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MANY BILLIONS GONE: IS IT TIME TO RECONSIDER THE CASE FOR BLACK REPARATIONS?

ROBERT WESTLEY*

For each beloved hour, sharp pittances of years.
Bitter contested farthings and coffers heaped with tears.\textsuperscript{1}

INTRODUCTION

Affirmative action for Black Americans as a form of remediation for perpetuation of past injustice is almost dead.\textsuperscript{2} Due to a string of Supreme Court decisions beginning with \textit{Bakke} and leading up to \textit{Adarand},\textsuperscript{3} the future possibility of using affirmative action to redress

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\textsuperscript{1} From the poem \textit{Compensation} by Emily Dickinson.


\textsuperscript{3} See Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (four members of the Court, led by Justice Brennan, found the use of racial quotas in medical school admissions constitutional, Justice Powell found it unconstitutional, and the remaining four Justices found it invalid on statutory grounds); Fullilove v. Klutznick, 448 U.S. 448 (1980) (six-to-three the constitutionality of congressionally mandated minority business enterprise set-aside upheld); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) (five-to-four racially preferential layoffs unconstitutional; no majority opinion issued); Local 28 of the Sheet Metal Workers’ Int’l Assoc. v. EEOC, 478 U.S. 421 (1986) (five-to-four, the constitutionality of minority membership goal upheld; plurality opinion on constitutional issue); United States v. Paradise, 480 U.S. 149 (1987) (five-to-
the perpetuation of past wrongs against Blacks is now in serious doubt. Whereas some believe that the arguments supporting affirmative action as a remedy or even a tool of social policy are still sound, affirmative action programs continue to encounter strong political headwinds and judicial disapprobation.

four the constitutionality of racial quota upheld; no majority opinion issued); City of Richmond v. J.A. Crow Co., 488 U.S. 469 (1989) (majority opinion authored by Justice O’Connor finds that local government mandated minority business enterprise set-aside is subject to strict scrutiny under the Fourteenth Amendment equal protection clause and is thereunder unconstitutional); Metro Broadcasting Inc. v. F.C.C., 497 U.S. 547 (1990) (plurality opinion of Justice Brennan upholds on the basis of diversity affirmative action program of the F.C.C. under deferential equal protection standard to which Congress was entitled in Fullilove, overruled by Adarand); Adarand Contractors, Inc. v. Pena, 515 U.S. 200 (1995).

In his Bakke opinion, Justice Powell found that diversity is sufficiently compelling under Fourteenth Amendment strict scrutiny analysis to permit the use of race as one factor among others in admissions decisions. 438 U.S. at 311. Until Adarand, diversity remained the only affirmative action rationale acceptable to the Court majority. But see Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (holding that a law school may not use diversity as a basis for taking race into account in law school admissions), cert. denied, 518 U.S. 1033 (1996); cf., Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) (striking down the use of race-based scholarships), cert. denied, 514 U.S. 1128 (1995).


In November of 1995, California voters approved Proposition 209 prohibiting the state from “discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting[.]” essentially ending publicly-sponsored affirmative action in California. See Cal. Const. art. 1, § 31(a). Although the initiative was immediately challenged in federal district court on a variety of federal constitutional and statutory grounds, and the plaintiffs were successful in obtaining a temporary restraining order and a preliminary injunction, in an opinion that is at turns snide and dismissive, Judge O’Scannlain of the Ninth Circuit vacated the preliminary injunction, restoring the operation of Proposition 209. See Coalition for Econ. Equity v. Governor Pete Wilson, 110 F.3d 1431 (9th Cir. 1997), reh’g denied, 122 F.3d 692 (9th Cir. 1997). Earlier that year, the Regents of the University of California voted to end affirmative action in University admissions and contracting. See Cho, supra note 4, at 1054; Amy Wallace & Dave Lesher, UC Regents, in Historic Vote, Wipe out Affirmative Action, L.A. Times, July 21, 1995, at A1. On June 26, 1997, it was revealed that not one of the 14 black students admitted under the new policy to UC Berkeley’s Boalt Hall School of Law has decided to enroll. See Amy Wallace, UC Law School Class May Have Only 1 Black, L.A. Times, June 27, 1997, at A1.
At the same time as the battle over the end of affirmative action has been underway, nothing less than a sea-change has been occurring within the legal academy regarding the proper evaluation of the anti-racist agenda set by the Civil Rights Movement. That agenda, which relied on the rhetoric of equality rights and a commitment to binary racial integration, is now widely seen as lacking transformative appeal for those who continue to be racially subordinated in American society. Yet, given the ambivalence among Blacks both inside and outside the academy towards the old guard civil rights agenda, and with the

Partially in response to these California developments, and those in Texas, see discussion of Hopwood v. Texas, supra note 3, President Clinton in a commencement address at the University of California, San Diego called for a national "conversation on the state of race relations today." See One America, Online NewsHour (June 16, 1997) (visited Mar. 21, 1999) <http://webcr05.pbs.org/plweb/cgi/fastweb?getdoc+newshour+726+1+wAAA+>. To follow through on his One America initiative, the President has empaneled a seven member advisory board, headed by noted historian John Hope Franklin. See White House Panel Joins the Online NewsHour for Race Dialogue, Online NewsHour (July 22, 1997) (visited Mar. 31, 1999) <http://www.pbs.org/newshour/forum/july97/race_7-3.html>. Nevertheless, it is still unclear how the national conversation on race will reverse the setbacks to affirmative action in the courts, and in public opinion.


demise of affirmative action clearly on the horizon, a new mass-based antisu

subordination agenda has not emerged. 9

This article suggests that legal theorists concerned about racial subordination of Blacks reconsider and revitalize the discussion of reparations as a critical legalism. 10 A critical legalism, as Professor Matsuda explains, 11 is a legal norm reflecting and reinforcing the interests and perspectives of the subordinated. 12 To the extent that many Black Americans believe some form of remedial action by the government in response to white racism continues to be justified, reparations is a critical legalism derived from "looking to the bottom." 13

As a critical legalism, however, Black reparations, unlike affirmative action, is a norm that has never been enforced. What its enforce-

1995, at 13A; Juan Williams, The Seduction of Segregation; And Why King’s Dream Still Matters, WASH. POST, Jan. 16, 1994, at Cl.

9 Many Blacks, however, consider reparations for slavery and its legacy as a more responsible accounting for human and civil rights violations than affirmative action. See Darrell Dawsey, Reparations Sought for Black Americans, L.A. TIMES, Dec. 10, 1990 at B1; Derrick Reveron, Blacks Are Told Economically They May Never Catch up, MIAMI HERALD, Oct. 27, 1991, at K1 (Dean of business school at Jackson State University proposes a $600 billion to $1 trillion reparations plan to compensate Blacks for lost economic opportunities caused by slavery).


11 Within the Critical Legal Studies Movement, Professor Matsuda raised early on the need to place the legal imagination at the service of the reparations claims of subordinated groups. See Matsuda, supra note 10, at 323.

12 See id. at 326.

13 See id. at 393.
ment would require in the first instance is a committed, concerted, and visionary appeal to a norm that, while no stranger to the law, nevertheless lies outside of the dominant legal imagination. Professor Matsuda has already canvassed and effectively rebutted some of the standard doctrinal objections to reparations that may be raised in a liberal legal framework that fails to consider the experience of victims.14 The task of mapping a legal path to enforcement of Black reparations, however, remains a challenge for legal theorists and policymakers attempting to pursue alternative routes to social justice because of the increasingly cramped space provided by litigation for remediation of injustice.15

This article will argue that a program of reparations, in addition to being a critical legalism, benefits subordinated communities in ways that avoid some of the pitfalls and drawbacks of affirmative action. Moreover, a glimmer of promise can be taken from the recent revival of the reparations principle in the case of Holocaust survivors whose assets were illegally confiscated by Swiss banks in the wake of World War II.16 Through legislation, the positive law of some countries has slowly and painfully evolved towards recognition of reparations claims in extreme cases of group injustice,17 casting aside judicially imposed

14 See id. at 373–88.
15 Every year since 1989, Rep. John Conyers, Jr. (D-Mich.) has introduced a bill to establish a commission to study reparation proposals for African Americans. This bill has never gotten out of committee. See H.R. 3745, 101st Cong. (1989); H.R. 1684, 102d Cong. (1991); H.R. 40, 103d Cong. (1993); H.R. 891, 104th Cong. (1995); H.R. 40, 105th Cong. (1997). As Verdun, supra note 10, at 600, analyzes it, there have been five major waves of political activism that promoted Black reparations since the emancipation of slaves, beginning with the Civil-War Reconstruction era and ending with the post-Civil Liberties Act era that started in 1989. Conyer’s bill is a manifestation of this most recent era of political activism promoting reparations for Blacks. It is arguable, however that a sixth era has begun: the post Holocaust survivor assistance, see infra note 16 and accompanying text, post apology for slavery era. On June 12, 1997, Rep. Tony Hall (D-Ohio) introduced a special measure to issue an apology for slavery. See 1997 US H.Con.Rep. 96. The introduction of Rep. Hall’s special measure along with President Clinton’s remarks about opening a dialogue on race relations have sparked new interest in the Conyers bill. See discussion supra note 5; Courtland Milloy, An Apology Won’t Settle This Debt, WASH. POST, June 22, 1997, at B1. The President has suggested that he is open to the idea of issuing a national apology to Blacks for slavery. See Peter Baker, President Mulls National Apology for Slavery; Proposal Called ‘Not a Bad Thing’ as Racial Issues Gain Attention, WASH. POST, June 16, 1997, at A4.
16 See Milloy, supra note 15, at B1 (noting that the U.S. government has announced that it will assist Holocaust survivors to recoup some of their monetary losses).
17 Of course, the problem is that this evolution has only occurred selectively. In South Africa, the Committee on Reapportionment and Rehabilitation of the Truth and Reconciliation Commission (TRC) is responsible for taking applications for reparations from the victims of apartheid. See Brandon Hamber, The Burdens of Truth: An Evaluation of the Psychological Support Services and Initiatives Undertaken by the South African Truth and Reconciliation Commission (June 26-28, 1997) (paper presented at the Third International Conference of the Ethnic Studies
Network, Derry, Northern Ireland) (on file with B.C. Third World L.J.). The TRC, which was brought into existence through an act of Parliament known as the National Unity and Reconciliation Act, was the first independent body established in South Africa to deal with the issue of past political violence and the prevention of future human rights abuses. See id. Although the TRC is obligated to write a policy which will ensure that survivors and families of victims are granted reparation, the government remains responsible for authorizing payment of reparations. See id. Even if authorized, it is uncertain what form such reparations will take, and the actual payment of reparations is expected to be years away. See id.; Suzanne Daley, In Apartheid Inquiry, Agony Is Relived but Not Put to Rest, N.Y. Times, July 17, 1997, at A1.

In Brazil, there has been a two track approach to the issue of reparations. On the one hand, Black Brazilians seek compensation in the form of quotas and affirmative action for their historic subordination in Brazilian society. Brazil imported more Black slaves than any other nation in the Western hemisphere. It maintained the institution despite several violent slave rebellions, and it abolished slavery in 1888, a quarter of a century after Abraham Lincoln’s Emancipation Proclamation took effect. The illiteracy rates of Black Brazilians today is twice that of whites. The income of whites is, on average, more than double that of Blacks. Although Blacks and mixed race people make up 45% of Brazil’s population, they represent only 1% of the student body at the nation’s largest public university. To redress these claims, President Fernando Henrique Cardoso established a government commission in 1996 to draft a plan for compensatory policies targeting Afro-Brazilians. See Sebastian Rotella, Singer Finds Race Issue No Laughing Matter in Brazil, L.A. Times, Sept. 5, 1996, at 1. On the other hand, the Brazilian government agreed in 1995 to compensate the families of those who disappeared or were murdered in some cases two decades after the incidents occurred. However, for groups like the Comissão de Familiares de Mortos e Desaparecidos Políticos, monetary compensation without symbolic reparation and revelations of the truth of what happened during the military dictatorship is seen as an attempt to buy silence. See Brandon Hamber, Living with the Legacy of Impunity: Lessons for South Africa about Truth, Justice and Crime in Brazil (Apr. 24, 1997) (paper presented at the Centre for Latin American Studies, University of South Africa (Unisa), Pretoria, South Africa) (on file with B.C. Third World L.J.).

So too in Argentina, the group known as Madres de la Plaza de Mayo, women who are relatives of family members who disappeared during the period of military rule, refuse to accept monetary reparation on the ground that it is really intended as hush money. See id. Despite some efforts to deal with the past in Argentina through the National Commission on Disappeared Persons in 1985, there is not one monument dedicated to the 30,000 who disappeared in a city like Buenos Aires where many other monuments abound. See id.

