.edu/wex/plenary_power [https://perma.cc/2QJQ-YUP2]. Plenary power is used by Congress to regulate interstate commerce and Native Americans. *Id. See also supra* text accompanying note 93 (Justice Thomas explains there is no record or source for this power).

[124] *Trust Land*, NAT'L CONF. STATE LEGIS., https://www.ncsl.org/legislators-staff/legislators/quad-caucus/trust-land-overview.aspx [https://perma.cc/73X3-6Y4T].

[125] In the recent Supreme Court decision, *McGirt v. Oklahoma*, the Court upheld the 1832 Treaty between the United States and the Creek Indians. 140 S. Ct. 2452, 2459 (2020). Justice Gorsuch wrote for the majority and explained that the attempts of Oklahoma (and the dissent) to include history or caselaw in this interpretation are unnecessary and, in fact, "none of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here." *Id.* at 2474. By applying basic rules of textualist interpretation, the treaty was upheld, as it should be. *See id.*

[126] ANDERSON, *supra* note 9, at 25. For example, the "League of Peace Entered Into by Massasoit and the First Settlers of New Plimouth" provided a different document with different language to King James. *Id.* at 26.

treaty . . . [would] be of any validity or force."[127] Therefore, the return to established treaty boundaries would be a reasonable (albeit long overdue) form of land reparations for Native nations.[128]

The third method of land-based reparations involves the restoration of stolen lands,[129] which is already within the power of the federal government under the Fifth Amendment "Takings Clause" of the Constitution.[130] Traditionally, takings are the ability of a government to gain title to land for public use, but they require payments of just compensation to the original owner in exchange for the land.[131] In this case, the land would be taken for the public purpose of reparations and given back to the nations.[132] One problem that is foreseeable is the possibility of repeating the outcome of *United States v. Sioux Nation of Indians*.[133] Again, in that case, the Supreme Court awarded monetary compensation to the Sioux Nation rather than returning the land, though the Court did determine that the taking of the Black Hills was a taking under the Constitution.[134] It is unclear from the Court's opinion what the Sioux Nation demanded when bringing the lawsuit, but in the eyes of the Sioux Nation, the confiscation of the land was illegal, and acceptance of the monetary settlement awarded by the Supreme Court would communicate validity of the "sale."[135] Although the government is authorized by the Takings Clause to return the stolen land, the Supreme Court would likely find a way to apply the holding in *Sioux Nation of Indians* even in the inverse situation—only providing monetary compensation.[136]

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[127] *Id.* at 85–87.

[128] Whether this is a proper form of reparations is debatable. Reparations should be an effort to compensate for the harm done; the failure of the United States to uphold its treaty obligations—including land boundaries and Treaty Rights—is another harm suffered by Native nations. So, the United States simply upholding its obligations is a far cry from true reparations. A full discussion of this is outside the scope of this Note.

[129] Stolen land here includes the land involved in coercive treaties and agreements, such as the one that removed the Black Hills from the Sioux Nation. *See* discussion *supra* notes 99–100. It can also refer to the land lost through the General Allotment Act, which was a unilateral abrogation of the treaties by the United States, although it was not referred to as such until later.

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

[131] *Takings*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/takings [https://perma.cc/4HET-RPYS].

[132] Davis, *supra* note 83, at 2107. *See also* Kelo v. City of New London, 545 U.S. 469, 485 (2005) (upholding the takings clause and allowing the government to take lands for the broader definition of "public purpose" and not simply "public use").

[133] 448 U.S. 371, 424 (1980).

[134] *Id.*

[135] PBS, *supra* note 107.

[136] This author arrived at this conclusion based on readings of Native law cases where the majority (and often concurrences) consistently found ways to remove authority and sovereignty from Native nations, especially when it comes to protecting U.S. land rights at the expense of Treaty Rights or Native sovereignty. *Cf.* Johnson v. M'Intosh, 21 U.S. 543 (1823) (invalidating Native title); Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (requiring nations to submit to the United States); Lone Wolf v. Hitchcock, 187 U.S. 553 (1902) (allowing Congress to unilaterally abrogate treaties); Alaska v. Native Village of Venetie

D. Truth Commissions

Although truth commissions are not a form of reparations *per se*, they are an important component of reparations and merit some discussion. A truth commission is used to promote a country-wide healing process and is similar to the process that psychologists use to help victims recover from emotional trauma.[137] It allows for an investigation of "broad patterns of human rights abuses in a country and creat[es] an authoritative, officially recognized record of past crimes and misdeeds."[138] The goal of a truth commission is to talk about what is happening now as a result of the past.[139]

Truth commissions create a record of facts (from all available sources, including the affected community) that helps to settle long-standing disputes and provide education about the discrimination (and typically genocide) against the affected population, in this case, Native people.[140] Additionally, the record created can be used as a highly-persuasive and comprehensive resource for judges, educators, legislators, and anyone who needs access to a full, unbiased account of the harm (here, the genocide against Native people).[141]

Truth commissions have been used in places like South Africa[142] and Rwanda[143] to promote peace and healing after genocide. Truth commissions are currently active in Canada[144] and Australia[145] as the countries attempt to work through the genocide against their own Indigenous people. Although compensation and legislative or social change are not the goal of truth commissions, it is a natural product of the record of facts produced by the commission.[146]

IV. LEGAL LANDSCAPE FOR REPARATIONS

It is difficult to discuss reparations, whether formal or informal, especially when the reparations are for the genocide of Native Americans by the United States. It is even harder to get a governmental hearing on the

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Tribal Gov't, 522 U.S. 520 (1998) (refusing to protect Native land rights); Oklahoma v. Castro-Huerta, 597 U.S. ___ (2022) (muddying sovereignty by allowing state police enforcement and laws to apply within treaty lands).

[137] Weston, *supra* note 76, at 1019.

[138] *Id.* at 1018.

[139] Piccard, *supra* note 16, at 179–80. The author goes on to say, "it is wrong and deplorably ignorant to see the boarding schools as just a part of the past." *Id.*

[140] Weston, *supra* note 76, at 1018–20.

[141] *Id.*

[142] *See* TRUTH & RECONCILIATION COMM'N, https://www.justice.gov.za/trc/ [https://perma.cc/LV22-MQZQ].

