Friday, November 5, 2022
10:50-12:05 PM

Session 506: Long-Overdue Reparations for African Americans: Why AAPIs Should Care

Session Description:
On the 25th of May, 2020--George Floyd’s murder--captured in 9 minutes and 29 seconds of horrific video-- triggered the largest protests in American history. NAPABA joined a nationwide chorus calling for a racial reckoning. But what does this mean, particularly when hate crimes against AAPI's have spiked dramatically?

We will begin with the award-winning film “Reparations” by ABA Silver Gavel filmmaker Jon Osaki, depicting White Europeans introducing in 1619 a new form of enslavement to North America based on skin color to reduce African People to chattel. This dehumanization, valuing White lives above all others, not only resulted in 246 years of African American enslavement, 90 years of Jim Crow terror, and decades more of exclusion, but gave birth to a racial hierarchy that put a target on the backs of other People of Color, including AAPIs.

Jon will discuss his motivation for producing Reparations, which depicts African American and AAPI spokespersons explaining why reparations matters. As Japanese Americans attest, reparations meant more than compensation for a great wrong. The acknowledgement that their incarceration was solely because of their race restored their identity and dignity, and was essential to healing and reconciliation.

Dr. Cheryl Grills, Professor of Psychology at Loyola Marymount, a former President of the Association of Black Psychologists, and Don Tamaki, member of the legal team that reopened Fred Korematsu’s landmark Supreme Court case, will be in conversation with Bonnie Youn, long-time NAPABA and GAPABA civil rights activist.

Professor Grills and Tamaki serve as members of the ground-breaking California Task Force to Study and Develop Reparation Proposals for African Americans. They will discuss in their individual capacities the work of the first and only state-entity examining the harm of slavery and its cumulative and cascading effects.

Moderator:
- Bonnie Youn, Managing Director with The RMN Agency

Speakers:
• **Dr. Cheryl Grills**, Professor of Psychology, Director of their Psychology Applied Research Center, and President’s Professor in their College of Liberal Arts, Loyola Marymount University, L.A.

• **Donald K. Tamaki**, Senior Counsel, Minami Tamaki LLP

• **Jon Osaki**, director and producer of educational, narrative, and short documentary films. His initial interest in film grew from his desire to share the stories of the Japanese Community Youth Council, where he has served as Executive Director since 1996. Currently Jon’s feature documentary, **ALTERNATIVE FACTS: The Lies of Executive Order 9066** is streaming on PBS.
DESCRIPTION OF CLE MATERIALS FOR SESSION #506
Long-Overdue Reparations for African Americans: Why AAPIs Should Care

The Executive Summary of the Interim Report of the California Task Force to Study and Develop Reparation Proposals for African Americans:

On June 1, 2022, the Task Force released its Interim Report, a sweeping, nearly 500 page authoritative report drawing a through-line from the harm of 246 years of slavery, 90 years of Jim Crow and racial terror, and decades more of continuing discrimination leading to current day consequences which are at once shocking, but not surprising.

Because of the length of the Interim Report, the CLE materials contains the 24-page Executive Summary. However, here is the link full Interim Report: https://oag.ca.gov/ab3121/reports


Professor Eric Yamamoto critiques reparations for Japanese Americans for their WWII incarceration, and contrasts it with other reparations movements, including HR 40 which is modeled after the 1980 bill creating a commission to study Japanese American reparations, but which has remained stalled in Congress for 34 years, reflecting Congress’ lack of political will to even study reparations for African Americans.


Authors Johnson and Odom are estates and trust experts, who trace the broken promises made to newly freed African Americans to grant them 40 acres of tillable land, followed by racial terror, sharecropping, de jure and de facto segregation, redlining, and systematic exclusion from wealth-building opportunities that created America’s middle class, such as the benefits of the New Deal, and federally insured home loans. In particular they note that the America’s shift to regressive tax policies exacerbated the racial wealth gap, and they propose changes to inheritance tax laws as one means of funding reparations.

Looking Toward Restorative Justice for Redlined Communities Displaced by Eco-Gentrification; Helen H. Kang; Michigan Journal of Race and Law, Volume 26, Special Issue, 2021:

Helen Kang’s article describes how racist federal, state, municipal and financial and housing industry policies resulted in redlining, racially restrictive covenants, single-family zoning and other forms of housing discrimination which in turn, have created massive segregation, destruction of Black neighborhoods, and concentrations of poverty and pollution in the San Francisco Bay Area, and nationwide.

Congressional Bill H. R. 40; JANUARY 4, 2021, 1ST SESSION 117TH CONGRESS.

HR 40 was originally introduced by Congressman John Conyers in 1989, just one year following the passage of the Civil Liberties Act of 1988 providing reparations for Japanese Americans. Following the death of Conyers, the bill has been championed by Congresswoman Sheila Jackson. The bill requires the federal government to address the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to study and consider a national apology and proposal for reparations for the institution of slavery, its subsequent de jure and de facto racial and economic discrimination against African Americans, and the impact of these forces on living African Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes. It currently has 196 co-sponsors, all Democrats, but has not been presented for a floor vote.
I. Introduction

In 1863, Abraham Lincoln signed the Emancipation Proclamation, and, in 1865, the 13th Amendment to the U.S. Constitution commanded that “[n]either slavery nor involuntary servitude ... shall exist within the United States.”¹ In supporting the passage of the 13th Amendment, its co-author Senator Lyman Trumbull of Illinois said that “it is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins...”² In 1883, the Supreme Court interpreted the 13th Amendment as empowering Congress “to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”³

However, throughout the rest of American history, instead of abolishing the “badges and incidents of slavery,” the United States federal, state and local governments, including California, perpetuated and created new iterations of these “badges and incidents.” The resulting harms have been innumerable and have snowballed over generations.