In the case of the Australian Aborigines, the Australian Human Rights and Equal Opportunity Commission has called the government’s former policy of forced removal of Aboriginal children from their families between 1910 and the early 1970s “genocidal,” and has urged the payment of reparations and establishment of an annual national day of apology. It is unlikely that these recommendations will be accepted by the current government. Prime Minister John Howard, criticizing what he calls the “black armband” view of history which focuses exclusively on atonement for past sins, has ruled out government compensation and has blocked an official parliamentary apology. See Clyde H. Farnsworth, Australians Resist Facing up to Legacy of Parting Aborigines from Families, N.Y. Times, June 8, 1997, at 18.

In Canada and Mexico, self-determination is also the central goal of reparations movements. In Canada the vast Northwest Territories will be split in two in 1999, and the eastern half will become a new territory called Nunavut. Because most people living in that area are Inuit, or Eskimos, they will have de facto control of the new territory, making Nunavut not a separate nation but the only major part of a North American government run by native people. See Anthony DePalma, Three Countries Face Their Indians, N.Y. Times, Dec. 15, 1996, § 4, at 3.

Hawaiian reparations demands have also centered primarily on the quest for self-determination or sovereignty. That quest was given new impetus in 1993 when Congress issued an apology “for the overthrow of the Kingdom of Hawaii on January 17, 1893 . . . and the deprivation of the rights of Native Hawaiians to self-determination . . . .” 100th Anniversary of the Overthrow of the
doctrinal limits such as time bar, sovereign immunity, and denial of jurisdiction. This evolving position, which has been taken in some cases, may serve as an enforceable norm for all subordinated groups under which Blacks may seek reparations. The fact that reparations have been more effectively obtained through legislation than through litigation offers an opportunity to circumvent a court system grown hostile to the remedial claims of Blacks arising under the very constitutional provisions enacted to protect Black rights.

Legislatures, it may be argued, provide a friendlier forum for racial redress for both formal and substantive reasons. Formally, although their actions may be subject to judicial review, they are not constrained by judicial doctrines of standing, deference, timing or res judicata. Each of these doctrines might impact negatively any lawsuit seeking Black reparations. The claim of reparations, although constructively taking the form of a traditional lawsuit, e.g., Victims of Racism v. The Government that Failed to Protect Them, inevitably presents issues, some of them political, that many courts would find difficult, if not impossible, to resolve. By contrast, legislatures may hold hearings, make findings, and pass resolutions or laws on any matter affecting the public interest and within the scope of constitutional power. Substantively, legislatures provide a friendlier forum than courts for racial remedies, even during periods of backlash, because of their ability to enact comprehensive solutions to diffuse social ills, such as racial discrimination, and the inherent susceptibility of legislators not

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Hawaiian Kingdom, Pub. L. No. 103–150, 107 Stat. 1510. In a state-sponsored plebiscite held in the summer of 1996, native Hawaiians voted three-to-one in favor of creating some sort of native Hawaiian government. However, even those who support Hawaiian independence view sovereignty as a goal that may still be decades away. See Carey Goldberg, Native Hawaiian Vote Favors Sovereignty, N.Y. TIMES, Sept. 14, 1996, at 7.

18 These were among the obstacles encountered by plaintiffs in the case of Cato v. U.S., 70 F.3d 1103 (9th Cir. 1995), where Black litigants attempted to sue the federal government for slavery and discrimination, and sought damages as well as an apology. The court denied that it possessed subject matter jurisdiction, and held that the Act under which plaintiffs sought relief (the Federal Tort Claims Act) did not waive the United States’ sovereign immunity. The court suggested that even if governmental immunity was waived under the Act, the claim would nevertheless be barred by the statute of limitations.

19 See discussion supra note 17.

only to constituent pressure but also to trading votes. Moreover, historically it has been legislatures, not courts, that have in fact initiated the most comprehensive remedies to racial subordination, *Brown v. Board of Education* and its progeny notwithstanding. Therefore, this article suggests that the Warren Court, despite its rulings favorable to the interests of the Civil Rights community, may have merely served to lull that community into a misplaced sense of reliance on litigation and federal courts. It is Congress, and perhaps the legislatures of former slave states, that must be persuaded to enact reparations. Reparations are worth fighting for even if such a campaign is unlikely to be successful, due to the intellectual benefit of racial dialogue. No matter how unjustly, affirmative action has been pigeonholed in popular consciousness as an "undeserved racial preference." Therefore, it seems easy for the majority to dismiss the demands of women and people of color for affirmative action and at the same time feel sympathy for the claim of reparations by Jewish Holocaust survivors. Unlike affirmative action, however, belief in the fairness of reparations does not require a strong commitment to the value of diversity nor a critical view of meritocracy. On the contrary, belief in the fairness of reparations requires at the intellectual level acceptance of the principle that the victims of unjust enrichment should be compensated. Under reparations, Blacks more readily may position themselves as creditors seeking payment of an overdue debt, rather than as racial supplicants seeking an undeserved preference.

In arguing the case for Black reparations, this article does not suggest that Blacks should receive reparations either exclusively or even first. In all justice, indigenous peoples should probably be compensated ahead of any others. I believe that the way to avoid the "everyone's been harmed" hierarchy of oppressions game is to coalesce as communities affirming real equality around development of a legal norm in the United States that mandates reparations to groups victimized by racism that is not group specific. Such a norm would apply to any group that could show the requisite degree of harm from racism, linked to an international standard of human rights, plus a reliable estimate of damages.

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21 See *infra* notes 113-18 and accompanying text.

What follows are some comparative and historical arguments for Black reparations that should have some relevance to grassroots activists and the traditional civil rights community, but my hope is to reinvigorate discussion of reparations among the intellectual community of legal theorists, philosophers, political scientists, economists, etc. My hope is to reap the intellectual benefit of starting to talk more seriously about the relationship between race and class, even if actual material compensation remains the baseless fabric of a vision. To some extent, questions such as the basis for the claim for group reparations, what will they look like, how much is owed, who should be the recipients, and whether reparations are regressive in the sense that they entrench biological fictions of race, cannot at this point be definitively determined, but only put forward as issues ripe for critical examination and re-examination.

It is worth emphasizing, however, that my comparative study of the payment of reparations to groups other than Blacks is meant to establish a moral principle that should be embodied in American law and perhaps a legal model for groups yet to be adequately compensated, such as Blacks. It is not meant to inflame or contribute to a competitive spirit among people of color or others who should be the natural allies of social justice for Blacks and all people of color. The variety of reparative remedies within the legislative power is more than adequate to compensate appropriately all victims of racism, if that should become a political priority.

Reparations include compensations such as return of sovereignty or political authority, group entitlements, and money or property transfers, or some combination of these, due to the wrongdoing of the grantor. It is obvious, then, that the form reparations will take depends on, among other things, the particular demands of the victimized group and the nature of the wrong committed. In arguing for Black reparations, this article supports the idea of compensation through money transfers and group entitlements because I believe that reparations present an opportunity for institution-building that is badly needed, and should not be squandered in the consumer market. Nevertheless, I also believe that the poorest among us should be compensated first and through meaningful (not symbolic) monetary transfers.

Part I of this article discusses the socioeconomic indicia of Black disadvantage in relation to whites, thus establishing the first predicate of a Black reparations claim, perpetuation of Black subordination. Part I further delineates the ways in which the new post-civil rights norms of race relations continue to reflect anti-Black racism, foreclosing a neutral spin on the statistical disparities between Black and white
well-being. Part II offers a comparative review of the reparations principle as applied in the case of Japanese Americans, European Jews, and the failure to apply that principle in the case of Black Americans in Reconstruction era legislation. Part III concludes with an evaluation favoring the benefits of a campaign for group reparations over the continued struggle to maintain affirmative action as the exclusive and primary tool for remediying Black subordination in American society.

I. THE ECONOMIC PREDICATE FOR BLACK REPARATIONS

At the conclusion of his exhaustive examination of statistical indicia of Black socioeconomic disadvantage in relation to whites, the historian and political economist Manning Marable aptly observes that "[s]tatistics cannot relate the human face of economic misery." Buried in the jungle of statistical disparity are the life circumstances, impossible choices, and tedium of deprivation. As a democratic socialist, Manning takes aim in his book How Capitalism Underdeveloped Black America at both the legacy of indifference to Black disadvantage fostered by the history of white racism and the exploitive dimensions of capitalist accumulation in which a substantial segment of the Black population is forced to serve as a symbolic index of the distance between working class whites and the abyss of absolute poverty. Hard-core poverty, poverty resistant to all attempts at amelioration, is thus indexically related to a segment of the Black population (and in some social imaginaries, all Blacks). In the sociological literature, this segment of the Black population is often isolated by the terms "underclass" or "ghettoclass" or "ghetto poor." Although there are substantial reasons to demarcate analytically class or economic distinctions within the Black population, the primary focus of the following analysis is the continuing existence of major disparities in the economic condition and life opportunities of Blacks and whites.

Just as there can be no doubt that such interracial disparities weigh most heavily upon the underclass, there can be no doubt that the persistence of those disparities is due in large measure to legally enforced exploitation of Blacks and socially widespread anti-Black racism. The achievements of Blacks who have prevailed against racist odds to improve their economic condition should not be minimized,

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but neither should the impact of the history and perdurance of racism on Black economic opportunity be trivialized. Despite well-publicized success cases like Oprah Winfrey, Michael Jackson, Bill Cosby, Michael Jordan, and others, Blacks as a group have not reached anything approaching economic equality or equality of opportunity with whites. Given the glacial and limited nature of economic reform, this is unsurprising. Because racism, in addition to its psychological aspects, is a structural feature of the U.S. political economy, it produces intergenerational effects.

Highlighting the intergenerational effects of structural racism in the United States political economy, Thomas Pettigrew notes that three useful generalizations can be made about the current situation of Black Americans.\textsuperscript{26} First, current statistics on Blacks, when compared to earlier data, show substantial improvement in Black living conditions.\textsuperscript{27} However, these same statistics pale when compared to current data on whites. Second, most of the “progress” of the past twenty years reflects the establishment of a solid, sizable, and skilled Black middle class which, crucially, is able to pass on its human capital to its children.\textsuperscript{28} Conversely, the most bleak statistics reflect the desperate situation of the unskilled Black poor or underclass. Third, modern forms of racism, to a greater extent than in the past, have become more subtle, indirect, procedural, and ostensibly nonracial.\textsuperscript{29} Pettigrew focuses on the analysis of traditional inequality factors, such as income, education, housing, employment patterns, and so forth, and how these factors operate in the context of the new racism.\textsuperscript{30} However, the burden of the reparations argument, for which material inequality may serve as a first predicate, is to show that current disparities in material resources are causally linked to unjust and unremedied actions in the past. Rather than merely highlighting intergenerational effects based on traditional inequality factors assumed to be causally linked to past racial discrimination against Blacks, the following discussion seeks to elucidate a key causal element in the maintenance of structural racism: the economic determinant of wealth.\textsuperscript{31}

The above observations form a set of concerns for reparations policy and political action this article attempts to address in the two

\textsuperscript{27} See id. at 674.
\textsuperscript{28} See id.
\textsuperscript{29} See id.
\textsuperscript{30} See id.
\textsuperscript{31} Wealth is not a traditional inequality factor among economists. Instead, many economists
sections below. Under the heading, “The Underclass Question: General Statistics and the Human Face of Misery,” I will present some of the current data on Black disadvantage that leads me to conclude that equality between Black and white Americans, even those who are considered middle class, has not been achieved. At the same time, I argue that the neoconservative attack on the poor and the instrumentalization of the Black middle class in pursuit of conservative agendas fail to account for the structural and intergenerational dimensions of racial disadvantage and privilege. Under the heading, “The Racist Restatement,” I will sketch the vocabulary and practices of the new racism that set the context in which reparations struggle must take place.

A. The Underclass Question: General Statistics and the Human Face of Misery

In his highly acclaimed monograph, political science professor Andrew Hacker notes that in the minds of most white Americans, “the mere presence of [B]lack people is associated with a high incidence of crime, residential deterioration, and lower educational attainment.”  

Even though most whites are willing to acknowledge that these characterizations do not apply to all Blacks, most whites prefer not to have to worry about distinguishing Blacks who would make good neighbors from those who would not. Housing segregation and educational disadvantage, therefore, remain dismally high.

Pettigrew, for instance, reports that the modest housing gains of Blacks do not begin to achieve parity with white housing. A “nationwide pattern of residential apartheid,” continues to be the rule rather than the exception. Thus, throughout the 1960s and 1970s, urban Blacks were residentially segregated from their fellow Americans far...
more intensively than any other urban ethnic or racial group. More­
over, the improvements seen in the Black housing stock are primarily
attributable to the ability of the expanding Black middle class to buy
older houses left behind by suburban-bound whites. Thus the Black
middle class, as well as the Black working class, have been victimized
by this massive discriminatory pattern in housing.