[143] *See* REPUBLIC OF RWANDA: NAT'L UNITY AND RECONCILIATION COMM'N, https://www.nurc.gov.rw/index.php?id=69 [https://perma.cc/9D9B-JGUL].

[144] *See Truth and Reconciliation Commission of Canada*, GOV'T OF CAN., https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525 [https://perma.cc/GXT7-RGTV].

[145] *See Truth and Justice in Victoria*, ABORIGINAL VICT., https://www.aboriginalvictoria.vic.gov.au/truth-and-justice [https://perma.cc/CDZ8-VD5H].

[146] *See* Weston, *supra* note 76, at 1032.

topic and nearly impossible to pass a law that awards reparations. However, reparations have been granted before, and this author believes they will be granted again. There is both an international legal landscape and a domestic legal landscape (or United States landscape) to consider for reparations.

A. International Landscape

Although the United States does not technically adhere to international law,[147] the importance of the international legal community should not be overlooked completely. The international community can put pressure on the United States and over time influence change.[148] The United States does recognize some principles of international law such as *jus cogens*,[149] which refers to crimes so fundamentally abhorrent they cannot be overlooked by any state.[150] Examples of these crimes include genocide, crimes against humanity, slavery, and torture.[151] The international legal principle of *jus cogens* is adopted in U.S. common law, as mentioned in the Restatement (Third) of the Foreign Relations Law of the United States.[152] The Sixth Circuit upheld *jus cogens* stating, "some crimes are so universally condemned that the perpetrators are the enemies of all people," when extraditing a defendant for mass murder.[153] Although the United States has ratified only five of the fourteen United Nations International Human Rights Treaties,[154] and does not subject itself to the International Criminal Court or other enforcement arms of the United Nations,[155] some

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[147] *See infra* discussion and text accompanying notes 145–46.

[148] *See United Nations Declaration on the Rights of Indigenous Peoples*, U.N. DEP'T ECON. & SOC. AFF.: INDIGENOUS PEOPLES, https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html [https://perma.cc/V6UQ-XC7R] (explaining that in 2007, the U.N. General Assembly adopted the Declaration on the Rights of Indigenous Peoples ("Declaration"), but the United States voted against it; now, the United States has reversed its position and supports the Declaration).

[149] *Jus cogens* refers to the fundamental principles of international law that are universally understood so that anything violating them cannot be condoned by any court of law, even without it being written. *Jus Cogens*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/jus_cogens [https://perma.cc/72MX-6XNR].

[150] Weston, *supra* note 76, at 1028–29.

[151] *Id.* at 1028.

[152] *Id.* at 1029.

[153] *Id.* at 1029 (quoting Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985)).

[154] *Ratification Status for United States of America*, U.N. HUM. RTS. OFF. HIGH COMM'R, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN [https://perma.cc/FBX3-2BWM]. Most alarmingly, the United States has not ratified the Convention of the Elimination of All Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, or the Convention on the Rights of the Child (to name a few). *Id.* The United States is also the only country in the world not to have ratified the Convention on the Rights of the Child. *Toolkits for Action*, WORLD WITHOUT GENOCIDE, https://worldwithoutgenocide.org/toolkits [https://perma.cc/N856-CEL3].

[155] *Id.* The International Criminal Court (ICC) is a permanent court that prosecutes individual perpetrators of genocide, crimes against humanity, aggression, and war crimes. *Id.* When a

components of international law, such as *jus cogens* are recognized in the United States.

One important international justice norm is the condemnation of genocide. According to the Convention on the Prevention and Punishment of the Crime of Genocide, Article II,

> [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> a) killing members of the group;
> b) causing serious bodily or mental harm to members of the group;
> c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> d) imposing measures intended to prevent births within the group;
> e) forcibly transferring children of the group to another group.[156]

Article I of the Genocide Convention explains that genocide does not need to take place in a hostile context but can happen during peacetime.[157] However, genocide does require a perpetrator's "intent" to be more than to destroy a culture or disperse a group; the intent must be absolutely understood—typically, it must be so obvious that it exists in a state plan or policy.[158] The intent is then carried out in a physical act (any of those listed above) that furthers the purpose of accomplishing the genocide.[159] People targeted by the persecutor are harmed because of their real or perceived membership in the group.[160]

The U.S. government passed numerous laws to create the boarding schools, rip children from their homes, and force them to assimilate, easily satisfying the definition of genocide under the Genocide Convention. To reiterate, genocide requires physical acts, with intent, demonstrated through law or policy. The physical acts of genocide include the forcible transfer of Native children to another group (boarding schools), causing serious bodily harm and even death while attending the schools, and deliberately inflicting conditions of life that would bring about destruction of Native people. The intent is clear through the many statements and policy objectives: the boarding schools were designed to force Native children to assimilate,

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country ratifies the ICC's founding document, the country is subject to the ICC's jurisdiction, granting the ICC prosecutor the ability to investigate and try alleged perpetrators of these egregious human rights violations committed within that country's borders. *Id.*

[156] *Genocide*, U.N. OFF. ON GENOCIDE PREVENTION & RESP. TO PROTECT, https://www.un.org/en/genocideprevention/genocide.shtml [https://perma.cc/S9DU-9SM7].

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.* For example, any child living on a reservation, even if they were not enrolled in a Tribe or nation, could be subjected to attending the boarding schools.

thereby destroying Native culture and communities. Lastly, these actions and policies were codified in laws that created the boarding schools, including the 1819 Indian Civilization Fund Act and the 1869 Peace Policy.[161]

B. United States Landscape

Although the definition of genocide is clearly met in the chapter of U.S. horrors known as the boarding schools, the United States does not recognize or accept this fact. There is a myth that the United States has made only one historical mistake: the import and enslavement of African people..[162] But crimes against Native Americans were the "original sin" of the United States.[163] The belief that Native people were not and are not harmed by the United States (or the colonizers) continues in many ways still today: first, through continued celebration of Christopher Columbus Day rather than Indigenous Peoples' Day; second, through the United States' failure to uphold Treaty Rights for Native Americans—evidenced by nations needing to bring litigation against the offending parties (often federal or state governments) for land development and other infringements on Treaty Rights;[164] and third, through the continued belief that Native people are not still targets for violence, despite the high rates of missing and murdered Indigenous women.[165] All of these examples of continued harm demonstrate the United States' ongoing failure to recognize its genocide against Native Americans.