This interim report is a general survey of these harms, as part of the broader efforts of California’s Task Force to Study and Develop Reparations Proposals for African Americans (Reparations Task Force). The Reparations Task Force was established under Assembly Bill 3121 (S. Weber) in 2020 and a report of the Task Force is due to the Legislature by June 1, 2022. A final report will be issued before July 1, 2023. The law charges the Reparations Task Force with studying the institution of slavery and its lingering negative effects on society and living African Americans. The law requires the Reparations Task Force to recommend appropriate remedies of compensation, rehabilitation, and restitution for African Americans with a special consideration for descendants of persons enslaved in the United States. This executive summary synthesizes many of the preliminary findings and recommendations of the Reparations Task Force.

So thoroughly have the effects of slavery infected every aspect of American society over the last 400 years, that it is nearly impossible to identify every “badge and incident of slavery,” to include every piece of evidence, or describe every harm done to African Americans. In order to address this practical reality, this interim report of the Reparations Task Force describes a sample of government actions and the compounding harms that have resulted, organized into 12 specific areas of systemic discrimination.

In order to maintain slavery, government actors adopted white supremacist beliefs and passed laws to create a racial hierarchy and to control both enslaved and free African Americans.⁴ Although the U.S. constitution recognized African Americans as citizens on paper, the government failed to give them the full rights of citizenship,⁵ and failed to protect—and often sanctioned or directly participated—African Americans from widespread terror and violence.⁶ Along with a dereliction of its duty to protect its Black citizens, direct federal, state and local government actions continued to enforce the racist lies created to justify slavery. These laws and government supported cultural beliefs have since formed the foundation of innumerable modern laws, policies, and practices across the nation.⁷

More Than 50 percent of U.S. Presidents from 1789 to 1885 enslaved African Americans

COURTESY OF JOHN PARROT/STOCKTREK IMAGES VIA GETTY IMAGES

The first twenty-one Presidents seated together in The White House. The enslavers are shaded in red.
Executive Summary

Today, 160 years after the abolition of slavery, its badges and incidents remain embedded in the political, legal, health, financial, educational, cultural, environmental, social, and economic systems of the United States of America. Racism, false, and harmful stereotypes created to support slavery continue to physically and mentally harm African Americans today. Without a remedy specifically targeted to dismantle our country’s racist foundations and heal the injuries inflicted by colonial and American governments, the “badges and incidents of slavery” will continue to harm African Americans in almost all aspects of life.

II. Enslavement

Nationally

The foundation of America’s wealth was built upon trafficked African peoples and their descendants—built by their forced labor and their bodies as they were bought and sold as commodities. American government at all levels allowed or participated in exploiting, abusing, terrorizing, and murdering people of African descent so that mostly white Americans could profit from their enslavement.

After the War of Independence, the United States built one of the largest and most profitable enslaved labor economies in the world.

The federal government politically and financially supported enslavement. The United States adopted a national constitution that protected slavery and gave pro-slavery white Americans outsized political power in the federal government. Half of the nation’s pre-Civil War presidents enslaved African Americans while in office, and throughout American history, more than 1,700 Congressmen from 37 states, once enslaved Black people. By 1861, almost two percent of the entire budget of the United States went to pay for expenses related to enslavement, such as enforcing fugitive slave laws.

Enslavers made more than $159 million between 1820 and 1860 by trafficking African Americans within the U.S. Charles Ball, an enslaved man who was bought by slave traffickers in Maryland and forced to march to South Carolina, later remembered: “I seriously meditated on self-destruction, and had I been at liberty to get a rope, I believe I should have hanged myself at Lancaster... I had now no hope of ever again seeing my wife and children, or of revisiting the scenes of my youth.”

Historians have argued that many of today’s financial accounting and management practices began among enslavers in the U.S. South and the Caribbean. In order to continually increase production and profits, enslavers regularly staged public beatings and other violent acts and provided deplorable living conditions.

Historians have also found evidence that enslavers raped and impregnated enslaved women and girls, and profited from this sexual violence by owning and selling their own children. President Thomas Jefferson, who enslaved four of his own children, wrote that the “labor of a breeding [enslaved] woman” who births a child every two years is as profitable as the best enslaved worker on the farm.

In the census of 1860, the last census taken before the Civil War, of the about 12 million people living in the 15 slave-holding states, almost four million were enslaved. In order to terrorize and force this enormous population to work without pay, the colonial and American governments created a different type of slavery.

Unlike in what historians call the pre-modern era, slavery in America was based on the idea that race was the sole basis for life-long enslavement, that children were

The American colonial Slave Codes created a new type of slavery that was different than the slavery which existed in pre-modern times.

- Babies were enslaved at birth, for their entire lives, and for the entire lives of their children, and their children’s children.
- These laws denied political, legal and social rights to free and enslaved Black people alike in order to more easily control enslaved people.
- These laws divided white people from Black people by making interracial marriage a crime.