The white American perception of Blacks as a "bad risk" was
openly reflected in federal governmental housing policy until 1948
when the Supreme Court struck down judicial enforcement of one of
the most blatant tools of racial discrimination in housing, the restric­
tive covenant. As Chief Justice Vinson explained, restrictive covenants
were private agreements among home owners which have as their
purpose the exclusion of persons of designated race or color from the
ownership or occupancy of real property. Although the Court only
considered judicial participation in the enforcement of such agree­
ments to be illegal, as a consequence of the Court's decision, the
Federal Housing Authority discontinued its open policy of subsidizing
mortgages on real estate subject to racially restrictive covenants in
1950. But by then, thousands of Black families had already missed out
on millions of dollars in wealth through equity accumulation, while
whites benefitted handsomely from discriminatory federal housing
subsidies.

The practice of government-enforced and private "redlining" in
the home mortgage industry continued after 1950 through less blatant
means than the restrictive covenant, leading to the current urbaniza­
tion and ghettoization of Blacks, and the suburbanization and relative
economic privileging of whites. Based on discrimination in home

36 By 1980, this pattern decreased by only eight percentage points. Moreover, in 1980 white
home ownership was 68% while Black home ownership was 44%; the median value of single-fam­
ily, owner-occupied white housing was $48,600 compared to $27,000 for similar Black residences;
and only 1% of white dwellings lacked complete plumbing compared to 5% of Black dwellings. See
Pettigrew, supra note 26, at 676; see also Douglas S. Massey & Nancy A. Denton, American
37 See Pettigrew, supra note 26, at 676.
39 See id. at 10.
40 See Oliver & Shapiro, supra note 31, at 18.
41 A 1991 Federal Reserve study of 6.4 million home mortgage applications by race and
income reported a widespread and systemic pattern of institutional discrimination in the nation's
banking system. The study found that commercial banks rejected Black applicants twice as often
as whites nationwide. In some cities, like Boston, Philadelphia, Chicago, and Minneapolis, it
reported a more pronounced pattern of minority loan rejections, with Blacks being rejected three
times more often than whites. See Glenn B. Canner, Expanded HMDA Data on Residential Lending:
mortgage approval rates, the projected number of creditworthy Black home buyers, and the median white housing-appreciation rate, it is estimated that the current generation of Blacks will lose about $82 billion in equity due to institutional discrimination. All things being equal, the next generation of Black homeowners will lose $93 billion.

As the cardinal means of middle class wealth accumulation, this missed opportunity for home equity due to private and governmental racial discrimination is devastating to the Black community. Wealth, although related to income, has a different meaning. Wealth is "the total extent, at a given moment, of an individual's accumulated assets and access to resources, and it refers to the net value of assets (e.g., ownership of stocks, money in the bank, real estate, business ownership, etc.) less debt held at one time." Income, on the other hand, refers to the flow of dollars over a set period of time. Just as substantial income, over time, may produce wealth, substantial wealth produces income and all the advantages in life that make up material well-being. Crucially, for the current situation of the Black community, wealth disparities between Blacks and whites are both cumulative and vast. It is a gap that earned income alone cannot close, and a gap that fundamentally supports structural distinctions of status between the white middle class and the Black middle class.

As Oliver and Shapiro argue, middle class status "rests on the twin pillars of income and wealth." Without either one or the other, that status can be quickly eroded or simply crumble. On average, Blacks who hold white collar jobs have $0 net financial assets compared to their white counterparts who on average hold $11,952 in net financial assets. Black middle class status, as such figures indicate, is based almost entirely on income, not assets or wealth. Thus, the Black middle class can at best be described as fragile.

42 See Oliver & Shapiro, supra note 31, at 151.
43 See id. at 150–51.
44 Id. at 30.
45 The structural distinctions, as discussed below, relate to two areas of concern: 1) the range of options available to provide for current needs, and 2) the ability in the future to overcome accumulated inequalities in a reform framework that does not include reparations.
46 Oliver & Shapiro, supra note 31, at 94.
47 Compared to college-educated whites, who on average earn $38,700 per year, have a net worth of $74,922, and net financial assets of $19,823, Oliver and Shapiro's studies show that college-educated Blacks on average earn only $29,440 per year, have a net worth of only $17,437, and net financial assets of only $175. See id. at 94.
48 Even middle class Blacks earning between $25,000 and $50,000 had an average net worth of $15,250 compared to their white counterparts whose average net worth was $44,069. See Oliver & Shapiro, supra note 31, at 94. Middle class Blacks in the same category held only $290 in net financial assets compared to $6,988 in net financial assets for whites. See id.
Structural advantages accrue to a wealth-based white middle class over an income-based Black middle class. Whether poor or "middle class," Black families live without assets, and compared to white families, Black families are disproportionately dependent on the labor market to maintain status. In real life terms, this means that Blacks could survive an economic crisis, such as loss of a job, for a relatively short time. Thus one structural advantage that accrues to a wealth-based white middle class over an income-based Black middle class is relative independence within and security from a fluctuating labor market. Another advantage of wealth over income is the possibility to reproduce middle class status intergenerationally through gift or inheritance.\textsuperscript{40} The overall advantage of wealth to income is in the ability both to meet current needs and to plan concurrently for future needs.

Not only are middle class Black families more fragile, precarious and marginal than the white middle class due to a lack of wealth, Oliver and Shapiro also demonstrate that poverty among Blacks and whites often means very different things. Poverty-level whites control nearly as many mean net financial assets as the highest-earning Blacks.\textsuperscript{50} The importance of this disparity among the Black and white poor would not be revealed by an analysis that focused entirely on income. The importance of this disparity is that it shows that even those at equivalent income levels can have vastly different life prospects, depending on their access to wealth resources. With no assets to rely on, and earning barely enough to survive, an edge of desperation is added to the plight of the Black poor. These disparities are important because they highlight the cumulative effects of societal and government-sponsored racial discrimination.

When we consider the living conditions and life prospects of the Black underclass,\textsuperscript{51} we confront a population that is able neither to meet its current needs without public assistance (or private charity) nor to plan effectively for future needs. To many neoconservative critics,\textsuperscript{52} the disparity between the Black middle class and the underclass is explicable in terms of the culture of poverty thesis. According

\textsuperscript{40} Because testamentary and inter vivos transfers within families routinely violate the principles of boot-strap meritocracy, I have often thought that it would be in the interest of equality to abolish inheritance as a legal form of disposition of property. It seems odd that a society that pays lip service to equal opportunity and individual merit at the same time should sanction undeserved privileges based on the accident of birth.

\textsuperscript{50} See Oliver & Shapiro, supra note 31, at 101.

\textsuperscript{51} See generally The Underclass Question (Bill E. Lawson ed., 1992).

\textsuperscript{52} See Cornel West, Demystifying the New Black Conservativism, in Race Matters 49, 49–59 (1993) (describing some of the main positions taken by Black neoconservatives on the situation of the Black underclass).
to the culture of poverty thesis, poor Blacks are responsible for their own im‌miseration due to their cultural pathology and lack of values.\textsuperscript{53} Black middle class success is juxtaposed to Black underclass failure to acquire the skills and discipline necessary to move ahead. And yet, the neoconservative attack on the poor and the instrumentalization of the Black middle class in pursuit of conservative agendas fail to account for the structural and intergenerational dimensions of racial disadvantage and privilege.

Ignoring the structural and intergenerational dimensions of racial advantage and disadvantage, neoconservatives push the idea that racial inequality has little (or nothing) to do with racism, but lots to do with bad individual choices and inappropriate cultural values (or no values at all). Furthermore, neoconservatives assert that government policies aimed at providing subsistence for the poor, such as Aid to Families with Dependent Children, contribute to their demoralization, and for that reason should end. Neoconservatives subscribe to a reform framework that focuses on elimination of poor subsistence support by the government, including the minimum wage, and promotion of self-help.

There are at least three problems with self-help that bear mention in the context of developing solutions to racial inequality. First, there is no assurance that self-help will ever bring about substantive equality between Blacks and whites. Given the scope and extent of current inequality, Blacks generally, and the underclass particularly, may be permanently economically subordinate to and dependent upon whites. Second, even if self-help achieved equality, again, the current disparities are so great that generations would endure unjust deprivations. By contrast, taking account of the structural and intergenerational dimensions of racial advantage and disadvantage implies a reform framework that does not simply blame the victims of societal discrimination and overtly racist government policies. Third, and most importantly, self-help provides no redress for unjust expropriations and denials of equal opportunity. Where the implementation of racist policies has a substantial and continuing impact on the ability of a social group to achieve equality, as they clearly do in the case of Black Americans, reparations is a just remedy.

For Pettigrew, statistics on the state of Black Americans do not augur the "declining significance of race," but the growing significance

\textsuperscript{53} See Howard McGary, The Black Underclass and the Question of Values, in \textit{The Underclass Question}, supra note 51, at 57-70 (describing both conservative and liberal responses to the persistence of the underclass).
of the interaction between class and race in American race relations. One feature of this interaction is that because the new Black middle class has typically gained its status through employment in predominantly white institutions, many whites, especially those of higher status, now meet and come to know members of the Black middle class. But Black poverty remains largely out of the intellectual and experiential purview of the vast majority of whites. Pettigrew writes:

The fact that whites know the [B]lack "success cases" but not the [B]lack poor undoubtedly contributes to the widespread current belief among whites that racial discrimination is now minimal and "...the chances for [B]lacks to get ahead have improved greatly..." (citation omitted). Both at the individual and institutional levels, racism is typically far more subtle, indirect, and ostensibly nonracial now than it was in 1964 ... 54

B. The Racist Restatement

In developing a vocabulary to characterize the new racism, Pettigrew isolates the following six features based on his social scientific research:

(1) rejection of gross stereotypes and blatant discrimination;
(2) normative compliance without internalization of new behavioral norms of racial acceptance;
(3) emotional ambivalence toward [B]lack people that stems from early childhood socialization and a sense that [B]lacks are currently violating traditional American values;
(4) indirect 'micro-aggressions' against [B]lacks which are expressed in avoidance of face-to-face interaction with [B]lacks and opposition to racial change for ostensibly nonracial reasons;
(5) a sense of subjective threat from racial change, and
(6) individualistic conceptions of how opportunity and social stratification operate in American society. 55

Pettigrew explains that compliance in the racial context means that whites follow the new norms only when they are under the surveillance of authoritative others who can reward and punish. Internalization means that whites have adopted the new norms as their own personal standard of behavior and will follow them without surveil-

54 Pettigrew, supra note 26, at 686.
55 Id. at 687.
lance. He notes that Black Americans, too, must learn the new norms. This process often entails unlearning past lessons and overcoming suspicions. 56

Exemplifying the new forms of anti-Black racism, Pettigrew points to the fact that about 90% of white Americans believe Black and white children should attend "the same schools," and that 95% favor equal job opportunity. However, in 1978 only 24% believed the federal government should "see to it that white and [B]lack children go to the same school." Furthermore, this percentage declined from 43% in 1966. "Likewise, in 1975 only 34% agreed that the federal government should 'see to it that the [B]lacks get fair treatment in jobs,' a percentage that remained constant from 1964." 57 So while an overwhelming majority of whites may currently oppose blatant discrimination, it is likewise the case that they oppose concrete remedies to discrimination. Few would perceive this apparent contradiction as "racist." This perception informs Pettigrew's conclusion that whites experience deep emotional ambivalence toward Black people, while at the same time rejecting gross stereotypes. Whites have a sense of subjective threat from racial change that is inconsistent with the new norms of racial acceptance. Whether, as Pettigrew asserts, the ambivalence of whites toward Blacks is entirely shaped by an individualist conception of opportunity in America, this factor is of notable importance. 58

56 See id. at 688.
57 Id. at 690.
58 Pettigrew notes that:
92% of whites regard their chance of "getting ahead" as equal to or better than average. ... Moreover, 78% think they have achieved a standard of living beyond that of their family of origin. ... Their own experience, therefore, tells them that America is a land of opportunity; they worked hard and "made it." This success, consistent with their work ethic values, leads most whites to adopt "the dominant ideology" (citation omitted): Opportunity is available for the talented and ambitious and achievement is individually determined. Therefore, the unequal distribution of rewards in society is just, for wealth reflects effort and ability. This ideology leads a majority of Americans to explain poverty with individualistic reasons (lack of effort, thrift, morals, and ability of the poor) rather than structural reasons (tax structure and failure of government and industry to provide good training, sufficient jobs, and decent wages) (citations omitted). Within this context, it is not surprising that for whites racial discrimination is not a particularly salient phenomenon. While 49% of whites surveyed thought that "some" discrimination exists ... , [B]lacks are thought to have as good a chance to get "ahead" as "the average person in America" ... , and to be the beneficiaries of "some" or "alot" of positive "preferential treatment" ... and of "great" improvements in their chances to succeed. ... If [B]lacks are doing that well in current American society, it follows that such remedies as school desegregation and affirmative action are not necessary. With this presumed "declining significance of race," the explanation for continued [B]lack poverty is simply the same ostensibly nonracial reason that accounts for
Pettigrew’s research reveals that (1) spatial discrimination, (2) cumulative discrimination, and (3) situational discrimination are three (often interrelated) ways in which indirect and ostensibly nonracial racial discrimination operates. An example of cumulative discrimination is racially different access to mortgages. Unsurprisingly, spatial segregation results in Black voter dilution through annexations, redistricting, or the like. It produces housing discrimination through decentralization of governmental services or resource distributions as laundered through private preferences in housing and rental markets. Situational discrimination refers to those pervasive and largely unconscious (to the perpetrator, at least) circumstances where white “micro-aggressions” against Blacks come into play. Pettigrew describes this phenomenon as “triple jeopardy.” In face-to-face interracial situations within predominantly white institutional settings, Blacks often encounter three interrelated hardships that make their inclusion difficult. First, Blacks must face the intransigence of racist stereotypes imposed by whites that limit their ability to perform. Second, Blacks experience the stress of occupying solo roles. And finally, Blacks must endure the opprobrium associated with being a token of affirmative action.