Although there are attempts to ignore Native American genocide, it is real, and the U.S. government can take steps to make it right. As discussed below, each of the three branches of government has power to pass reparations: the executive can write orders, the legislature can pass a bill, and the judiciary can hear a case and apply the proper legal doctrines.

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[161] *See* discussion *supra* Part II.

[162] William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 13 (2002) (calling on the United States to recognize its own human rights abuses).

[163] *Id.*

[164] A recent example of this can be found in the Line 3 debates in Minnesota: the Mille Lacs Band of Ojibwe, White Earth Nation, and Red Lake Nation, all advocated for the protection of their Treaty Rights rather than having those rights set aside by the executive branch. *See* In re Enbridge Energy, 964 N.W.2d 173 (2021). The Leech Lake Tribal Council asserted that the Minnesota approval of the Line 3 route attacks Native sovereignty. *Id.* at 186. The Mille Lacs Band of Ojibwe also joined the lawsuit to protect their Treaty Rights to hunt, fish, and gather on the proposed pipeline area. *Id.* at 185.

[165] Murder rates of Native American women are ten times higher than the national average for all races, likely due to the lack of policing or prosecution by the federal government within Indian Country. *See* Garet Bleir & Anya Zoledziowski, *Murdered and Missing Native American Women Challenge Police and Courts*, CTR. FOR PUB. INTEGRITY (Oct. 29, 2018), https://publicintegrity.org/politics/murdered-and-missing-native-american-women-challenge-police-and-courts/ [https://perma.cc/YV9J-U9ZE] (citing a Department of Justice study).

C. Executive Branch Power

The executive branch is vested with power by Article II of the U.S. Constitution; sections two and three enumerate these powers.[166] When determining whether the President has power to act, the modern test to apply comes from Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[167] Justice Jackson outlined three levels of power that the President has, from strongest to weakest, depending on the acts (or lack thereof) from Congress.[168] First, if Congress expressly or impliedly authorizes the President to act, then the President's power is at its strongest.[169] Second, if Congress has not indicated its preference for how the President should act, then the President may act with their independent power; if Congress does not act against the President's use of their power, it may be assumed that the President acted within their power.[170] And third, if the President acts contrary to the will of Congress, the action will only be upheld if it is an act not granted to any other branch by the Constitution, and the balance of power is not threatened.[171] Justice Jackson cautioned all three branches of government against allowing the President to ever exert this power as it puts at risk "the equilibrium established by our constitutional system."[172]

Applying the categorical powers of the President to the lens of reparations for Native Americans is no easy feat. Traditionally, it is the power of the President to make treaties with the advice and consent of the Senate,[173] but interaction with Native nations has been given to Congress through judicial rulings such as declaring Native nations as "domestic dependent nations"[174] and the blind acceptance of the 1871 rider passed by the House that prohibits the creation of treaties between the United States and Native nations.[175] The rider, in particular, was "constitutionally suspect" because it regulated treaty-making, something the House has no authority over without the consent of the Senate or the President.[176] Regardless of the muddy waters surrounding the executive branch and Native nation negotiations, the President surely has authority to act under Justice Jackson's

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[166] U.S. CONST. art. II, §§ 2–3.
[167] 343 U.S. 579, 634 (1952) (Jackson, J., concurring).
[168] *Id.* at 635–38.
[169] *Id.* at 635.
[170] *Id.* at 637.
[171] *Id.*
[172] *Id.* at 638.
[173] U.S. CONST. art. II, § 2, cl. 2.
[174] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).
[175] Indian Appropriations Act, 16 Stat. 566 (Mar. 3, 1871), codified at 25 U.S.C. § 71 (2018), *reprinted in* ANDERSON, *supra* note 9, at 88 ("[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.") After the passage of this rider, the executive branch continued to negotiate with the nations, but this time the laws passed to enforce the agreements were not treaties, but executive agreements and Congressional statutes. ANDERSON, *supra* note 9, at 89.
[176] ANDERSON, *supra* note 9, at 89 (using the language from Justice Thomas's concurrence in *U.S. v. Lara*).

second or third categories of power.

The President likely has authority to enforce reparations under their second or third category of power because there is no express prohibition from Congress, and it is a matter relating to another sovereign. When Congress has not expressly or impliedly authorized or forbidden an action, the President may act using their own independent power.[177] In practice, Congress has not legislated in any way that forbids the President from granting reparations or establishing a truth commission. The only direct prohibition of relations to Native nations is through the House rider in 1871, prohibiting treaty-making; however, even that is unlikely to hold water.[178]

Category three is also a possibility, as one of the few independent powers of the President is the power to recognize other sovereigns (this is done by negotiating treaties and appointing and dispatching ambassadors).[179] This third category of Justice Jackson's framework may be more tenuous, however. Even though it is frequently said that Native nations have inherent sovereignty,[180] they are labeled "domestic dependent nations."[181] Nevertheless, if the President chose to recognize the nations as sovereigns and treat them accordingly, there is a strong possibility that the judiciary would uphold this recognition of sovereignty under the third category.

Whether under the second or third category of power provided by Justice Jackson, the President can issue executive orders and direct federal agencies. The power to promulgate executive orders is found in Article II of the Constitution.[182] Executive orders are used to direct administrative agencies, such as the Department of the Interior, which is responsible for managing and protecting Native people and nations, wildlife, public land and minerals, and national parks.[183] The President also has the power to appoint officers who will then remain under the President's control, such as the Secretary of the Interior.[184]

Using the joint powers under categories two and three, the

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[177] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[178] *See supra* text accompanying note 171.

[179] *See* U.S. CONST. art. II, § 3. *See also* Zivotofsky *ex. rel.* Zivotofsky v. Kerry, 576 U.S. 1, 28 (2015) ("[T]he power to recognize or decline to recognize a foreign state and its territorial bounds resides in the President alone.").