Some of these laws survived well into the 20th century. The Supreme Court only declared that outlawing interracial marriage was unconstitutional in 1967.
enslaved from birth, and that people of African descent were naturally destined to be enslaved. Colonists in North America claimed and passed laws to maintain a false racial hierarchy where white people were naturally superior. Colonial laws effectively made it legal for enslavers to kill the people they enslaved. In some states, free nor enslaved African Americans could not vote or hold public office. Enslaved people could not resist a white person, leave a plantation without permission, or gather in large groups away from plantations.

After the War of Independence, the American government continued to pass laws to maintain this false racial hierarchy which treated all Black people as less than human. After the Civil War, the federal government failed to meaningfully protect the rights and lives of African Americans. When Andrew Johnson became president after the assassination of Abraham Lincoln, he proclaimed in 1866, "[t]his is a country for white men, and by God, as long as I am President, it shall be a government for white men[.]"

The Slave Codes were reborn as the Black Codes, and then as the Jim Crow laws segregating Black and white Americans in every aspect of life. Although many of these laws were most prominent in the South, they reflected a national desire to reinforce a racial hierarchy based in white supremacy.

California
Despite California entering the Union in 1850 as a free state, its early state government supported slavery. Proslavery white southerners held a great deal of power in the state legislature, the court system, and among California’s representatives in the U.S. Congress.

In 1852, California passed and enforced a fugitive slave law that was harsher than the federal fugitive slave law, and this made California a more proslavery state than most other free states. California also outlawed non-white people from testifying in any court case involving white people.

California did not ratify the Fourteenth Amendment until 1959, which protected the equal rights of all citizens, and the Fifteenth Amendment, which prohibited states from denying a person’s right to vote on the basis of race, until 1962.

III. Racial Terror

Nationally
After slavery, white Americans, frequently aided by the government, maintained the badges of slavery by carrying out violence and intimidation against African Americans for decades. Racial terror pervaded every aspect of post-slavery Black life and prevented African Americans from building the same wealth and political influence as white Americans.

African Americans faced threats of violence when they tried to vote, when they tried to buy homes in white neighborhoods, when they tried to swim in public pools, and when they tried to assert equal rights through the courts or in legislation. White mobs bombed, murdered, and destroyed entire towns. Federal, state, and local governments ignored the violence, failed to or refused to prosecute offenders, or participated in the violence themselves.

Racial terror takes direct forms, such as physical assault, threats of injury, and destruction of property. It also inflicts psychological trauma on those who witness the harm and injury. Many African Americans were traumatized from surviving mass violence and by the constant terror of living in the South. Lynchings in the American South were not isolated hate crimes
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committed by rogue vigilantes, but part of a systemat-
ic campaign of terror to enforce the racial hierarchy.\textsuperscript{52} Racial terror targeted at successful African Americans has contributed to the present wealth gap between Black and white Americans.\textsuperscript{53}

While lynching and mob murders are no longer the social norm, scholars have argued that its modern equivalent continues to haunt African Americans today as extra-
judicial killings by the law enforcement and civilian vigilantes.\textsuperscript{54} Racial terror remains a tool for other forms of discrimination and control of African Americans from redlining and segregated schools to disparate healthcare and denial of bank loans.

California

Supported by their government, ordinary citizens also terrorized and murdered Black Californians.\textsuperscript{55} The Ku Klux Klan (KKK) established local chapters all over the state in the 1920s.\textsuperscript{56} During that time, California sometimes even held more KKK events than Mississippi or Louisiana.\textsuperscript{57} Many of California’s KKK members were prominent individuals who held positions in civil leadership and police departments.\textsuperscript{58}

For example, in 1920s Los Angeles, prominent and numerous city government officials were KKK members or had KKK ties, including the mayor, district attorneys, and police officers.\textsuperscript{59} Violence against African Americans peaked in the 1940s, as more Black Californians tried to buy homes in white neighborhoods.\textsuperscript{60}

Today, police violence against and extrajudicial killings of African Americans occur in California in the same manner as they do in the rest of the country.\textsuperscript{61}

IV. Political Disenfranchisement

Nationally

African Americans have pursued equal political participa-
tion since before the Civil War, but the federal, state, and local governments of the United States have sup-
pressed and continue to suppress Black votes and Black political power.\textsuperscript{62} After the Civil War, the United States protected the voting rights of African Americans on pa-
per, but not in reality.\textsuperscript{63} During the 12-year period after the Civil War called Reconstruction, the federal government tried to give newly freed African Americans access to basic civil rights\textsuperscript{64} and, by 1868, more than 700,000 Black men were registered to vote in the South.\textsuperscript{65} During Reconstruction, over 1,400 African Americans held fed-
eral, state, or local office, and more than 600 served in state assemblies.\textsuperscript{66}

However, that progress was short lived.