The importance of Pettigrew’s research consists not merely in development of a framework and a vocabulary by which to examine the modern expression of anti-Black prejudice. Racism in America has frequently been characterized as a “sickness.” To the extent that this view of racism is correct, Pettigrew’s research pathologizes perspectives which would otherwise be regarded as purely political—e.g., the dominance of individualism in American political and social life—or purely personal—e.g., the choice of school, profession, or neighborhood. Less frequently in modern discourse, racism is considered to be an intellectual position based on the belief in the inherent superiority of whites. This alternative view, however, is racism’s history. Pettigrew reveals that such a view remains racism’s practice.

white poverty: sloth. Every [B]lack “success case” in the new middle class can be seen as “proof” that skin color is no longer a barrier to achievement. Given the inordinate attention devoted to them by such institutions as the mass media and the administration, these “success cases” are the most visible to the white world. Consequently, this racial subcase of the dominant ideology of individualism is further enhanced.

Id. at 692.

59 See Pettigrew, supra note 26, at 694.
60 See id. at 696.
62 But see generally Richard J. Herrnstein & Charles Murray, The Bell Curve: Intelli-
The pervasiveness of white supremacist structures cannot be limited to the social spheres examined by Pettigrew. They inhabit our literature and the canons of literary interpretation; they inhabit our speech; they inhabit popular culture, from films and television, to music, dance and fashion; they determine classroom curricula throughout the educational system; they influence the friends we make, the restaurants we choose to eat in, the places we shop; they establish national priorities and the means employed to resolve social problems; often, they define what it means to be a problem. White supremacist structures insinuate their presence into the most intimate encounters among people, especially sexual ones; they inform critical standards in art and philosophy, legal standards in politics, educational standards in school and professional standards in employment.

It is difficult, if not impossible, to expose indexically the many blatant and recondite ways racism has entered the lives of Americans. This much is clear: structures of white supremacy have asserted hegemony over numerous aspects of social, political and personal life in the United States. This is the reality that lies behind the statistics. Racism, as the practice of white supremacy, cannot be circumscribed by the petty injustices that individuals commit against individuals. Racism is a group practice. The theory of that practice is the viability of the race idea, and the anomalous belief that group harms may be legally reme-
died solely through redress to individuals. To show just how anomalous the belief is that individual redress can adequately remedy group injuries, we should consider three historical moments of group oppression after each of which an attempt was made to compensate serious harms to groups: the Japanese Internment, the Jewish Holocaust and Black Reconstruction.

II. Compensation to Victimized Groups

A. Japanese Americans

In 1942, under the authority of President Franklin D. Roosevelt,72 120,000 people of Japanese ancestry from the West Coast were ordered to be evacuated, relocated and interned by the U.S. military. Approximately two-thirds of those interned were native-born American citizens.73 The internment order was issued in direct response to the bombing of Pearl Harbor by the Japanese Empire. The research of Professor Peter Irons revealed that the government fraudulently concealed its actual reasons for internment of Japanese-American citizens from the Supreme Court in initial litigation challenging the internment order.74 Subsequent litigation efforts have overturned cases upholding the government’s authority to enforce the internment order.75 History has shown that greed, prejudice and “race” hatred had more to do with the internment of Japanese Americans than concern for national security.76

The indignities suffered by Japanese Americans due to their internment were not confined to their loss of freedom.77 They lost both real and personal property.78 They lost businesses and employment income. They lost pets and farm animals. They were forced to wear identification tags, and many endured living conditions unfit for ani-

74 See Peter Irons, Justice At War vii–ix (1983).
75 See Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985); Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986), aff’d in part and rev’d in part, 828 F.2d 591 (9th Cir. 1987); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).
77 See, e.g., id. at 989–94.
mals. They suffered the disruption of familial life and customs. They suffered disease and hardship from exposure to the elements, poor sanitation and poor diet. They lost all rights to privacy, even to the extent of performing ordinary bodily functions. They suffered shame. They lost educational opportunities. They lost freedom of expression and the ability to communicate freely with others outside the camps. They were denied the right to use the Japanese language or read Japanese literature other than the Bible and the dictionary. They lost control over their own labor. Even the moral conscience of Japanese Americans was invaded by conditioning release on swearing an oath of loyalty to the United States. Many internees, especially the elderly, endured these conditions for as long as four years. Many died. Upon release, hostility towards Japanese Americans continued, though the majority had neither homes nor businesses nor jobs to which to return.

Despite their tremendous collective losses, the government initially provided only minimal assistance to help those who had been interned return to normal life. Most received train fare and $25. In 1948, Congress enacted the American-Japanese Evacuation Claims Act. This piece of legislation remained the only official attempt by Congress to compensate Japanese-American property losses for over forty years. It was flawed primarily for the following reasons. First, it required the Attorney General to limit any award to $100,000 upon a showing that damage or loss of property was "a reasonable and natural consequence of the evacuation or exclusion . . ." Second, it required that compensation be paid only for loss of property that could be proved by records. Finally, once a claim had been paid under the Act, the

79 See generally Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied (1982) [hereinafter Personal Justice Denied]. The Commission on Wartime Relocation estimated that based on 1945 dollars, the internees lost between $108 and $164 million in income and between $41 and $206 million in property. In 1983 dollars, the losses are between $810 million and $2 billion. See id.


81 The most notable attempt by Japanese Americans to gain compensation through the judiciary is the case of Hohri v. United States, 586 F. Supp. 769 (D.D.C. 1984), aff'd in part and rev'd in part, 782 F.2d 227 (D.C. Cir. 1986), reh'g en banc denied per curiam, 793 F.2d 304 (D.C. Cir. 1986), vacated and remanded, 482 U.S. 64 (1987) (with instructions to transfer case to the Federal Circuit), 847 F.2d 779 (Fed. Cir. 1988), dismissed per curiam. Typically, the courts have not denied relief on substantive grounds. Rather, they have deployed, as the complex history of the Hohri case suggests, a vast array of judicial doctrines to dispose of the case on procedural grounds, e.g., sovereign immunity, tolling of the statute of limitations, lack of jurisdiction, et cetera.


claimant waived his or her right to make any further claims against the United States arising out of the evacuation.\footnote{84}

On August 10, 1988, President Reagan signed the Civil Liberties Act of 1988 into law.\footnote{85} In doing so, he set in motion the statutory means by which Japanese Americans would begin to receive federal reparations payments.\footnote{86} Although deficiencies remain in how the government has implemented this legislation,\footnote{87} the importance of the legislation lies in the precedent established for compensation of wronged groups within the American system. Crucially, the Civil Liberties Act pays compensation to \textit{the group} (surviving internees and their next of kin) on the basis of a group criterion.\footnote{88} The Act acknowledges that Japanese Americans were harmed as a group;\footnote{89} that they should be compensated as a group; and that they should be made whole economically for the injuries they suffered on the basis of group membership.\footnote{90} In addition to monetary compensation, the law also authorized institutions by which the injustice done to Japanese Americans may be memorialized.\footnote{91}

\begin{footnotes}
$148$ million. \textit{See} \textit{Personal Justice Denied}, \textit{supra} note 79, at 118. Because of inflation and because the government based its payments on the $1942$ dollar, internees were actually compensated at the rate of $10$ cents on the dollar. \textit{See} \textit{Daniel S. Davis, Behind Barbed Wire: The Imprisonment of Japanese Americans During World War II} 138–39 (1982). The Act did not cover loss of earnings and profits from businesses and farms sold under the hurried conditions prior to evacuation or the loss of Constitutional rights. Some citizens were given as little as $72$ hours to evacuate. \textit{See} S. Rep. No. 100-202, at 3 (1987).

\footnote{84} \textit{See} 50 U.S.C. app. § 1984(d).


\footnote{86} The total payments to be made by the United States in acknowledgement of its violation of the Constitutional rights of those of Japanese ancestry is $1.25$ billion. Although this figure falls short of the most generous estimate of collective loss suffered by internees ($2$ billion), eligibility requirements are such that only an estimated $60,000$ survivors or their next of kin will be paid. About half of the internment survivors died before the legislation was passed.

\footnote{87} More than a year after the Act became law not one payment had been made to an internment survivor. \textit{See Justice for Japanese, L.A. Daily J.}, Aug. 15, 1989, at 6. An estimated $2,000$ survivors died during that time. \textit{See id}.

\footnote{88} Attorney General Richard Thornburgh proposed that non-Japanese spouses and parents who were also interned be paid reparations under the Act. \textit{See Rules Due on Reparations to Internees, L.A. Daily J.}, June 13, 1989, at 7. The point is that hatred of those of Japanese ancestry led to the internment, and therefore it is appropriate that those who suffered real losses due to that hatred be compensated.


\footnote{90} Although the Act authorizes payments to individual victims, there can be no confusion on the point that this is "class legislation." Illustratively, payments to internees do not discriminate along lines of who suffered what, or to what extent, or for how long. Each internment survivor was to be paid the same amount, $20,000$ free of taxes. On the other hand, taxes of every American, including those of internees, are used to raise the revenue to pay the reparations.

\end{footnotes}
Memorializing injustices committed in the past is not only an obviously important way of preventing those same injustices from occurring in the future; it also provides public recognition of suffering, a chance for victims and their ancestors to mourn their loss in a social space that symbolizes respect, and a constant reminder to potential aggressors or the destructively indifferent that history will not overlook grievous abuses of human dignity.

Perhaps there are some lessons in the Japanese-American reparations experience for those seeking reparations for Black Americans. In *Racial Reparations: Japanese American Redress and African American Claims*, Professor Yamamoto suggests that Japanese-American claims succeeded, as did those of Blacks who were the survivors of the Rosewood massacre, because they, unlike the reparations claims of Black Americans generally, fit tightly within the individual rights paradigm of the law. He proposes that successful claims must fit the traditional individual rights paradigm of the law by satisfying the demand for identifiable victims and perpetrators, direct causation, damages that are limited and certain, and acceptance of payment as final. The demand for identifiable victims and perpetrators and direct causation is difficult (if not impossible) to meet from a class whose reparations claims include acts that occurred hundreds of years ago, and many of whose members were not yet born when the most egregious violations were occurring.

Importantly, however, a tight fit with the individual rights paradigm may be considered a legal prerequisite to success only in the context of judicially imposed redress. A tight fit is not a moral prerequisite, nor is it a legal barrier to legislative redress. It is noteworthy that even Japanese-American claims were denied by courts and ultimately awarded by Congress. Additionally, the survivors of the Rosewood massacre received reparations as a result of the action of the Florida legislature. In the context of legislative action, the demand for a tight fit may be a practical or political, rather than a legal, prerequisite to success. Political realities change. As in the case of reparations for Japanese Americans, political realities changed partly as a function of the passage of time (allowing an abatement of anti-Asian hostility), partly as a function of concerted effort by community activists who challenged the status quo (demanding that American society live up to its professed ideals), and partly as a function of shifts in international relations (at the time that Japanese-American reparations were

approved, Japan had become an important U.S. ally and a major economic force). Standing alone, a tight fit with the individual rights paradigm of the law could not persuade American courts to award group reparations even to identifiable victims of racial injustice.