[180] For example, the Indian Civil Rights Act explains the powers of self-government (as it pertains to Native nations) include the "inherent power of Indian tribes." 25 U.S.C. § 1301 subdiv. 2 (2018). *See also* U.S. v. Winans, 198 U.S. 371, 381 (1905) ("[A] treaty was not a grant of rights to the Indians, but a grant of rights from them," which means Native nations already had all the authority of a sovereign, they simply turned over some rights to the U.S. government in exchange for other promises); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (explaining that Native nations have sovereign immunity as enjoyed by sovereign powers); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014) (stating that Native nations possess inherent sovereign authority).

[181] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

[182] U.S. CONST. art. II, § 3.

[183] *About Interior*, U.S. DEPT. INTERIOR, https://www.doi.gov/about [https://perma.cc/66YQ-CT99].

[184] U.S. CONST. art. II, § 2, cl. 2.

President can use executive orders to direct administrative agencies (such as the Department of the Interior) and appointed officers (such as the Secretary of the Interior) to pursue or enact federal reparations for Native Americans. Such directives could also order or even appoint a truth commission to conduct fact-finding research and begin the process of reparations.[185] This is consistent with what the Department of Interior has done already, forming the Missing and Murdered Unit[186] and initiating the boarding school investigation.[187] Given the disposition of the current President and the polarized Legislature, an executive order is likely the most effective route in beginning the reparations process.

D. Legislative Branch Power

The U.S. Constitution, Article I, creates the Legislature, and enumerates the powers, some of which can grant reparations.[188] Particularly relevant are the powers to waive sovereign immunity, tax and spend, and create commissions.

Congress has waived sovereign immunity before, even when it comes to lawsuits brought by Native people or nations against the federal government. This power is a combination of clauses 9 and 18, found in Article I, Section 8 of the Constitution.[189] One example of this power was the Indian Tucker Act, which allowed the federal court of claims to hear cases brought by Native nations, or Native individuals, against the U.S. government.[190] The goal of these courts was to provide a venue for nations to bring takings, breach of contract, fraud, and other claims against the U.S. government and receive compensation.[191] These courts were helpful only if a nation had a treaty that clearly stated that the land used to belong to the nation; without the treaty, the U.S. government held that the nation did not have proof of "title" and did not recognize aboriginal title.[192] The court of claims was a far cry from a just court, as it never awarded interest on the value of the land (nor the actual present-day value of the land); it interpreted its jurisdiction as only over treaty interpretation, and nations did not have access to competent lawyers.[193] However, the claims court proves that Congress can waive sovereign immunity for nations to bring suit against the

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[185] Weston, *supra* note 76, at 1057.

[186] *Missing and Murdered Indigenous People*, U.S. DEPT. INTERIOR: INDIAN AFFS., https://www.bia.gov/bia/ojs/missing-murdered-unit [https://perma.cc/9V4M-UTLG].

[187] *See* discussion *infra* Part V.

[188] U.S. CONST. art. I, § 8.

[189] U.S. CONST. art. I, § 8, cl. 9, 18.

[190] 28 U.S.C. § 1505 (2018). *See also* ANDERSON, *supra* note 9, at 212 (explaining that the Indian Tucker Act was a reproduction of the Tucker Act, which waived sovereign immunity for suits brought in the federal court of claims). 28 U.S.C. § 1491 (2018); ANDERSON, *supra* note 9, at 212.

[191] *See* ANDERSON, *supra* note 9, at 210.

[192] *Id.*

[193] *Id.* at 210–12. *See also* Richard J. Ansson Jr., *The Indian Claims Commission: Did the American Indians Really Have Their Day in Court?*, 23 AM. INDIAN L. REV. 207, 215 (1998) (explaining the lawyers for the nations were usually ineffective).

federal government.

The power to tax and spend is also provided in the enumerated powers of Congress.[194] Congress may spend money in order to promote the general welfare, which could include the grant of reparations to Native Americans.[195] The primary limitation on this power is the test set out in *South Dakota v. Dole*.[196] However, a reparations bill would pass this test easily, as it would serve the general welfare, have a clear purpose, relate to the federal interest, and not be conditional or coercive to states.[197] Recently, President Biden signed into law the American Rescue Plan Act, which was a clear use of Congress's spending power and is the largest investment into Native Americans and Indian Country to date—investing $1,750,000,000 into Native government and programs including childcare, housing, water, law enforcement, and COVID-19 protections.[198] While this is not a reparations bill, it is an example of how Congress can use its spending power to support Native nations.

Lastly, Congress has the ability to create commissions under the necessary and proper clause[199] and has done so over 150 times.[200] A congressional advisory commission provides independent advice to recommend public policy adaptations.[201] Typically, a commission is temporary, comprised of many members, and reports to Congress.[202] It can provide expertise to the Legislature, deeper analysis into complex issues, and nonpartisan findings so the proposed solutions are more palatable.[203] For example, in the past, Congress has created the Indian Law and Order Commission, the Commission on Indian and Native Alaskan Health Care, and the National Commission on American Indian, Alaska Native, and Native Hawaiian Housing.[204] Each of these commissions did exactly as a commission should: they conducted research and fact-finding to provide recommendations to Congress on complex policy issues. Congress certainly has the power to raise a truth commission to investigate the boarding schools further, or even compile a full account of all the atrocities committed against Native Americans by the U.S. government.

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[194] U.S. CONST. art. I, § 8, cl. 1.

[195] *See id.*

[196] 483 U.S. 203, 207–08 (1987). The test requires four things: that the spending be in support of the general welfare, that if it is conditioned there must be unambiguous terms, the funding must be related to the federal interest of the program, and the terms of funding cannot be coercive. *Id.*

[197] *Id.*

[198] *The American Rescue Plan Act*, U.S. DEPT. INTERIOR: INDIAN AFFS., https://www.bia.gov/service/american-rescue-plan-act [https://perma.cc/77ZF-U9U2]. All of these services are part of the responsibility of the U.S. government in the "ward-guardian" relationship it created through treaties but which the United States has failed to uphold.

[199] U.S. CONST. art. I, § 8, cl. 18.

[200] JACOB R. STRAUS, CONG. RSCH. SERV., R40076, CONGRESSIONAL COMMISSIONS: OVERVIEW AND CONSIDERATIONS FOR CONGRESS 1 (2022), https://sgp.fas.org/crs/misc/R40076.pdf [https://perma.cc/57DB-P9TE].

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.* at 14, 16, 19.