During the contested presidential election of 1876, Republicans and Democrats agreed to withdraw fed-
eral troops from key locations in the South, effectively ending Reconstruction.\textsuperscript{67} Southern states then willfully ignored the voting protections in the U.S. Constitution, and passed literacy tests, poll taxes, challenger laws, grandfather clauses, and other devices to prevent African Americans from voting.\textsuperscript{68} States also barred African Americans from serving on juries.\textsuperscript{69}

This targeted government action was extremely effec-
tive in stripping African Americans of what little political power gained during the Reconstruction era. For example, in 1867 Black turnout in Virginia was 90 percent.\textsuperscript{70} After Virginia’s voter suppression laws took effect, the number of Black voters dropped from 147,000 to 21,000.\textsuperscript{71} During Reconstruction, 16 Black men held seats in Congress.\textsuperscript{72} From 1901 until the 1970s, not a sin-
gle African American served in Congress.\textsuperscript{73}

These government actions returned white supremacists to power in local, state, and federal government.\textsuperscript{74} Historians have argued that racist lawmakers elected from the Southern states blocked hundreds of federal civil rights laws\textsuperscript{75} and rewrote many of the country’s most important pieces of legislation to exclude or dis-
 criminate against African Americans.\textsuperscript{76}
For example the New Deal, a series of federal laws and policies designed to pull America out of the Great Depression, created the modern white middle class and many of the programs that Americans depend upon today, such as Social Security. But the New Deal excluded African Americans from many of its benefits.

Historians have argued that southern lawmakers ensured that the Servicemen’s Readjustment Act of 1944 (commonly known as the G.I. Bill) was administered by states instead of the federal government to guarantee that states could direct its funds to white veterans. Similarly, in order to secure the support of white southern lawmakers, Congress included segregation clauses or rejected anti-discrimination clauses in the Hospital Survey and Reconstruction Act of 1946 (commonly known as the Hill Burton Act), which paid for our modern healthcare infrastructure. The same tactics were applied to the American Housing Act of 1949, which helped white Americans buy single family homes. These federal legislative decisions enshrined the government sanctioned discrimination of African Americans for decades to come and perpetuates the racial hierarchy today.

California
California also passed and enforced laws to prevent Black Californians from accumulating political power. California passed a law prohibiting non-white witnesses from testifying against white Californians. This law shielded white defendants from justice. The California Supreme Court explained that any non-white person to testify “would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls,” a prospect that the court viewed as an “actual and present danger.”

California did not allow Black men to vote until 1879. The state also passed many of the voter suppression laws that were used in the South. California prohibited individuals convicted of felonies from voting, added a poll tax, and put in place a literacy test.

V. Housing Segregation

Nationally
America’s racial hierarchy was the foundation for a system of segregation in the United States after the Civil War. The aim of segregation was not only to separate, but also to force African Americans to live in worse conditions in nearly every aspect of life.

Government actors, working with private individuals, actively segregated America into Black and white neighborhoods. Although this system of segregation was called Jim Crow in the South, it existed by less obvious, but effective means throughout the entire country, including in California.

During enslavement, about 90 percent of African Americans were forced to live in the South. Immediately after the Civil War, the country was racially and geographically configured in ways that were different from the way it is segregated today. Throughout the 20th century, American federal, state, and local municipal governments expanded and solidified segregation efforts through zoning ordinances, slum clearance policies, construction of parks and freeways through Black neighborhoods, and public housing siting decisions. Courts enforced racial covenants that prevented homes from being sold to African Americans well into late 1940s.

The federal government used redlining to deny African Americans equal access to the capital needed to buy a single-family home while at the same time subsidizing white Americans’ efforts to own the same type of home. As President Herbert Hoover stated in 1931, single-family homes were “expressions of racial longing” and “[t]hat our people should live in their own homes is a sentiment deep in the heart of our race.”

The passage of the Fair Housing Act in 1968 outlawed housing discrimination, but did not fix the structures put in place by 100 years of discriminatory government policies, and residential segregation continues today.

The average urban Black person in 1890 lived in a neighborhood that was only 27 percent Black. In 2019, America is as segregated as it was in the 1940s, with the average urban Black person living in a neighborhood that is 44 percent Black. Better jobs, tax dollars, municipal services, healthy environments, good schools, access to health care, and grocery stores have followed white residents to the suburbs, leaving concentrated poverty, underfunded schools, collapsing infrastructure, polluted water and air, crime, and food deserts in segregated inner city neighborhoods.
California

In California, the federal, state, and local government created segregation through redlining, zoning ordinances, decisions on where to build schools and highways and discriminatory federal mortgage policies. California’s “sundown towns,” (a term derived from municipal signs announcing that African Americans must leave by dusk) like most of the suburbs of Los Angeles and San Francisco, prohibited African Americans from living in entire cities throughout the state.

The federal government financed many whites only neighborhoods throughout the state. The federal Home Owners’ Loan Corporation maps used in redlining described many Californian neighborhoods in racially discriminatory terms. For example, in San Diego there were “servant’s areas” of La Jolla and several areas “restricted to the Caucasian race.”

During World War II, the federal government paid to build segregated housing for defense workers in Northern California. Housing for white workers generally better constructed and permanent. While white workers lived in rooms paid for by the federal government, Black wartime workers lived in cardboard shacks, barns, tents, or open fields.

Racially-restrictive covenants, which were clauses in property deeds that usually allowed only white residents to live on the property described in the deed, were commonplace and California courts enforced them well into the 1940s.

Numerous neighborhoods around the state rezoned Black neighborhoods for industrial use to steer white residents towards better neighborhoods or adopted zoning ordinances to ban apartment buildings to try and keep out prospective Black residents.