B. European Jews

If, arguendo, the example of the Japanese-American internment, followed by legislation enabling Japanese Americans to receive reparations and public recognition of their suffering, can serve as a limiting case of the United States' willingness to redress wrongs committed against a group with group remedies, then the example of Wiedergutmachung for the Jewish survivors of the Holocaust should be considered the model from which it is drawn. The Nazi attempt to exterminate European Jewry stands as the centerpiece of the twentieth century conception of genocide.93 In this regard, we can say with confidence that all the suffering Japanese Americans endured at the hands of the white American establishment, European Jews certainly suffered under the viciously corrupt government of Nazi Germany.94

While the number of Jews who lost their lives as a result of the Nazi campaign of genocide is staggering,95 the methods employed by the Nazis to accomplish their goals evince an irredeemable degree of hatred and cruelty.96 But the shocking and gruesome means by which the Nazis slaughtered millions of Jews cannot distract our observation of Jewish material and economic losses. Those losses too were staggering.97

Germans plundered Jewish property in a variety of ways.98 Jews were forced to hand over their jewelry and other valuables, their bank

93 The term genocide was coined by Raphael Lemkin, a Polish legal scholar, to characterize the killing of entire human groups during World War I (the Armenians) and World War II (the Jews). The word first appeared in 1944 in his Axis Rule in Occupied Europe xi–xii (1944). Through Lemkin’s influence, the Genocide Convention was adopted by the UN in 1948.

94 See Nana Sagi, German Reparations: A History of the Negotiations 1–2 (1980). This must be measured in terms of both numbers of persons killed and discriminatory enactments. Homosexuals and gypsies were also killed by the Nazis in great numbers. See Genocide and Human Rights, ch. III (Jack Nesan Porter ed., University Press of America 1982) [hereinafter Genocide and Human Rights].


96 See generally Gerald Fleming, Hitler and the Final Solution (1984) (a documentary history of Nazi attempt to exterminate the Jews of Germany and Europe).

97 In 1944, before the extent of the Holocaust was fully known, Dr. Nehemiah Robinson, a member of the Institute of Jewish Affairs, estimated the value of property seized from the Jews at two billion dollars. See Sagi, supra note 94, at 21.

98 See id. at 1–2.
accounts were frozen, they were not allowed to inherit, and they were subjected to collective levies and fines. Jews, fearing their property would be seized, tried transferring it—*in toto* or in part—to non-Jews by fictitious sales or else sold it at prices far below its real value.99 Others, deprived of their source of livelihood and in need of wherewithal to go on living, were forced to sell off their belongings. After the greater part of their property had been taken from them in the guise of a “Flight Tax” (*Reichsfluchtsteuer*), those who emigrated could only take a small sum of German money and that too was converted to foreign currency at the lowest possible rate. Fleeing Nazi persecution, tens of thousands of Jews abandoned homes, businesses and personal property. Germans confiscated Jewish possessions by concentrating the Jews in ghettos and other sealed-off areas. At the point that the Germans began deporting Jews to concentration camps, they often had very little left.

Even before the end of World War II, plans were being formulated by Jewish organizations and personalities outside Germany for compensation to individuals and reparations to the Jewish people as a whole.100 The eventual claimants who signed the Luxemburg Agreements in September, 1952 were the State of Israel, on behalf of the half-million victims of the Nazis who had found refuge in its borders, and the Conference on Jewish Material Claims against Germany [hereinafter the Claims Conference], on behalf of the victims of Nazi persecution who had immigrated to countries other than Israel and of the entire Jewish people entitled to global indemnification for property that had been left heirless.101 The Luxemburg Agreements became the basis of an unprecedented piece of legislation known as *Wiedergutmachung*.

*Wiedergutmachung* was unprecedented in several respects. First, international law did not require Germany to make reparations payments to victims of the Holocaust.102 Nor did the Allied Powers exert

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99 The situation of Jewish property owners under the Nazi regime in this respect parallels that of Japanese Americans in the United States in the 1920s who used a variety of methods such as deeds in the names of minor children, guardianship, and “dummy corporations” to escape the effect of the Alien Land Laws.

100 Conferences were held in Baltimore in 1941 and in Atlantic City in 1944. See SAGI, *supra* note 94, at 2. Shalom Adler-Rudel was the first to bring before the public the demand for German reparations to the Jews in 1940. See *id.* at 14.

101 See *id.* at 3.

102 See *id.*. International law would permit the exaction of reparations by the Allied Powers. As in World War I, Germany would be forced to pay compensation to the countries which had defeated it. However, the principle that reparations should be paid by a defeated country not
pressure on Germany to accede to the Luxemburg Agreements. The treaty obligation by which Israel was to receive the equivalent of one billion dollars in reparations from West Germany for crimes committed by the Third Reich against the Jewish people reflected Chancellor Konrad Adenauer’s view that the German people had a moral duty to compensate the Jewish people for their material losses and suffering. Secondly, the sums paid not only to Israel, but also to the Claims Conference, showed a genuine desire on the part of the Germans to make Jewish victims of Nazi persecution whole. Under Protocol No. 1 of the Luxemburg Agreements, national legislation was passed in Germany that sought to compensate Jews individually for deprivation of liberty, compulsory labor and involuntary abandonment of their homes, loss of income and professional or educational opportunities, loss of (World War I) pensions, damage to health, loss of property through discriminatory levies such as the Flight Tax, damage to economic prospects, and loss of citizenship. The elderly, the needy and the disabled were to receive priority in payment. Near heirs were eligible to assert the claim of a persecutee who died without receipt of payment. Real property was to be restored, with extremely limited protection of “good faith” purchasers, and identifiable personal property was also to be restored or compensated. In matters of proof of possession, equitable consideration was given to persecutees whose files and documents had been lost or destroyed.

Finally, Wiedergutmachung was remarkable and unprecedented for the principle it established. As David Ben Gurion was to say after signing of the Agreements:

only to the victors but to a persecuted minority among its own citizens as well, was a new departure in international law. They had only a moral claim to reparations. The State of Israel, for its part, was not even in existence at the time of the Holocaust.

See Sagi, supra note 94, at 3. In fact, Sagi points out that at the time Israel asserted its claim to reparations, the Allies, especially the United States, were somewhat opposed. The United States was opposed on the grounds that, due to the Marshall Plan, America itself would end up paying the reparations debt, and it also feared that in any case the newly-formed Federal Republic of Germany was still too economically weak to carry the burden of further reparations. By 1951, when Israel first asserted its claim to global reparations, the United States was intent on making Germany into an ally, and the demand for reparations to Israel might injure these plans. See id. at 55–60.

See id. at 3.

The Claims Conference, through the intermediacy of Israel, was to receive 450 million DM (3 DM to every $1). See Sagi, supra note 94, at 176-77. Moreover, under the Federal Indemnification Law, persecutees received some 53 billion DM by 1978. See id. at 196.

Until the adoption of Protocol No. 1, compensation to persecutees was accomplished by means of military law of the Allied Powers (the Soviet Union not participating) and regional legislation of the various German Länder. See Sagi, supra note 94, at 38-42.
There is great moral and political significance to be found in the Agreement itself. For the first time in the history of relations between people, a precedent has been created by which a great State, as a result of moral pressure alone, takes it upon itself to pay compensation to the victims of the government that preceded it. For the first time in the history of a people that has been persecuted, oppressed, plundered and despoiled for hundreds of years in the countries of Europe a persecutor and despoiler has been obliged to return part of his spoils and has even undertaken to make collective reparation as partial compensation for the material losses.  

The principle, then, was that when a State or government has through its official organs—its laws and customs—despoiled and victimized and murdered a group of its own inhabitants and citizens on the basis of group membership, that State or its successor in interest has an unquestionable moral obligation to compensate that group materially on the same basis. Jews were persecuted and oppressed in Germany as a group. Germany sought to compensate them both individually and as a group. Much of the impetus behind the Jewish demand for group compensation was the realization that, because so many of the Nazi's Jewish victims had perished, the new German State would reap the material benefits of Nazi crimes. Like abandoned Japanese property on the West Coast which escheated to the state and was auctioned off, heirless Jewish property in Germany provided yet another classic example of unjust enrichment. Wiedergutmachung in the form of reparations to the entire Jewish people significantly diminished the extent of this injustice.

It is unlikely that David Ben Gurion, in stating that the Luxemburg Agreements represented a "first" in the history of human society, was unaware of the situation of Black people in the United States. Blacks have never received any group compensation for the crime of slavery imposed upon them by the people and government of the United States. As in the case of the Japanese, Jews received not only material...
compensation for their losses, but their victimization was also publicly memorialized in Germany, Israel and in the United States\textsuperscript{110} (even though there was no legitimate claim of oppression or genocide that Jewish survivors of the Holocaust might assert against the United States).\textsuperscript{111} The only “memorial” dedicated to the suffering of Black

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\textsuperscript{110} Out of the sums paid to the Claims Conference by Germany, support was given to various organizations for the implementation of projects in the fields of education, research, and publications perpetuating the memory of the dead. Some 4.5 million dollars was devoted to memorials and documentation on the Holocaust. See Sagi, \textit{supra} note 94, at 200–01. In 1979, the President’s Commission on the Holocaust submitted proposals to President Jimmy Carter for the establishment of an “appropriate memorial” to the victims of Nazi persecution. See Stephen J. Massey, \textit{Individual Responsibility for Assisting the Nazis in Persecuting Civilians}, 71 MINN. L. REV. 97, 158 n.318 (1986).

\textsuperscript{111} For a contrary view, see Yehuda Bauer, \textit{Whose Holocaust}, and Henry L. Feingold, \textit{Who Shall Bear Guilt For The Holocaust: The Human Dilemma, in Genocide and Human Rights, supra} note 94, at 35, 59. While Feingold merely seeks to establish that the United States, both in its immigration policy and its military strategy during the war, failed to give the assistance needed by Jewish persecutees in Germany, Bauer argues that President Carter’s dedication of the American Holocaust memorial to the 11 million victims of Nazi persecution (6 million Jews and 5 million non-Jews) “watered-down” the Holocaust as a “specific Jewish tragedy.” Bauer’s is an obvious and offensive exercise in comparative victimology, by which I mean the attempt to situate a given group—in this case the Jews—at the top of an imagined hierarchy of oppression. The political motivation of this exercise is plain: if Jews suffered the most, they deserve the most in recompense. The moral purchase of the claim is also not insignificant: by arguing that the Jews are the paradigmatic victim, Jews become central moral authorities on oppression. They can never be oppressors. Feingold, in his own way, participates in this centering of the Jew as ultimate victim by seeking to draw the United States into the immoral genocidal universe of the Nazis, regardless of the fact that the United States fought a war against the Nazis at a tremendous cost in lives. The supposedly neutral Swiss are not singled out for similar treatment. Even more reprehensible than the views of these two authors is the fact that the editor of \textit{Genocide and Human Rights}, Jack Nusan Porter, excludes the experience of American Blacks from treatment in his anthology altogether, claiming that “[w]hile repressive acts did occur, mass genocide was not one of them.” Jack Nusan Porter, \textit{Introduction to Genocide and Human Rights, supra} note 94, at 11–12.
slaves and the survivors of slavery in the United States is contained in a series of legislative enactments passed after the Civil War. The history of Black Reconstruction shows how these enactments were successively perverted by the courts, and by Congress itself.

C. Black Americans

After the hostilities of the Civil War ended, Congress pursued a legislative program calculated to secure the social and political equality of the freedmen. In pursuance of its enforcement power under the Fourteenth Amendment, Congress passed the Ku Klux Klan Act of

Although I believe that comparative victimology can be useful from the standpoint of establishing historical facts about the different treatment of various groups, ultimately the attempt to quantify pain must leave a bad taste in the mouth of any fair-minded reader. I hope that my own comparisons will be accepted not as quantification, but as qualifications. Blacks in America have not been oppressed in the same way that Jews were oppressed in Germany, although there are significant overlaps in terms of the ideology employed to justify extermination of the Jews. By the same token, the oppression of white women has not been the same as the oppression of Blacks, but there are similarities. Oppression, in my opinion, has to be understood in its specificity and particularity to the persons involved and the reasons used to justify it. But what difference could it make to our sense of moral outrage whether a corpse got that way by being gassed in an oven or lynched by a mob?

112 The Civil War spanned the years of 1861-1865.

113 The Thirteenth Amendment, passed and signed by President Lincoln on February 1, 1865, provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII, §§ 1, 2. The Fourteenth Amendment, enacted by Congress in June, 1866 (and finally ratified in 1868), provides (in relevant part):

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or Property, without due Process of law; nor deny to any person within its jurisdiction the equal Protection of the laws.