All these powers (power to waive sovereign immunity, power to tax and spend, and power to raise a commission) were demonstrated when Congress passed the Civil Liberties Act of 1988 ("the Act").[205] The Act was passed in response to the internment of Japanese Americans during World War II, included an apology, and made restitution.[206] First, Congress prepared to pass the Act by establishing a commission—the Commission on Wartime Relocation and Internment of Civilians—to gather facts and determine whether any wrong was committed after the passage of Executive Order 9066.[207] Next, the commission's findings were used to issue a formal apology (an important part of reparations) in the Act for the crimes perpetrated by the U.S. government against Japanese Americans, including an acknowledgement that the motivation was one of racial prejudice.[208] Lastly, a trust fund was established by the Act, and managed by the Treasury, with a total of $1,250,000,000 to be expended, demonstrating the use of taxing and spending power.[209] Each eligible individual received a payment of $20,000.[210] Eligible individuals were those of Japanese ancestry who were U.S. citizens or permanent residents and confined as a result of Executive Order 9066 or other laws passed during World War II with the same effect.[211] If the eligible person was deceased, a spouse, child, or parent could collect the award on their behalf.[212] The Act also required proper record keeping of documents related to this period of U.S. history in addition to procedures and policies related to the disbursement of the funds.[213] While the Act did not constitute a waiver of sovereign immunity, it became a mechanism for invalidating future lawsuits, as the acceptance of the payment included a waiver of claims arising from the laws and practices giving rise to the Act.[214] The Civil Liberties Act of 1988 demonstrates a reparations plan created by Congress using its power to raise commissions and tax and spend.

Title II of the Act, which is often overlooked, also provides reparations but is less well known: the Aleutian and Pribilof Islands Restitution.[215] The U.S. government deprived the Aleut people of their village and lands on the Attu Island (part of Alaska) during World War II.[216]

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[205] Pub. L. No. 100-383, 102 Stat. 903 (1988).
[206] *Id.* § 1.
[207] Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96-317, 94 Stat. 964 (1980). Executive Order 9066 was issued by President Franklin Roosevelt on February 19, 1942; the order authorized the evacuation and confinement in internment camps of all people of Japanese ancestry. *Executive Order 9066: Resulting in the Relocation of Japanese*, NATIONAL ARCHIVES, https://www.archives.gov/historical-docs/todays-doc/?dod-date=219 [https://perma.cc/A5HZ-T6XB].
[208] Civil Liberties Act of 1988, § 2 subdiv. a.
[209] *Id.* § 104.
[210] *Id.* § 105 subdiv. A(1).
[211] *Id.* § 102 subdiv. a.
[212] *Id.* § 105 subdiv. a(7)(A).
[213] *Id.* § 107 subdiv. a.
[214] *Id.* § 105 subdiv. a(3)(A).
[215] *Id.* § 207.
[216] *See id.* § 202(5)(A).

The Act provided payment for that taking.[217] After a prescribed inspection and a fact-finding mission, the relevant Alaska Native corporation was paid a total sum (not to exceed $15,000,000) for the loss of land and received a restoration of land title of the traditional village site.[218] Although on its face it presents as a reparation, this was the extent of the land restoration, and the payment of this settlement constituted full satisfaction of any claims against the United States for these harms that gave rise to the Act.[219] Although the Civil Liberties Act of 1988 was not perfect, it can provide an important roadmap and reference point for future reparations bills.

E. Judicial Branch Power

The judiciary is vested with power under Article III of the Constitution.[220] Although it is responsible for adjudicating controversies,[221] it recognizes the compelling interests of states and the federal government to remedy specific instances of discrimination.[222] When a case presents complex moral trade-offs, which might justify a judiciary's finding of an issue nonjusticiable, the Legislature possesses the power to arbitrate the matter.[223] The courts "*should* defer—or give 'great weight'—to Congress on empirical questions."[224]

This issue of judicial deference to the findings of Congress was raised in *Jacobs v. Barr* in 1992, when a German American challenged the constitutionality of the Civil Liberties Act of 1988, alleging discrimination because he was not compensated despite also being interned.[225] The D.C. circuit court held that the Act was constitutional given the ample record from Congress when preparing to pass the Act.[226] This holding demonstrates the importance of raising a truth commission or other neutral fact-finding body to create a comprehensive record before passing any reparations bill.

Without a reparations bill, the judiciary is unlikely to hear a claim seeking the enforcement or creation of such reparations. In *Cato v. United States*, plaintiffs brought claims against the U.S. government under the

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[217] *Id.* § 207 subdiv. a.
[218] *Id.* § 207 subdiv. c, e.
[219] *Id.* § 207 subdiv. d(2).
[220] U.S. CONST. art. III.
[221] U.S. CONST. art. III, § 2.
[222] Carlton Waterhouse, *Follow the Yellow Brick Road: Perusing the Path to Constitutionally Permissible Reparations for Slavery and Jim Crow Era Governmental Discrimination*, 62 RUTGERS L. REV. 163, 180 (2009) (examining categories for slavery reparations).
[223] *See* Davis, *supra* note 83, at 2144.
[224] Jacobs v. Barr, 959 F.2d 313, 319 (D.C. Cir. 1992).
[225] *Id.* at 314.
[226] "After three years of testimony from hundreds of witnesses, Congress concluded that Japanese Americans were detained *en masse* because of racial prejudice and demagoguery, while German Americans were detained in small numbers, and only after individual hearings about their loyalty. Congress's conclusions, which are amply supported by the historical record, suggest that the decision to compensate Japanese but not German Americans can survive the most exacting equal protection review—let alone the intermediate scrutiny that the Supreme Court requires us to apply." *Id.*

Federal Tort Claims Act for the enslavement of their ancestors, requesting an apology for the discrimination and monetary damages.[227] The Ninth Circuit refused to adjudicate the claim given the government's failure to waive sovereign immunity and held that the case was nonjusticiable under the standing doctrine.[228] Without a reparations bill supported by detailed fact-finding, a court is unlikely to grant damages (here, reparations) for conduct permitted by law as it is the Legislature's responsibility to settle such matters.