State agencies demolished thriving Black neighborhoods in the name of urban renewal and park construction. Operating under state law for urban redevelopment, the City of San Francisco declared the Western Addition blighted, and destroyed the Fillmore, San Francisco’s most prominent Black neighborhood and business district. In doing so, the City of San Francisco closed 883 businesses, displaced 4,729 households, destroyed 2,500 Victorian homes, and damaged the lives of nearly 20,000 people.

The city then left the land empty for many years.

VI. Separate and Unequal Education

Nationally

Through much of American history, enslavers and the white political ruling class in America falsely believed it was in their best interest to deny education to African Americans in order to dominate and control them. Slave states denied education to nearly all enslaved people, while the North and Midwest segregated their schools and limited or denied access to freed Black people.

After slavery, southern states maintained the racial hierarchy by legally segregating Black and white children, and white-controlled legislatures funded Black public
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Contrary to what Americans are taught, the U.S. Supreme Court’s landmark 1954 case, *Brown v. Board of Education*, which established that racial segregation in public schools is unconstitutional, did not mark the end of segregation.123

After *Brown v. Board*, many white people and white-dominated school boards throughout the country actively resisted integration.124 In the South, segregation was still in place through the early 1970s due to massive resistance by white communities.125 In the rest of the country, including California, education segregation occurred when government sanctioned housing segregation combined with school assignment and siting policies.126 Because children attended the schools in their neighborhood and school financing was tied to property taxes, most Black children attended segregated schools with less funding and resources than schools attended by white children.127

In 1974, the U.S. Supreme Court allowed this type of school segregation to continue in schools if it reflected residential segregation patterns between the cities and suburbs.128 In part, as result of this and other U.S. Supreme Court decisions that followed to further undermine desegregation efforts, many public schools in the United States were integrated and then resegregated, or never integrated in the first place.

**California**

In 1874, the California Supreme Court ruled segregation in the state’s public schools was legal,129 a decision that predated the U.S. Supreme Court’s infamous “separate but equal” 1896 case of *Plessy v. Ferguson* by 22 years.130

In 1966, as the South was in the process of desegregating, 85 percent of Black Californians attended predominantly minority schools, and only 12 percent of Black students and 39 percent of white students attended racially balanced schools.131 Like in the South, white Californians fought desegregation and, in a number of school districts, courts had to order districts to desegregate.132 Any progress attained through court-enforced desegregation was short-lived. Throughout the mid- to late-1970s, courts overturned, limited, or ignored desegregation orders in many California districts, as the Supreme Court and Congress limited methods to integrate schools.133 In 1979, California passed Proposition 1, which further limited desegregation efforts tied to busing.134

In the vast majority of California school districts, schools either re-segregated or were never integrated, and thus segregated schools persists today. California remains the sixth most segregated state in the country for Black students.135 In California’s highly segregated schools, schools mostly attended by white and Asian children receive more funding and resources than schools with predominately Black and Latino children.136

**VII. Racism in Environment and Infrastructure**

**Nationally**

Due to residential segregation, African Americans have lived in poor-quality housing throughout American history, exposing them to disproportionate amounts of lead poisoning and increasing risk of infectious disease.137 Segregated Black neighborhoods have more exposure to hazardous waste, oil and gas production, automobile and diesel fumes, and are more likely to have inadequate public services like sewage lines and drinking water pipes.138 African Americans are more vulnerable than white Americans to the dangerous effects of extreme weather patterns such as heat waves, made worse by the effects of human consumption and industrial degradation of the environment.139

**California**

National patterns are replicated in California. Black Californians are more likely than white Californians to live in overcrowded housing, and near hazardous waste.140 Black neighborhoods are more likely to lack tree canopy141 and suffer from the consequences of water142 and air pollution.143 For instance, Black Californians in the San Joaquin Valley were excluded...
from most urban areas with access to clean water as a result of redlining policies, racial covenants, and racially-motivated violence.144

In Tulare county, the largely Black community of Teviston had no access to sewer and water infrastructure, while the adjacent white community of Pixley did.145 This discrimination continued until recently: the town of Lanare, formed by Black families fleeing the Dust Bowl, had no running water at all until the 1970s, and was subjected to dangerous levels of arsenic in the water even after wells and pipes were drilled.146 The town’s residents did not get access to clean drinking until 2019.147

VIII. Pathologizing the Black Family

Nationally
Government policies and practices—at all levels—have destroyed Black families throughout American history. After the Civil War, southern state governments re-enslaved children by making them “apprentices” and forcing them to labor for white Americans, who were sometimes their former enslavers.148 In the past century, state and federal government financial assistance and child welfare systems have based decisions on racist beliefs created to maintain slavery and which continue to operate today as badges of slavery.149

Government issued financial assistance has excluded African Americans from receiving benefits. In the early 1900s, state governments made support payments every month to low income single mothers to assist them with the expenses incurred while raising children.150 Black families were generally excluded, despite their greater need.151

Scholars have found that racial discrimination exists at every stage of the child welfare process.152 The data show that when equally poor Black and white families are compared, even where both families are considered to be at equal risk for future abuse, state agencies are more likely to remove Black children from their families than white children.153 As of 2019, Black children make up only 14 percent of American children, and yet 23 percent of children in foster care.154 Studies have shown that this is likely not because Black parents mistreat their children more often, but rather due to racist systems and poverty.155