U.S. CONST. amend. XIV, § 1. Congress was given the power to enforce this amendment by “appropriate legislation.” U.S. CONST. amend. XIV, § 5.

This portion of the Fourteenth Amendment was an attempt to constitutionalize the Civil Rights Act of 1866, which provided in section 1 that all persons born in the United States were “citizens of the United States” and proceeded to list certain rights of “such citizens, of every race and color, without regard to any previous condition of slavery.” See Eugene Gressman, The Unhappy History of Civil Rights Legislation, 50 MICH. L. REV. 1323, 1328-33 (1952) (arguing not only that the amendment was intended to allay doubts as to the constitutionality of the Act, but also that “privileges or immunities” was intended to encompass the fundamental rights of persons contained in the Act, the Bill of Rights and the Declaration of Independence).

Adopted in 1870, the Fifteenth Amendment prohibited the denial of the right to vote to United States citizens because of “race, color, or previous condition of servitude.” Congress was empowered to enforce the provision “by appropriate legislation.” U.S. CONST. amen. XIV, § 2.
1871. \textsuperscript{114} Congress also passed the Civil Rights Act of 1875 under the Fourteenth Amendment. Its preamble stated:

\textbf{\textit{We recognize the equality of all men before the law, and hold that it is the duty of government in all its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political . . . [and that it was] the appropriate object of legislation to enact great fundamental principles into law.}} \textsuperscript{115}

In pursuance of its enforcement power under the Fifteenth Amendment, Congress also passed the Civil Rights Act of 1870. \textsuperscript{116} This Act essentially reiterated the provisions of the 1866 Act,\textsuperscript{117} adding criminal penalties for violation of the law, a conspiracy section, and sought to effectuate the right of free suffrage.

At the same time, Congress sought to ensure the future economic independence of Black people. \textsuperscript{118} Of the Freedmen's Bureau Acts

\textsuperscript{114} Ch. 22, 17 Stat. 13 (1871). Under section 2 of the Act, it was a criminal offense to "conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose . . . of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws . . . ." \textit{Id.}

If state authorities were unable or unwilling to prevent the deprivation of a constitutional right, and violence resulted, the President was empowered to take appropriate measures to suppress the violence. Moreover, the person whose civil rights were injured was given a civil cause of action against the officer who should have but did not protect him. \textit{See id.} at 14, 15.

\textsuperscript{115} Ch. 114, 18 Stat. 335 (1875). Section one of the Act required all inns, public conveyances, theaters, and other places of public amusement to open their accommodations and privileges to "all persons within the jurisdiction of the United States," subject only to legal conditions applicable alike to citizens of every race and color, regardless of any previous condition of servitude. \textit{See id.} at 336.

Section 2 made a violation of this provision a misdemeanor and gave the injured person the right to recover a $500 penalty for each offense. Federal courts were given exclusive jurisdiction over cases arising under this statute, with all cases being reviewable by the Supreme Court regardless of the sum of money involved. \textit{See id.} The public accommodations provisions of the 1875 act were held by the Supreme Court to be unconstitutional in The Civil Rights Cases, 109 U.S. 3 (1883).


\textsuperscript{117} \textit{See} 42 U.S.C. 1982 (1998). The Civil Rights Act of 1866 declared that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed," were citizens of the United States. \textit{See} ch. 31, 14 Stat. 27 (1866). Such citizens were granted the same right to make and enforce contracts, sue, give evidence, acquire property and "to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . ." \textit{See id.} Moreover, all citizens were to be "subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." \textit{See id.} The 1866 Act was passed by Congress over President Johnson's veto in an attempt to respond to the Black Codes. \textit{See} The Slaughterhouse Cases, 83 U.S. 36 (1873) (describing the effect of the Black Codes).

\textsuperscript{118} The Bureau of Freedmen, Refugees, and Abandoned Lands was created by an act of
passed for the economic independence of Black people, the most important aspects were the land and education provisions. Under the first Act, Congress made no appropriation for the duties assigned to the Bureau. The Bureau’s income was derived from abandoned lands rented to freedmen and refugees. As President Johnson pursued his policy of pardoning ex-Confederates and restoring their land to them, however, the Bureau was gutted of its only source of funding. More importantly for the freedmen, their hope of buying this land from the federal government evaporated.

Congress acted again in the summer of 1866, this time not through Freedmen’s Bureau legislation, but by extending the hope of land to the freedmen through the Southern Homestead Act. Under the Act, lands in Alabama, Arkansas, Florida, Louisiana and Mississippi were opened for settlement in eighty-acre plots. Ex-Confederates could not apply for homesteads before January 1, 1867. This gave the freedmen roughly six months to purchase land at reasonably low rates without competition from white Southerners and Northern investors.

Because of their destitution and depressed economic conditions in the South, most freedmen were unable to take advantage of the homesteading program. The majority of the homesteads were taken up by Blacks in Florida, but even there the total number was only a little over three thousand. The lands provided by the Homestead Act were generally inferior for farming purposes. Often the lands were distant not only from transportation lines but also from employment centers where freedmen needed to work until they could become self-supporting. Most homesteaders lacked both the means for a few months’ subsistence and the most elementary farming equipment. The homesteading program was thus a miserable failure.

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120 See id. at 74–75.
121 Ch. 127, 14 Stat. 66 (1866).
122 See Bentley, supra note 119, at 134.
123 See id. at 144.
124 See id.
The work of educating the freedmen was first taken up during the war by the benevolent societies of the North, such as the Edward L. Pierce group, the American Tract Society, and the American Missionary Association.\textsuperscript{125} By January, 1865, 75,000 Black children in the Union-occupied South were being taught by approximately 750 teachers.\textsuperscript{126} Nearly all those who received compensation for teaching Black pupils in the South during this time were supported by private charities.

Under the Freedmen’s Bureau Act of 1866, Congress provided $500,000 for rent and repair of school and asylum buildings, and decided that the Bureau might “seize, hold, lease or sell for school purposes” any property of the ex-Confederate States.\textsuperscript{127} To meet the need for permanent schools, the Bureau in most states paid for completion of buildings that the freedmen themselves began constructing. Often these structures were located on land that the freedmen had purchased for themselves. Additionally, in order to obtain financial assistance from the Bureau, school organizations were required to ensure that the buildings would always be used for educational purposes and that no pupil would ever be excluded because of race, color, or previous condition of servitude.\textsuperscript{128} By March, 1869, the Bureau had either built or had helped to build 630 schoolhouses.\textsuperscript{129} It had spent $1,771,132.25.\textsuperscript{130} In the next three years, its appropriation for educational expenses amounted to another $2,000,000.\textsuperscript{131}

From 1867 to 1870, the Bureau furnished $407,752.21 to twenty institutions of higher learning for freedmen and $3,000 to a school for white refugees. Of this amount, $25,000 went to Howard University in the nation’s capital.\textsuperscript{132} By 1871, there were eleven colleges and universities and sixty-one normal schools in the nation which were especially intended for Blacks.\textsuperscript{133}

For the safekeeping of the freedmen’s savings and the investment of their wartime bounties, Congress also chartered the Freedman’s Bank under the Freedman’s Saving and Trust Company Acts.\textsuperscript{134} The

\textsuperscript{125} See id. at 169.
\textsuperscript{126} See id. at 170.
\textsuperscript{127} See Bentley, supra note 119, at 172.
\textsuperscript{128} See id. at 172–73.
\textsuperscript{129} See id. at 173.
\textsuperscript{130} See id.
\textsuperscript{131} See id.
\textsuperscript{132} See Bentley, supra note 119, at 175.
\textsuperscript{133} See id. at 176. “Normal” school is a translation of the French école normale, which literally means a school that serves as a model. It refers to a school in which teachers are trained.
\textsuperscript{134} See Freedman’s Savings and Trust Company Act, ch. 92, 13 Stat. 510 (1865); Act of June 20, 1874, ch. 949, 18 Stat. 131; Act of Feb. 13, 1877, ch. 57, 19 Stat. 231; Act of Feb. 21, 1881, ch.
bank was a miserable failure, which, in the end, deprived many of its trusting depositors of their savings. 135

Although no federal plans for reparations to the former slaves were ever considered, even by the most "radical" members of Congress, 136 the lands provision of the first Freedmen's Bureau Act was intended to make good on a promise that had first been planted in the minds and hearts of Black people by General Sherman. 137 While the Freedmen's Bureau Act of 1865 had promised to purchasers of the lands only "such title thereto as the United States can convey," once the government assigned plots and collected rents and gave options, the radical politicians would be able to argue that it was morally bound to pay reparations to the freedmen. The government could hardly take back for the sake of slave masters and traitors, they would say, what it had given to freedmen and loyalists.

The purpose of the land redistribution plan, as with many of the programs instituted during Reconstruction, was not only to punish the Confederates, but to create among the freedmen a landowning yeomanry, to indebt the freedmen politically to the Republicans, and to ensure the future economic independence of the freedmen. The purpose of land redistribution, however, was not by any means to pay reparations to Blacks for their loss of freedom and uncompensated labor. Ironically, during its first year of operation, the freedmen financed the efforts of the Bureau with the rents they paid and they were expected to buy the lands that the Union had confiscated. Even more tragically, President Lincoln had supported, both before and during the war, a

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135 See generally H.R. Rep. No. 44-502 (1876). See also FREDERICK DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS 400-06 (1862) (1892) (relating his brief experience as president of the Freedman's Bank).

136 Even before the war ended, radicals in Congress had managed, against President Lincoln's wishes and probably in derogation of the Constitution, to pass the Confiscation Act of August 6, 1861. Ch. 60, 12 Stat. 319 (1861). See HANS L. TREFOUSSE, THE RADICAL REPUBLICANS: LINCOLN'S VANGUARD FOR RACIAL JUSTICE 206, 209, 249 (1969). The Act was preliminary to their plans for redistribution of the lands of Southern "traitors." See BENTLEY, supra note 119, at 89-90. On March 13, 1865, Charles Sumner wrote to the British statesman, John Bright, "From the beginning I have regarded confiscation only as ancillary to emancipation." See id. at 90.

137 Sherman's Special Field Order No. 15 (January 16, 1865), reprinted in WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 350 (1906), provided that designated lands in South Carolina and Georgia were "reserved and set apart for the settlement of the negroes now made free by the acts of war and the proclamation of the President of the United States."

In the Freedmen's Bureau Act of 1866, Blacks possessing Sherman titles were protected from Johnson's restoration order. Of course, Blacks thought, in their innocence, that Congress would find a way to provide land for all 4 million of them who wanted it.
plan to pay slaveowners for their lost "property" as a means of ending slavery.\textsuperscript{138}

Opponents of land redistribution, rejecting the radical analogy of Blacks to the Indians, stated:

There are many reasons why Congress may legislate in respect to the Indians which do not apply. . . . The Indians occupy towards this Government a very peculiar position. They were in possession of the public domain; they had what the Government recognized as a possessory right . . . .\textsuperscript{139}

Congressional critics of Freedmen's Bureau legislation also objected that the position of the freedmen within the American polity was not \textit{sui generis}, and therefore "class legislation" on their behalf was neither justified nor in the spirit of the American Constitutional system.\textsuperscript{140}

The desire for landownership was both natural and strong among the freedmen.\textsuperscript{141} They had cultivated the land on Southern plantations for generations. They had fought in the war to gain their own freedom. Despite the abuses they endured from white Southerners, they thought of the South as their home.\textsuperscript{142} In fact, the desire for land was so strong,

\textsuperscript{138} See Bentley, supra note 119, at 15. See also John Hope Franklin & Alfred A. Moss, Jr., \textit{From Slavery to Freedom: A History of Negro Americans} 188-89 (1988).


\textsuperscript{140} In the words of one Congressman,

A proposition to establish a bureau of Irishmen's affairs, a bureau of Dutchmen's affairs, or one for the affairs of those of Caucasian descent generally . . . would, in the opinion of your committee, be looked upon as the vagary of a diseased brain. . . . Why the freedmen of African descent should become these marked objects of special legislation, to the detriment of the unfortunate whites, your committee fail to comprehend. . . . The propriety of incurring an expenditure of money for the sole benefit of the freedmen, and laying a tax upon the labor of the poor and, perhaps, less favored white men to defray it, is very questionable . . . .

H.R. Rep. No. 38-2, at 2 (1864). "This, sir, is what I call class legislation—legislation for a particular class of the [B]lacks to the exclusion of all whites. . . . Such partial legislation, Mr. Speaker, cannot be lasting; it seems to me to be in opposition to the plain spirit pervading nearly every section of the Constitution . . . ." Cong. Globe, 39th Cong., 1st Sess. 544 (1866) (statement of Rep. Taylor).