Despite the precedent to uphold a reparations bill, like the court did in *Jacobs*,[229] the judiciary does not *have* to uphold the legislation or even defer to Congress's findings. There are many instances of the judiciary not upholding legislation, despite congressional research and strong arguments in favor of simply dismissing a case through the nonjusticiability doctrines.[230] It is reasonable to assume scholars would *not* encourage faith in the judiciary's upholding of any reparations bill for Native Americans because there is so much negative treatment in caselaw.[231] Nevertheless, it is almost certain that any legislation granting reparations to Native Americans would face the judiciary eventually, so advocates must be prepared.[232]

F. Surviving Judicial Scrutiny

To overcome the judiciary, a strong record must be developed to demonstrate the need for reparations: this record creates clear ties from the harm done to the solution proposed.[233] Generally, measures designed to compensate victims of past discrimination are constitutionally permissible if they "serve [an] important governmental objective . . . within the power of Congress and are substantially related to the achievement of those objectives."[234] If the racial classification is needed only to provide a general remedy and is approved by Congress, then only a moderate level of scrutiny is necessary.[235] For example, the Civil Liberties Act of 1988 was upheld because Japanese Americans were victims of specific prejudice, which

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[227] 70 F.3d 1103, 1106 (9th Cir. 1995).

[228] *Id.* at 1111.

[229] *Jacobs*, 959 F.2d at 322.

[230] *See generally* U.S. v. Lopez, 514 U.S. 549 (1995) (holding that Congress did not have authority to pass the Gun-Free School Zones Act of 1990); U.S. v. Morrison, 529 U.S. 598 (2000) (holding that Congress did not have authority to pass the Violence Against Women Act); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (declaring Congress's passing of Medicaid expansion was unconstitutional).

[231] Bradford, *supra* note 162, at 131 ("Proponents of Indian reparations cannot rest upon prior judicial deference to Congress, nor can they be sure that future Congresses, mindful of this judicial yaw, will be as forthcoming with such remedies.").

[232] *Cf.* Waterhouse, *supra* note 222, at 169 (explaining the judicial tests applied against different types of reparations; allowing this author to infer any reparations bill planning and architecture must account for subsequent judicial scrutiny). The best bills for reparations will foresee any judicial scrutiny and claims against it and be drafted in a way to survive the courts.

[233] *See id.* at 198.

[234] Jacobs v. Barr, 959 F.2d 313, 318 (D.C. Cir. 1992) (quoting Metro Broadcasting Inc. v. FCC, 497 U.S. 547, 563 (1990)).

[235] *Id.* at 321 (discussing Congress's decision to use racial classification of Japanese Americans subject to racial prejudice as a basis for compensation but not to extend compensation to German Americans).

Congress proved with evidence from their fact-finding commission: the court held that the Legislature "had clear and sufficient reason to compensate interns of Japanese [ancestry] . . . and the compensation is substantially related (as well as narrowly tailored) to Congress's compelling interest in redressing a shameful example of national discrimination."[236] The court in *Jacobs* provided dicta that so long as "the historical evidence is hardly controversial" the law "would survive any standard of review."[237] Therefore, if a thorough record can be developed that details the harm and discrimination, then the judiciary should be able to uphold the legislation. The Department of the Interior's investigation into the boarding schools should provide a substantial amount of this record.

Native American reparations may be subject to the limitations addressed in *Jacobs*, but any law awarding reparations should not be subject to anything higher than rational basis review for two reasons: first, Native Americans are not protected by the Constitution in the same way as non-Native people,[238] and second, Native Americans are considered a *political*, not racial, classification.[239]

In *Talton v. Mayes*, the U.S. Supreme Court heard a claim for *habeas corpus* brought by a Cherokee man imprisoned and sentenced to death by the Cherokee Nation.[240] The Court held that because the Cherokee Nation had its own government, it was not "operated upon by the Fifth Amendment" and although Congress could restrain the government of the Cherokee Nation, Native people are not subject to the rights or protections of the Constitution.[241] Although Congress passed the Indian Civil Rights Act, extending some constitutional provisions over Native Americans, the fact is, the U.S. Constitution itself does not apply to Native Americans in the same way it applies to others.[242] Therefore, the Equal Protection Clause and its scrutiny should not apply.

The far more important law to apply is the recognition of "Native American" as a political classification, not a racial classification, meaning that laws governing Native Americans are subject only to rational basis review.[243] Any preference given to Native Americans is granted to "members of quasi-sovereign tribal entities."[244] Even though civil rights doctrine recognizes Native American as a racial classification, laws created by the

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[236] *Id.* at 322.
[237] *Id.* at 320.
[238] Talton v. Mayes, 163 U.S. 376, 384–85 (1896).
[239] Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).
[240] *Talton*, 163 U.S. at 378–79.
[241] *Id.* at 384.
[242] *See id.*; Indian Civil Rights Act, 25 U.S.C. § 1302 (2018); ANDERSON, *supra* note 9, at 335.
[243] *See Mancari*, 417 U.S. at 555 ("As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.").
[244] *Id.* at 554.

federal government relate to Native Americans as a political group.[245] Identifying as Native American (according to the federal government) is signified most often by formal enrollment in a federally recognized Tribe and is considered an "exercise of political consent and voluntary civic participation."[246] The relationship between the U.S. federal government and Native nations is one of a government-to-government trust relationship.[247] As long as a federal law that treats Native Americans differently "can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians," the law must stand.[248]

To apply rational basis review, the law granting different treatment to Native Americans must be "reasonably and directly related to a legitimate, nonracially based goal."[249] If the legislative reasoning is tied "rationally to the fulfillment of Congress' unique obligation toward the Indians," the law will be upheld.[250] In the case of *Morton v. Mancari*, the policy at issue related to the furtherance of Native self-government, so the policy allowing preferential treatment toward Native Americans when hiring and promoting within the Bureau of Indian Affairs (located within the Department of the Interior) was upheld.[251] This is a famous case in the field of Native American (federal) law and sets out a standard that has been upheld ever since: legislation that allows different treatment toward Native Americans is subject only to rational basis review if the treatment is rationally related to the furtherance of the United States' unique responsibilities toward Native Americans.[252]

While distrust toward the judiciary is well-founded in Native American law, there is reason to have faith that a reparations bill will be upheld. In light of the controlling *Mancari* precedent, only a rational basis review should be used. However, the development of a clear and persuasive record outlining the discrimination and the rational connection to the reparations or solution proposed will help to ensure the law survives judicial scrutiny.