In the 2015-16 school year, Black students were arrested at three times the rate of white students, while only comprising 15 percent of the population in schools.156 This disparity widens for Black girls, who make up 17 percent of the school population, but are arrested at 3.3 times the rate of white girls.157 Meanwhile, the criminal and juvenile justice systems have intensified these harms to Black families by imprisoning large numbers of Black children, thereby separating Black families.158

California
Californian trends in the child welfare, juvenile justice and disciplinary action in schools match those in the rest of the country. Recent California Attorney General investigations have found several school districts punish Black students at higher rates than students of other races.159 Investigations at the Barstow Unified School District, the Oroville City Elementary School District, and the Oroville Union High School District showed that Black students were more likely to be punished and/or suspended, and were subjected to greater punishments, than similarly-situated peers of other races.160

A 2015 study ranked California among the five worst states in foster care racial disparities.161 Black children in California make up approximately 22 percent of the
foster population, while only six percent of the general child population, far higher than the national percentages. Some counties in California—both urban and rural—have much higher disparities compared to the statewide average. In San Francisco County, which is largely urban and has nearly 900,000 residents, the percentage of Black children in foster care in 2018 was more than 25 times the rate of white children.

IX. Control Over Creative Cultural and Intellectual Life

Nationally
During slavery, state governments controlled and dictated the forms and content of African American artistic and cultural production. Advocates argue that this is still true today. After the Civil War, governments and politicians embraced minstrelsy, which was the popular racist and stereotypical depiction of African Americans through song, dance, and film. Federal and state governments failed to protect Black artists and creators from discrimination and simultaneously promoted discriminatory narratives.

Federal and state governments allowed white Americans to steal Black art and culture with impunity—depriving Black creators of valuable copyright and patent protections. State governments denied Black entrepreneurs and culture makers access to the leisure sites, business licenses, and funding for lifestyle activities that were offered to white people. State governments built monuments to memorialize the Confederacy as just and heroic through monument building, while simultaneously suppressing the nation’s history of racism, slavery and genocide. States censored cinematic depictions of discrimination while also censoring depictions of Black people integrating into white society.

California
In California, city governments decimated thriving Black neighborhoods with vibrant artistic communities, like the Fillmore in San Francisco. Local governments in California have discriminated against, punished, and penalized Black students for their fashion, hairstyle, and appearance. State-funded California museums have excluded Black art from their institutions. California has criminalized Black rap artists, as California courts have allowed rap lyrics to be used as evidence related to street gang activity. California has been home to numerous racist monuments and memorials for centuries.

X. Stolen Labor and Hindered Opportunity

Nationally
It is undeniable that the labor of enslaved Africans built the infrastructure of the nation, produced its main agricultural products for domestic consumption and export, and filled the nation’s coffers. Since then, federal, state, and local government actions directly segregated and discriminated against African Americans. In 1913, President Woodrow Wilson officially segregated much of the federal workforce. While African Americans have consistently served in the military since the very beginning of the country, the military has historically paid Black soldiers less than white soldiers and often deemed African Americans unfit for service until the military needed them to fight.

Federal laws have also protected white workers while denying the same protections to Black workers, empowering private discrimination. Approximately 85 percent of all Black workers in the United States at the time were excluded from the protections passed the Fair Labor Standards Act of 1938—protections such as a federal minimum wage, the maximum number of working hours, required overtime pay, and limits on child labor. The Act essentially outlawed child labor in
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industrial settings—where most white children worked—and allowed child labor in agricultural and domestic work—where most Black children worked.184

Although federal and state laws such as the Federal Civil Rights Act of 1964 and the California Fair Employment and Housing Act of 1959 prohibit discrimination, enforcement is slow and spotty.185 Federal and state policies such as affirmative action produced mixed results or were short lived.186 African Americans continue to face employment discrimination today.187

California

Several California cities did not hire Black workers until the 1940s and certain public sectors continued to avoid hiring Black workers even in 1970.188 The San Francisco Fire Department, for example, had no Black firefighters before 1955 and, by 1970 when Black residents made up 14 percent of the city’s population, only four of the Department’s 1,800 uniformed firefighters were Black.189 During the New Deal, several California cities invoked city ordinances to prevent Black federal workers from working within their cities.190 Labor unions excluded Black workers in California.191 Today, by some measures, California’s two major industries, Hollywood and Silicon Valley, disproportionately employ fewer African Americans.192

XI. An Unjust Legal System

Nationally

American government at all levels criminalized African Americans for social control, and to maintain an economy based on exploited Black labor.193

After the Civil War, and throughout segregation, states passed numerous laws that criminalized African Americans as they performed everyday tasks, like entering into the same waiting rooms as white Americans at bus stations or walking into a park for white people.194 In the South, until the 1940s, Black men and boys were frequently arrested on vagrancy charges or minor violations, then fined, and forced to pay their fine in a new system of enslavement called convict leasing.195 In the words of the Supreme Court of Virginia, they were “slaves of the state.”196

During the tough on crime and War on Drugs era, politicians continued to criminalize African Americans to win elections. President Richard Nixon’s domestic policy advisor explained that by “getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, [the Nixon White House] could disrupt those communities... Did we know we were lying about the drugs? Of course we did.”197

The criminalization of African Americans is an enduring badge of slavery and has contributed to over policing of Black neighborhoods, establishment of the school-to-prison pipeline, the mass incarceration of African Americans, and numerous other inequities reaching every corner of the American legal system.198