No land is to be provided for the poor white men of this country, not even poor land; but when it comes to the negro race three million acres must be set apart [referring to a provision of the first Freedmen's Bureau Bill of 1866 for which Congress failed to override a Presidential veto], and it must be "good land" at that.

\textit{Id.} at 362 (statement of Sen. Saulsbury).

\textsuperscript{141} See generally Edward Magdol, \textit{A Right to the Land: Essays on the Freedmen's Community} ch. 6 (1977).

\textsuperscript{142} Regardless of how the freedmen felt toward the South, it should be noted that "the Lincoln administration adopted a deliberate policy" to keep the freedmen in the South. See
the belief that the government would deliver so great, and the freedmen's knowledge of government protocol so poor, that carpetbaggers were able to sell fake land deeds to the former slaves. The freedmen were sometimes sold painted sticks which supposedly had been distributed by the government for the purpose of staking out the negroes' forty acres. One spurious land deed proclaimed:

Know all men by these presents, that a naught is a naught, and a figure is a figure; all for the white man, and none for the nigure. And whereas Moses lifted up the serpent in the wilderness, so also have I lifted this [damned] old nigger out of four dollars and six bits. Amen. Selah!
Given under my hand and seal at the Corner Grocery in Granby, some time between the birth of Christ and the death of the Devil. 143

There is no need to recount here the horrors of slavery. 144 Suffice to say that, if the land redistribution program pursued by Congress during Reconstruction had not been undermined by President Johnson, if Congress' enactments on behalf of political and social equality for Blacks had not been undermined by the courts, if the Republicans had not sacrificed the goal of social justice on the altar of political compromise, 145 and Southern whites had not drowned 146 Black hope in

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George M. Fredrickson, The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817–1914, at 166 (1971). This policy was continued by subsequent administrations, so that large-scale Black migration to the North did not occur until the period just before World War I. The Northerners' fear of inundation by Blacks was coupled with their desire to use Black labor to rebuild the South or, at best, to colonize Blacks outside the United States.

143 Deed for Land, Given with Painted Sticks (Jan. 9, 1866), in Documents Relating to Reconstruction Nos. 6 & 7, 45 (Walter L. Fleming ed., 1904). Of course, the freedman who bought this could not read.

144 For narrative accounts of conditions that existed under slavery for Blacks, see Herbert Aptheker, American Negro Slave Revolts (1969), and Kenneth M. Stampp, The Peculiar Institution: Slavery in the Ante-Bellum South (1989).

145 It is generally accepted that resolution of the disputed presidential election of 1876 in favor of the Republican candidate, Hayes, over the Democratic candidate, Tilden, coincided with the North's retreat from the South, both in arms and in commitment to equal justice for Blacks. Soon thereafter, Jim Crow became the rule of the day for Blacks in the South. See Franklin & Moss, supra note 138, at 230–31; and Bell, Race, Racism and American Law, supra note 10, at 27–28.

146 The only hindrances to wholesale extermination of Blacks in the South during the period following Reconstruction were the South's dependence on cheap Black labor, the fear of further military intervention from the North, and the heritage of slavery itself which provided Southern racists with a model of control and exploitation of their Black "inferiors," rather than outright extermination. See generally Edward Eggleston, The Ultimate Solution of the American
a sea of desire for racial superiority, then talk of reparations—or genocide—at this point in history might be obtuse, if not perverse.147

As things stand, however, the South pursued a policy of racial separation with the sanction of the Supreme Court and the silent consent of Congress for a century after the official abolition of slavery. The expedient of the lynch mob secured for white supremacists the twin goals of control and exploitation of Blacks on the one hand, and extermination of Blacks on the other. Since Blacks (or "disloyal" whites) could be lynched, beaten, castrated, or burned to death with basic impunity, usually on the pretext of rape of a white woman, the twin goals were met. Total annihilation was never forced to an issue.148

Even during Reconstruction, Blacks had very little to say about what was owed to them as a group that the white man was bound to respect.149 That situation has changed remarkably little.

The material bases of the claim for group reparations to Blacks are (1) the value of the uncompensated labor of generations of slaves150 and (2) the century-long violation of Black civil rights through state-

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147 According to Lemkin, who coined the term: Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of personal security, liberty, health, dignity, and even the lives of individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.

Lemkin, supra note 93, at 79.


149 For a compelling early example of the impotence of Black leaders' attempts at group representation in the face of white racism, see Reconstruction, the Negro, and the New South 20–31 (Cox & Cox eds., 1973) (exchange between the President [Johnson] and Negro Spokesmen on Suffrage). Johnson, the self-styled "Moses" of the freedmen, there tells Frederick Douglass and company that the vote must be denied to the Blacks in order to avoid race war, and implies that Blacks should leave the country. Lincoln also had insisted to Black leaders that the best course for their "race" was emigration from the United States. See Franklin and Moss, supra note 138, at 189.

150 One academic study by economic historians estimates the present-day value of "unpaid
enforced segregation. As Boris Bittker\textsuperscript{151} argued succinctly in 1973, the claim for reparations cannot be limited to the outrageous exploitation of Blacks perpetrated during slavery.\textsuperscript{152} The ugly facts of the recent past and contemporary life also require redress and compensation. The legacy of Jim Crow is still with us, as the statistics from Pettigrew quoted earlier demonstrate. The psychological inheritance of slavery still exercises the image of the Black in the white mind.\textsuperscript{153}

Though slavery officially ended, the attitudes toward intrinsic Black character, based on ideologies of race, persisted. One of the best contemporary articulations of this persistent belief in the duality of Black character occurs in James Baldwin’s *Notes of a Native Son*, in the essay, *Many Thousands Gone*. There Baldwin writes:

In our image of the Negro breathes the past we deny, not dead but living yet and powerful, the beast in our jungle of statistics. It is this which defeats us, which lends to interracial cocktail parties their rattling, genteel, nervously smiling air: in any drawing room at such a gathering the beast may spring, filling the air with flying things and an unenlightened wailing. \ldots Wherever the Negro face appears a tension is created, the tension of silence filled with things unutterable.\textsuperscript{154}

Blacks deserve reparations not only because the oppression they face is “systematic, unrelenting, authorized at the highest governmental levels, and practiced by large segments of the population,”\textsuperscript{155} but also because they face this oppression as a group, they have never been adequately compensated for their material losses due to white racism, and the only possibility of an adequate remedy is group redress.


\textsuperscript{152}See id. at 12.

\textsuperscript{153}See Fredrickson, supra note 142, at chs. 1, 2, 6, 7, 9 and 10 (arguing that ideologies espousing the duality of Black character—as wild and criminal beast and as docile and minimally educable child—are traceable to antebellum pro-slavery apologists).

\textsuperscript{154}James Baldwin, *Many Thousands Gone*, in *Notes of a Native Son* 27 (1963).

\textsuperscript{155}Bittker, supra note 151, at 21.
III. Many Billions Gone: How Black Reparations Fulfill the Antiracist Agenda of the Black Freedom Struggle

This final part of the argument for Black reparations addresses the nettlesome objection to reparations based in concerns about distributive justice. Doctrinal objections to reparations rooted in the complex question of the identification of victims and perpetrators often serve as a proxy for concerns about redistributive fairness. Distributive justice will not uphold the status quo in which the privileged benefit from past wrongs committed by others. When, moreover, those wrongs were committed with the assistance, support, or acquiescence of government, a claim for redress is appropriately directed to the government. However, any redress awarded by government to victims of group oppression will inevitably be to some extent overinclusive and underinclusive. In this respect, I contend, Black reparations resemble affirmative action, but the arguments in favor of reparations are more compelling than those in favor of affirmative action as a form of redress. In the course of my argument for a plan of group reparations, I consider the ways in which Black reparations avoid some of the pitfalls and drawbacks of affirmative action. Finally, I conclude that Black reparations should be considered a prerequisite to civil equality.

A. Redistributive Fairness and Black Reparations

In arguing for reparations to Blacks on the model of Wiedergutmachung,156 and drawing upon the precedent of the Civil Liberties Act of 1988,157 several issues of redistributive fairness must now be faced squarely. Both the Jewish and the Japanese-American experiences contain features that diverge from the reality of Blacks. From the Japanese and Jewish experiences it is clear that the courts are an inappropriate body before which to submit a claim for reparations. Moreover, even though reparations were paid to Japanese Americans on the basis of a group criterion, each eligible claimant received an individual payment. For their part, Jews received both individual and group compensation from the West German government.

The problem of who legitimately represented the material claims of Japanese Americans and Jews was settled in two different ways. In the case of the Japanese Americans, it was settled by structuring the legislation so that individual claimants were compensated. In the case

156 See supra Part II.B.
157 See supra Part II.A.
of the Jews, it was settled by structuring the agreements so that individuals were compensated, and a recognized Jewish state, the government of Israel, was compensated on behalf of the group. Because Israel existed as a state, Jews were prepared to accept nonmonetary compensation in the form of goods and services.

The questions raised by the claim of reparations for Blacks from the standpoint of redistributive fairness are what form should reparations take, and what amount of overinclusiveness and underinclusiveness should a plan for Black reparations permit.

1. A Plan for Group Reparations

Because it is my belief that Blacks have been and are harmed as a group, that racism is a group practice, I am opposed to individual reparations as a primary policy objective. Obviously, the payment of group reparations would create the need and the opportunity for institution-building that individual compensation would not. Additionally, beyond any perceived or real need for Blacks to participate more fully in the consumer market—which is the inevitable outcome of reparations to individuals—there is a more exigent need for Blacks to exercise greater control over their productive labor—which is the possibility created by group reparations.\footnote{I am not the first to suggest group reparations as a means of institution-building for the Black community. \textit{See generally} Robert S. Lecky \& H. Elliott Wright, \textit{Black Manifesto: Religion, Racism, and Reparations} (1969).}

Most of the earlier catalogued disabilities that Black people face in contemporary America are traceable to the economic question.\footnote{This is not to deny the importance of noneconomic forms of oppression, but to acknowledge the hegemonic role of money in capitalist America.} Blacks are unemployed or underemployed because they have insufficient Black industries to turn to for jobs when white-controlled industries discriminate against them. Black business is undercapitalized and dependent on government because Blacks have no strong financial institutions willing and able to invest in their development. Blacks are uneducated and undereducated because they cannot, as a group, afford the cost of quality education. For the same reason, inability to pay, Blacks suffer from poor quality health care or no health care at all. The Black image in the white mind cannot be changed in a direction that Blacks would prefer, so long as Blacks do not exercise significant control over the media that produce, package and market representations of Blacks. Each disability, from failure to exercise fully the franchise, to homelessness, poverty, disease, and occupational disadvant-
tage, has an economic component and admits (at least partially) of economic solutions. But the security of these solutions depends on group reparations.

It is one of the aims of this inquiry to demonstrate that Blacks are a cognizable group for purposes of recognition of their rights as a group and group redress. Thus, the question of group status is one which cannot be answered simply. The irony posed by the very question of Black national group status is that in ordinary social and political discourse, Blacks are treated as a group for every purpose other than rights-recognition. Even as we profess the values of color-blindness, it is common and accepted usage to maintain a catalogue of "racial" firsts, failures, accomplishments and defects. The contradiction is neither accidental nor a remnant from an earlier period of "race" consciousness.

None of this is to say that the question of Black national group status is an easy matter to resolve. Ideally, however, one could settle the problem of legitimate representation for purposes of obtaining group reparations through, first of all, seeking the endorsement and support of established Black organizations, and secondly, through a plebiscite of intended beneficiaries. Given the current conditions under which the majority of Black people live, a plebiscite would be effective only if the work of educating the masses were carried out with meticulous care. Blacks, and whites, desperately need to understand the basis of the claim for group reparations, the historical precedents, and the future potential of a successful campaign.

On the issue of accepting nonmonetary compensation, it must first be pointed out that, in a sense, that is what affirmative action has been about. Affirmative action, by providing Blacks with educational and employment opportunities that they would not otherwise have due to white racism, "compensated" Blacks for the injustices they suffered. This sort of nonmonetary compensation is unacceptable for the following reasons: 1) many whites and some Blacks believe that affirmative action is a "hand-out" and not compensation, thus perpetuating discrimination against all Blacks, and not just those who benefit personally from affirmative action programs; 2) very few Blacks actually benefit personally from affirmative action, thus all Blacks are not compensated; 3) affirmative action, by its nature, must ultimately be

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160 See IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 43 (1990) (noting that neither social theory nor philosophy has a clear and developed concept of the social group).