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[245] Addie C. Rolnick, *The Promise of* Mancari*: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 964–65 (2011) (reviewing the legal roots and practical consequences of the political classification).

[246] *Id.* at 967. It is important to note that the Native American legal category is shaped by racialized ideas about Native Americans and their exercise of protected Treaty Rights triggers discrimination based on their race. *Id. See, e.g.*, Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., 843 F.Supp. 1284 (W.D. Wis. 1994), *aff'd*, 41 F.3d 1190 (7th Cir. 1994).

[247] Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 289 (2012) (examining the tension between Native and federal interests).

[248] *Id.* (quoting Morton v. Mancari, 417 U.S. 535, 555 (1974)).

[249] *Mancari*, 417 U.S. at 554.

[250] *Id.* at 555.

[251] *Id.*

[252] *See generally id.*; Skibine, *supra* note 247, at 289; *see also* Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1214–16 (5th Cir. 1991) (upholding the *Mancari* decision even when applied to religious preference).

F. State Authority

Given the slow-moving nature of the federal government, and the ties between states and Native nations via the boarding schools, it is also possible for states to pass reparations bills. For example, Minnesota was home to fifteen boarding schools, the most well-known being Pipestone Indian School, St. Benedict's Orphan School (St. Joseph's Academy), Morris Industrial School for Indians, and Vermilion Lake Indian School.[253] Some states would have a far more challenging time passing reparations, due to the sheer volume of schools—as an example, while Minnesota had fifteen schools, Oklahoma had eighty-three.[254]

If a state hopes to pass legislation specific to Native Americans that provides different treatment, the law will only be upheld if it promotes a federal scheme or "further[s] the unique relationship between tribes and the federal government" (read: treaty obligations).[255] If a state deprives Native Americans of rights and services provided to other citizens, the law at issue must pass strict scrutiny review.[256] But a reparations bill would not deprive Native people of rights and services, rather it would provide something exclusively to them. Therefore, a state could pass its own reparations bill for any role the state actors played in furthering discrimination against Native Americans through boarding schools and still should not face strict scrutiny. The law would be upheld because it would further the relationship between Native nations and the federal government, promoting self-determination and reparations for harm done.

There are many avenues through which Native Americans can receive long overdue reparations for the genocide that was the boarding schools. The executive branch can direct agencies and officers or make treaties, the legislative branch can raise a truth commission or pass bills, and the laws can be upheld by the judiciary whenever the time comes. Even states can pass laws to address the part they played in the boarding schools. It is clear that the boarding schools constituted genocide against Native Americans, and it is well past time that the U.S. government does something about it.

V. MOVING FORWARD: THE DEPARTMENT OF THE INTERIOR INVESTIGATION AND NEXT STEPS

Reparations should be made to Native Americans by the federal government, and it is likely that they will survive judicial review if the right formula is used. The investigation ordered by Secretary of the Interior, Deb Haaland, is an important first step in the reparations process. On June 22, 2021, Secretary Haaland announced the Department of the Interior's ("the

[253] *List, supra* note 51.
[254] *Id.*
[255] ANDERSON, *supra* note 9, at 201.
[256] *Id.* (discussing state actions depriving Native Americans of rights that have failed under strict scrutiny).

Department") Federal Indian Boarding School Initiative ("the Initiative"), investigating the U.S. boarding schools.[257] The Initiative is broken down into three parts: collection, consultation, and reporting (mirroring truth and reconciliation commissions employed elsewhere).[258] While the Initiative is underway, it is far from complete, mostly because it will take an incredible amount of time as the U.S. government has never undertaken a project related to the boarding schools before now.[259]

So far, the Department has combed through its records to find any information or reference to the boarding schools, the identities and numbers of students enrolled, and their nation or Tribal affiliations.[260] The search paid particular attention to finding any records related to cemeteries or possible burial sites associated with the boarding schools so a search can be conducted to locate and identify the remains.[261] The Initiative ordered any believed cemeteries and burial sites to be protected.[262] The Department began reporting when it released Volume 1 of the investigation in May 2022.

> The investigation found that from 1819 to 1969, the federal Indian boarding school system consisted of 408 federal schools across 37 states or then territories, including 21 schools in Alaska and 7 schools in Hawaii. The investigation identified marked or unmarked burial sites at approximately 53 different schools across the school system. As the investigation continues, the Department expects the number of identified burial sites to increase.[263]

Volume 1 includes an explanation of the investigative process, defines the boarding schools (compared to other (also harmful) institutions for Native children), likely sources of money used to pay for the schools, general

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[257] Secretary Deb Haaland, *Memorandum: Federal Indian Boarding School Initiative*, U.S. DEPARTMENT OF THE INTERIOR (June 22, 2021), https://www.doi.gov/sites/doi.gov/files/secint-memo-esb46-01914-federal-indian-boarding-school-truth-initiative-2021-06-22-final508-1.pdf [https://perma.cc/HQQ2-6JBQ] [hereinafter *June 2021 Memorandum*]. For the most up-to-date information about the Initiative, visit the Department's website. *Federal Indian Boarding School Initiative*, U.S. DEPARTMENT OF THE INTERIOR: INDIAN AFFAIRS, https://www.bia.gov/service/federal-indian-boarding-school-initiative [https://perma.cc/JDE6-9H37].

[258] *See* discussion *supra* Section III.D.

[259] *See* Press Release, Deb Haaland, Secretary of the Interior, Department of the Interior Releases Investigative Report, Outlines Next Steps in Federal Indian Boarding School Initiative (May 11, 2022), https://www.doi.gov/pressreleases/department-interior-releases-investigative-report-outlines-next-steps-federal-indian [hereinafter May 2022 Press Release] [https://perma.cc/K43X-M4GY] ("[The Initiative] reflects an extensive and first-ever inventory of federally operated schools, including profiles and maps."); Bryan Newland, *Federal Indian Boarding School Initiative Investigative Report*, U.S. DEPARTMENT OF THE INTERIOR 3 (May 2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf [https://perma.cc/NZ2J-NWLL].

[260] *June 2021 Memorandum*, *supra* note 257, at 2; Bryan Newland, *supra* note 259, at 3.

[261] Bryan Newland, *supra* note 259, at 3.