It has also led to the retraumatization of African Americans when both the police and mainstream media refuse to accept African Americans as victims. Law enforcement poorly investigates or ignore crimes against African American women.199 Violence against Black trans people are underreported, unresolved and under-investigated.200 Black children on average remain missing longer than non-Black children.201

According to one meta-study, from 1989 to 2014, employment discrimination against African Americans had not decreased.
injustices, academics, judges, legislators and advocates have argued that the U.S. criminal justice system is a new iteration of legal segregation.205

California
Like the rest of the country, California stops, shoots, kills and imprisons more African Americans than their share of the population.206 Data show that law enforcement most frequently reported taking no further action during a stop with a person they perceived to be Black, suggesting there may have been no legal basis for the stop.207 A 2020 study showed that racial discrimination is an “ever-present” feature of jury selection in California.208 The lingering effects of California’s punitive criminal justice policies, such as the state’s three-strikes law, have resulted in large numbers of African Americans in jails and prisons.209

XII. Mental and Physical Harm and Neglect

Nationally
The government actions described in this report have had a devastating effect on the health of African Americans. Compared to white Americans, African Americans live shorter lives and are more likely to suffer and die from nearly all known diseases and medical conditions compared to white Americans.210 When African Americans are hospitalized, Black patients with heart disease receive older, cheaper, and more conservative treatments than their white counterparts.211

Researchers have found that by some measures, this health gap has grown and cannot be explained by poverty alone,212 as middle- and upper-class African Americans also manifest high rates of chronic illness and disability.213 Researchers have linked these health outcomes in part to African Americans’ unrelenting experience of racism in our society.214 Research suggests that race-related stress may have a greater impact on health among African Americans than diet, exercise, smoking, or low socioeconomic status.215

In addition to physical harm, African Americans experience anger, anxiety, paranoia, helplessness, hopelessness, frustration, resentment, fear, lowered self-esteem, and lower levels of psychological functioning as a result of racism.216 These feelings can profoundly undermine Black children’s emotional and physical well-being and their academic success.217

California
These national trends are similar in California. The life expectancy of an average Black Californian was 75.1 years, six years shorter than the state average.218 Black babies are more likely to die in infancy and Black mothers giving birth die at a rate of almost four times higher than the average Californian mother.219 Compared with white Californians, Black Californians are more likely to have diabetes, die from cancer, or be hospitalized for heart disease.220

Compared to white Californian men, Black Californian men are

5x MORE LIKELY to die from prostate cancer

Black Californians suffer from high rates of serious psychological distress, depression, suicidal ideation, and other mental health issues.221 Unmet mental health needs are higher among Black Californians, as compared with white Californians, including lack of access to mental healthcare and substance abuse services.222 Black Californians have the highest rates of attempted suicide among all racial groups.223

XIII. The Wealth Gap

Nationally
As described in further detail throughout this report, government policies perpetuating badges of slavery have helped white Americans accumulate wealth, while overwhelmingly erecting barriers which prevent African Americans from doing the same.

Federal and California Homestead Acts essentially gave away hundreds of millions of acres of land almost for free mostly to white families.224 Today, as many as 46 million of their living descendants reap the wealth benefits, approximately one-quarter of the adult population of the United States.225 In the 1930s and 1940s,
the federal government created programs that subsidized low-cost loans, which allowed millions of average white Americans to own their homes for the first time. Of the $120 billion worth of new housing subsidized between 1934 and 1962, less than two percent went to non-white families. Other bedrocks of the American middle class, like Social Security and the G.I. Bill, also mostly excluded African Americans. The federal tax structure has in the past, and continues today, to discriminate against African Americans.

These harms have compounded over generations, resulting in an enormous wealth gap that is the same today as it had been two years before the Civil Rights Act was passed in 1964. In 2019, the median Black household had a net worth of $24,100, while white households have a net worth of $188,200. This wealth gap persists across all income levels, regardless of education level or family structure.

California
The wealth gap exists in similar ways in California. A 2014 study of the Los Angeles metro area found that the median value of liquid assets for native born African American households was $200, compared to $110,000 for white households. California’s homestead laws similarly excluded African Americans before 1900 because they required a homesteader to be a white citizen. Throughout the 20th century, federal, state and local governments in California erected barriers to Black homeownership and supported or directly prohibited African Americans from living in suburban neighborhoods. In 1996, California passed Proposition 209 in 1996, which prohibited the consideration of race in state contracting. One study has estimated that, as a result of Proposition 209, minority- and women-owned business enterprises lost about $1 billion.
XIV. Key Findings

- From colonial times forward, governments at all levels adopted and enshrined white supremacy beliefs and passed laws in order to maintain slavery, a system of dehumanization and exploitation that stole the life, labor, liberty, and intellect of people of African descent. This system was maintained by, and financially benefited, the entire United States of America and its territories.

- This system of white supremacy is a persistent badge of slavery that continues to be embedded today in numerous American and Californian legal, economic, and social and political systems. Throughout American history and across the entire country, laws and policies, violence and terror have upheld white supremacy. All over the country, but particularly in the South during the era of legal segregation, federal state and local governments directly engaged in, supported, or failed to protect African Americans from the violence and terror aiming to subjugate African Americans.