161 Cf. Delgado, supra note 6, at 1224 (arguing that affirmative action bases inclusion of people of color on principles of social utility, rather than reparations or rights).
administered by a judiciary which increasingly believes that affirmative action is "reverse discrimination," un-Constitutional if not narrowly-tailored to redress specific acts of discrimination by identified violators, and furthermore, that rights are (or should be) individual, and that "race" is the wrong basis on which to assign benefits and burdens under the law; 4) affirmative action subjects Blacks participating in it to Pettigrew's "triple jeopardy" threat;\(^{102}\) 5) the fact that affirmative action is out of line with mainstream white American values means that politically it could not be maintained for a long enough period to compensate Blacks adequately; 6) affirmative action is, or is intended to be, meritocratic; 7) affirmative action, in most cases, is discretionary, situational and sporadic, not uniform and systematic.

Compensation to Blacks for the injustices suffered by them must first and foremost be monetary. It must be sufficient to indicate that the United States truly wishes to make Blacks whole for the losses they have endured. Sufficient, in other words, to reflect not only the extent of unjust Black suffering, but also the need for Black economic independence from societal discrimination. No less than with the freedmen, freedom for Black people today means economic freedom and security. A basis for that freedom and security can be assured through group reparations in the form of monetary compensation, along with free provision of goods and services to Black communities across the nation. The guiding principle of reparations must be self-determination in every sphere of life in which Blacks are currently dependent.

To this end, a private trust should be established for the benefit of all Black Americans. The trust should be administered by trustees popularly elected by the intended beneficiaries of the trust. The trust should be financed by funds drawn annually from the general revenue of the United States for a period not to exceed ten years. The trust funds should be expendable on any project or pursuit aimed at the educational and economic empowerment of the trust beneficiaries to be determined on the basis of need. Any trust beneficiary should have the right to submit proposals to the trustees for the expenditure of trust funds.

The above is only a suggestion about how to use group reparations for the benefit of Blacks as a whole. In the end, determining a method by which all Black people can participate in their own empowerment will require a much more refined instrument than it would be appropriate for me to attempt to describe here. My own beliefs about what

\(^{102}\) See supra Part I.B.
institutions Black people need most certainly will not reflect the views of all Black people, just as my belief that individual compensation is not the best way to proceed probably does not place me in the majority. Everybody who could just get a check has many reasons to believe that it would be best to get a check. On this point, I must subscribe to the wisdom that holds, if you give a man a loaf, you feed him for a day.\footnote{This wisdom attempts to distinguish between temporary relief and long-term solutions.} It is for those Blacks who survive on a “breadconcern level”\footnote{This term, I believe, was first coined by Audre Lorde. It appears in Matsuda, \textit{supra} note 10, at 325 n.12 (citing \textit{AUDRE LORDE, SISTER OUTSIDER} 34 (1984)).} that the demand for reparations assumes its greatest importance.

2. The Overinclusiveness and Underinclusiveness of Black Reparations

Just as affirmative action has been criticized by some for rewarding undeserving middleclass Blacks at the expense of underclass or poor whites, a plan for Black reparations could be attacked on the ground that Blacks who enjoy relatively privileged and discrimination-free lives would benefit at the expense of underprivileged whites and nonBlack nonwhites. This criticism raises the issues of overinclusion and underinclusion to show that a valid concern of redistributive fairness is not satisfied in a remedial scheme based on the equality principle that excludes any segment of the poor or underprivileged and includes any segment of the privileged.

This criticism substitutes class status rather than racial group status as the proper basis for remediation. One difficulty with this approach is racially identifiable class stratification, with Blacks disproportionately absent from and whites overly represented among the privileged classes. Racial group status, therefore, cannot be simply shoved aside as irrelevant to concerns about equality among economic classes. Moreover, the class-over-race approach to redistributive fairness ignores that the central claim of Black reparations is redress for exploitation through government sanctioned white supremacy. The claim is one of entitlement, not need.

Nonetheless, it would be undeniably troubling if a relatively privileged group insisted on pressing its entitlement claims in a context in which the underprivileged and truly disadvantaged would have to pay. We can imagine a scenario in which a more powerful social group unjustly exploits a less powerful group, and then later finds itself in a less advantageous economic position than those who had been wronged in
the past. Perhaps those who had been wronged, through their own industry and efforts or by windfall, managed to surpass the achievements of those who had been their oppressors. A valid claim for redress might exist among the newly prosperous group against their former exploiters, and yet it might seem unjust to pursue the claim. Because of the class differences, redress may impair the achievement of social equality between the two groups in a society where equality was a normative value.

The problem of overinclusion within the beneficiary group in a plan for Black reparations hardly approaches the level of a threat to the values of social equality among groups. Nor would a plan for Black reparations that was marginally overinclusive in the sense that some are compensated who suffered no harm seriously impair the ability of society to achieve social equality. On the contrary, the goal of social equality is enhanced when the beneficiary group is also a group such as Blacks that suffers continuing economic subordination despite advances made by some individuals.

Overinclusion within the group who must pay reparations also presents problems of the troubling but not irresolvable variety. Some might object that their ancestors had nothing to do with enslavement of Blacks or actually opposed racism and discrimination. Moreover, if reparations are drawn from general revenue, beneficiaries who are also taxpayers will pay a part of their own redress. From the standpoint of redistributive fairness, this may seem unjust. On the other hand, given the near impossibility (because of administrative costs) of obtaining redress only from those who perpetrated racism and exploitation, the focus of reparations doctrine needs to be on the role of government. This was the case with respect to both Japanese and Jewish reparations.

Reparations to Blacks is an obligation of the American government for its role in slavery and the violation of Black rights. Government obligations are paid with taxpayer funds. Taxpayers do not typically have a right to pick and choose among specific governmental expenditures they wish to support; nor should they. In order to preserve government at all, policymakers must be allowed to make allocation decisions in the best interest of their constituents and society as a whole. In my view, the alternative inexorably leads to free rider dilemmas and social fragmentation or immobilization. Thus, Black reparations, as with other government obligations, may justly be paid out of general revenue consistently with redistributive fairness.

The class-over-race approach to redistributive fairness also raises the issue of underinclusiveness. If Blacks receive reparations for wrongs done to them and their ancestors, shouldn’t other poor and under-
privileged groups, including some white ethnic groups, also receive reparations? This question becomes an objection to Black reparations when it suggests either that America has too many victims to compensate them all, and therefore should not compensate any, or that Black reparations could be paid only at the expense of harming the nonBlack poor. In other words, the former assumes zero balances and the latter zero sum.

The basis of the claim for Black reparations is not need, but entitlement. Need is not irrelevant, but it is by no means central to the claim. Reparations as a norm seeks to redress government-sanctioned persecution and oppression of a group. In that regard, it has been a workable norm for groups other than Blacks. Compensation of such groups need not be a zero balance endeavor given the variety of compensatory possibilities and circumstances to which groups seeking redress respond. Sovereignty, land, money transfers, tax breaks, educational scholarships, and medical and housing subsidies all lie within the compensatory arsenal of government. Their extensive use outside the context of reparations belies the assertion that their implementation within the context of reparations would overburden national revenues.

Moreover, reparations to Blacks would not inevitably harm the nonBlack poor. Racist exploitation has contributed to the persistence of poverty among Blacks and the unjust privilege of whites. Redressing these harms through Black reparations would help to alleviate part of the problem of persistent poverty. To the extent that poverty remains a problem among nonBlacks and Blacks alike, it is both just and consistent with the equality principle to demand adequate social welfare, equal educational opportunity and access to jobs. Other national goals, like space exploration or defense, may need to be downsized in order to fulfill the moral obligation of social justice.

Recognition of reparations as an enforceable legal norm, available to any similarly subordinated group, upholds justice without placing an undue burden on the valid concerns of redistributive fairness. In addition to its positive deterrent effect, payment of reparations contributes inestimably to the norm of social equality because of how it might change the lives and perspectives of the subordinated. Equal treatment is not a shibboleth but a real possibility. Injustice against groups is not tolerated or rewarded. Opportunity free from stigma and disadvantage is the norm in my country. Discrimination and racism may end. In my view, these effects alone, if realized, make implementation of Black reparations as an enforceable legal norm long overdue.
B. Black Reparations as Precondition to Civil Equality

One final argument may be advanced in defense of Black reparations. The genocidal conditions under which Black people have been forced to live during their tenure in the United States have been ameliorated but not ended by the demand for civil rights. The miserly development of that sorry and treacherous history was highlighted at the beginning of this article. A crucial but seldom considered defect of all civil rights legislation is the fact that it needs to be administered and enforced. Many Blacks (and whites, too) appear to be under some delusion that once Congress passes civil rights legislation, Blacks are protected from discrimination and white racism. Nothing could be further from the truth, as the history of Black Reconstruction clearly shows. Every measure passed by Congress during Reconstruction for the social and political equality of Blacks—with the possible exception of the Thirteenth Amendment—was subverted or made null and void before the turn of the century.

During the heyday of the 1960s Civil Rights Movement, Blacks again received legislation from Congress which, in turn, is being methodically nullified by invidious court opinions. Since President Bush vetoed the Civil Rights Act of 1990, and Congress failed to override that veto, Black people will not begin to get back the civil rights lost during the Reagan administration for some time. A pattern of gain

165 See supra notes 3–6 and accompanying text.
166 See supra note 20; EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (holding that the Civil Rights Act of 1964 (Title VII) does not extend its protection to American citizens working outside the territorial jurisdiction of the United States); West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991) (holding that expert witness fees are not recoverable by a prevailing plaintiff as a form of attorney's fees covered by federal civil rights laws); Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989) (holding that district courts may award Title VII attorney fees against losing intervenors only where the intervenor's action was frivolous, unreasonable or without foundation); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (holding that the Civil Rights Act of 1866 does not prohibit racial harassment and other forms of race discrimination that extend beyond the "making" or "enforcement" of a "contract"); Lorance v. AT & T Technologies, Inc., 490 U.S. 900 (1989) (holding that the time limit for challenging a discriminatory seniority system begins to run when the plan is adopted, not when the plan is applied to a specific individual); Martin v. Wilks, 490 U.S. 755 (1989) (permitting white fire fighters to collaterally attack a consent decree many years after its issuance); Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989) (holding that an employment practice that has a disparate impact on minorities need not be rebutted by a showing of business necessity under Title VII); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that an employer may escape liability in "mixed motive" cases if the employer can establish that it would have made the same decision absent discriminatory motive).

167 As the cases in note 166 supra indicate, those rights that the Court has denied extend to the award of statutory attorney fees, standing, and allocation of burdens during trial. These factors may be more important to the ability to vindicate underlying rights of equal employment opportunity through legislation than the underlying rights themselves.
and then loss has unquestionably revealed itself. To attribute this pattern to the fact of administration, is not to overlook or discount other ideological components of legislative failure. It is merely to acknowledge the perverse operation of that time-worn saw: the price of freedom is eternal vigilance.

Civil rights legislating is an open-ended enterprise, with no end in sight so long as such laws must be administered by those whose commitment or resources are seldom great, and enforced against those who are determined to discriminate. I fear that I am correct in supposing that Blacks will always need civil rights legislation, and there will always be "new patterns of racism," that is, until Blacks as a group obtain something approaching economic parity with whites. This, it appears to me, is the precondition of achieving autonomy and respect as a group in the United States. Also, until white people make peace with their racist and exploitative past, they will never accept the responsibility for racism and exploitation, both present and portended.

Each year the government fails to pass Black reparations legislation the debt increases rather than diminishes and the obligation to redress wrongs inflicted on the Black community becomes more difficult to satisfy. Congress' failure even to hold hearings on the need for such legislation may be attributed to selective indifference to Black social justice claims on the one hand and racial antipathy to Blacks on the other. As with the Supreme Court, a ruling majority seems to believe what Justice Bradley articulated over one hundred years ago in *The Civil Rights Cases*, that:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.

As Justice Harlan expressed then in dissent, and we today may acknowledge, "[i]t is scarcely just to say that the colored race has been the special favorite of the laws[;]" and less than twenty years out from slavery, in any event, did not mark the point in Black progress at which equality with whites no longer should have been a national concern.

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168 See *supra* note 10.
170 *Id.* at 61 (Harlan, J., dissenting).
The maintenance of a system in which “any class of human beings” is kept “in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant[.].” 171 marks Justice Bradley’s statement as not only unreasonable, but also unjust. It is no less unreasonable and unjust today.

However, for those who long for the millennium in which Black equality with whites ceases to be the American dilemma and becomes the American reality, reparations contain within them at least the promise of closure. The closure afforded by reparations means that no more will be owed to Blacks than is owed to any citizen under the law. This is the effect of any final judgment on the merits. Once reparations are paid, Blacks will be able to function within American society on a footing of absolute equality. Their chance for public happiness, as opposed to private happiness, will be the same as that of any white citizen who currently takes this concept for granted because the public so utterly “belongs” to him, so utterly affirms his value, his humanity, his dignity and his presence.

171 Id. at 62 (Harlan, J., dissenting).