[262] *Id.*

[263] May 2022 Press Release, *supra* note 259. The difference in numbers provided here compared to the numbers provided previously in this Note can be explained by the precise definition used in Volume 1 to define a boarding school for the purposes of this Initiative.

methodologies of the schools, and initial indicators of gravesites.[264] The Department is still searching its own records to compile Volume 2, which will include a list of marked and unmarked burial sites, the amount of federal funding distributed to the boarding schools, and investigations into the legacy impacts of the boarding schools on Native nations, communities, and people.[265]

As Volume 1 was released, the Department announced that it would begin its "Road to Healing" project and collect oral histories by talking to survivors of the boarding schools.[266] In November 2021 alone, the Department spoke with 707 survivors.[267] This began the final component of the Initiative: to consult with all Native nations.[268] Conversations centered around the nature and scope of the proposed work, addressed cultural concerns regarding the dissemination of the information gained, and ensured the burial sites would be protected so any human remains could be repatriated.[269]

Although the Department's Initiative does not plan to address the full spectrum of harm done to Native Americans as a result of the boarding schools, it is an important first step. The president of the Native Congress of American Indians, Fawn Sharp, told NPR that the investigation will "lead us down a path of truth, and a path of justice, and a path of righteousness," demonstrating the hope some Native people feel in light of this proclamation.[270] Other Native people, such as Jacki Thompson Rand, professor of American Indian Studies at the University of Illinois Urbana-Champaign, met the investigation with wariness: "As a Native person who's grown up in the system, I don't know what the secretary of the interior can do to give me my life back . . . [b]ut it's a start."[271]

A reparations plan can begin even while the Initiative is in progress. However, more fact-finding must take place in order to create a comprehensive picture that details the extent of harms perpetrated by and resulting from the U.S. boarding schools.[272] This can be done by the executive or legislative branch, and could continue or expand the Initiative underway by the Department.[273] As stated above, the record must establish

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[264] *See* Bryan Newland, *supra* note 259. Volume 1 is a broad overview of the information known immediately to the Department; more specifics will appear in subsequent volumes.
[265] *Id.* at 9 (detailing Secretary Newland's recommendations for fulfilling the Initiative).
[266] May 2022 Press Release, *supra* note 259.
[267] *Tribal Consultations Summary*, U.S. DEPARTMENT OF THE INTERIOR 2, https://www.bia.gov/ sites/default/files/dup/inline-files/appendix_d_bsi_tribal_consultation_report_508_3.pdf [https://perma.cc/T4BU-KJ66].
[268] *June 2021 Memorandum*, *supra* note 257, at 2–3.
[269] *See generally Tribal Consultations Summary*, *supra* note 267 (explaining the scope of the consultations).
[270] Evans, *supra* note 2.
[271] Fabiola Cineas, *Reckoning with the Theft of Native American Children*, VOX (July 27, 2021), https://www.vox.com/22594144/native-american-boarding-schools-children [https://perma.cc/7EC8-ZQY3].
[272] *See* discussion *supra* Section III.D.
[273] *See* discussion *supra* Sections IV.C, D.

nonpartisan, concrete facts of what happened, including stories from any survivors, descendants of the survivors, Bureau of Indian Affairs records, and records from other non-governmental organizations already being compiled (such as what is being done by the National Native American Boarding School Healing Coalition).[274] After a full record is developed, conversations must continue with Native communities to determine a path forward.[275] Creating a reparations bill of any kind without participation of Native nations and Native people will not bridge the gap or repair the damage in any meaningful way.[276] The goal of reparations should always be to fully rectify the past harm—even though it is impossible—and this certainly cannot be done without the full participation of those harmed by the injustice. Any recommendations for reparations should be compiled and submitted along with the complete record of harm and its lasting effects.[277]

After the Legislature receives the report, a bill must be drafted that acknowledges the harm done, offers an apology, and provides reparations as requested by Native Americans. As long as the record is detailed, the evidence is discussed in the legislative history, and the reparations granted are rationally related to the purpose of the bill, it should pass judicial scrutiny.[278]

Reparations for Native Americans have begun elsewhere, including Canada (which prompted the Department's Investigation).[279] Private organizations have issued apologies[280] and developed reparations plans unique and related to their specific participation in the boarding schools.[281] The U.S. government, and anyone else seeking to remedy the harm caused by the boarding schools, can certainly look to other governments or private entities for examples of what to do—or not do.

It is important for everyone to recognize who was present first on

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[274] *See* discussion *supra* Section III.D.

[275] *See* discussion *supra* Section III.A.

[276] *Id.*

[277] From this author's reading on the subject (and the information gathered and provided in this Note) the reparations scheme may include monetary compensation, but it is far more likely the reparations provided will include long-term obligations of the U.S. government. Examples include written laws re-establishing treaty obligations and preventing the federal government from circumventing their obligations in the future, providing culturally responsive and competent services in accordance with treaty obligations (such as covering appropriate medical care, education services, etc.), education of all people to prevent and counteract the perpetual ignorance of the genocide against Native Americans, and restoration of land for any human remains repatriated from the boarding schools, to name only a few.

[278] *See* discussion *supra* Section IV.F.

[279] *Truth and Reconciliation Commission of Canada*, *supra* note 144; *June 2021 Memorandum*, *supra* note 257, at 1.

[280] *See, e.g.*, Dan Gunderson, *A Reckoning: St. Benedict Nuns Apologize for Native Boarding School*, MINN. PUB. RADIO NEWS (Oct. 26, 2021), https://www.mprnews.org/story/2021/10/26/a-reckoning-monastic-order-apologizes-for-native-boarding-school [https://perma.cc/847P-S9YQ].

[281] *See, e.g.*, *Waivers: American Indian Tuition Waiver*, UNIV. MINN. MORRIS, https://morris.umn.edu/native-american-students-morris/waivers [https://perma.cc/S4HQ-TLCR] (granting a waiver of tuition because the original buildings on the campus housed a boarding school).

these lands known today as the United States. If all Americans can remember, it is more likely that change and the reparations owed will come. For "effective change comes from the citizenry rather than from their elected representatives."[282] It is the responsibility of every person to advocate for and recognize the sovereignty of Native nations.

[282] Piccard, *supra* note 16, at 183–84.