- Government actions and derelictions of duty have caused compounding physical and psychological injury for generations. In California, racial violence against African Americans began during slavery, continued through the 1920s, as groups like the Ku Klux Klan permeated local governments and police departments, and peaked after World War II, as African Americans attempted to move into white neighborhoods.

- After the Civil War, African Americans briefly won political power during Reconstruction. Southern states responded by systematically stripping African Americans of their power to vote. Racist lawmakers elected from southern states blocked hundreds of federal civil rights laws and edited other important legislation to exclude or discriminate against African Americans. These coordinated efforts at the federal level harmed Black Californians, particularly when coupled with discrimination at the state and local levels.

- Government actors, working with private individuals, actively segregated America into Black and white neighborhoods. In California, federal, state, and local governments created segregation through discriminatory federal housing policies, zoning ordinances, decisions on where to build schools, and discriminatory federal mortgage policies known as redlining. Funded by the federal government, the California state and local government also destroyed Black homes and communities through park and highway construction, urban renewal and by other means.

- Enslavers denied education to enslaved people in order to control them. Throughout American history, when allowed schooling at all, Black students across the country and in California have attended schools with less funding and resources than white students. After slavery, southern states passed laws to prevent Black and white students from attending the same schools. Throughout the country, even after the U.S. Supreme Court held “separate but equal” to be unconstitutional, children went to the school in their neighborhoods, so education segregation was further entrenched by residential segregation. Many public schools in the United States never integrated in the first place or were integrated and then re-segregated. Today, California is the sixth most segregated state in the country for Black students, who attend under-resourced schools.

- Due to residential segregation and compared to white Americans, African Americans are more likely to live in worse quality housing and in neighborhoods that are polluted, with inadequate infrastructure. Black Californians face similar harms.

- Government financial assistance programs and policies have historically excluded African Americans from receiving benefits.

- The current child welfare system in the country and in California, operates on harmful and untrue racial stereotypes of African Americans. This has resulted in extremely high rates of removal of Black children from their families, even though Black parents do not generally mistreat their children at higher rates than white parents. Black children thus disproportionately suffer the loss of their families and the additional harms associated with being in the child welfare system.

- Federal and state governments, including California, failed to protect Black artists, culture-makers, and media-makers from discrimination and simultaneously promoted discriminatory narratives. State governments memorialized the Confederacy as just and heroic through monument building, while suppressing the nation's history of racism and slavery.
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- Federal, state, and local government actions, including in California, have directly segregated and discriminated against African Americans at work. Federal and state policies like affirmative action produced mixed results and were short lived. African Americans continue to face employment discrimination today in the country and in California.

- American government at all levels, including in California, has historically criminalized African Americans for the purposes of social control, and to maintain an economy based on exploited Black labor. This criminalization is an enduring badge of slavery and has contributed to the over-policing of Black neighborhoods, the school to prison pipeline, the mass incarceration of African Americans, a refusal to accept African Americans as victims, and other inequities in nearly every corner of the American and California legal systems. As a result, the American and California criminal justice system physically harms, imprisons, and kills African Americans more than other racial groups relative to their percentage of the population.

- The government actions described in this report have had a devastating effect on the health of African Americans in the country and in California. Compared to white Americans, African Americans live shorter lives and are more likely to suffer and die from almost all diseases and medical conditions than white Americans. Researchers have linked these health outcomes in part to African Americans’ unrelenting experience of racism in our society. In addition to physical harm, African Americans experience psychological harm, which can profoundly undermine Black children’s emotional and physical well-being and their academic success.

- Government laws and policies perpetuating badges of slavery have helped white Americans accumulate wealth, while erecting barriers that have prevented African Americans from doing the same. These harms compounded over generations, resulting in an enormous gap in wealth between white and African Americans today in the nation and in California.
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XV. Preliminary Recommendations for Future Deliberation

Enslavement
- End legal slavery in California by doing the following:
  - Deleting language from the California Constitution that permits involuntary servitude as punishment for crime by passing ACA 3 (Kamlager).
  - Repealing Penal Code Section 2700, which states that the California Department of Corrections and Rehabilitation (CDCR) “shall require of every able-bodied prisoner imprisoned in any state prison as many hours of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the director of Corrections.”
  - Pass legislation that makes education, substance use and mental health treatment, and rehabilitative programs the first priority for incarcerated people. In addition, allow incarcerated people to make decisions regarding how they will spend their time and which programs and jobs they will do while incarcerated.
  - Require that incarcerated people who are working in prison or jail be paid a fair market rate for their labor.
  - Prohibit for-profit prison companies from operating within the system (i.e. companies that control phone calls, emails, and other communications).
  - Require that any goods or services available for purchase by incarcerated people and their families be provided at the same cost as those goods and services outside of prison.
  - Allow people who are incarcerated to continue to exercise their right to vote.
- Implement a comprehensive reparations scheme, as will be detailed in the Task Force’s Final Report.
- Transmit the Task Force’s Final Report and findings to the President and the Congress with a recommendation that the federal government create a Reparations Commission for African Americans/American Freedmen through statute or executive action.
- Request that the State of California and the U.S. federal government facilitate data disaggregation for Black/African racial groups.

Racial Terror
- Make it easier to hold law enforcement officers (including correctional officers) and their employing agencies accountable for unlawful harassment and violence, including 1) a provision overruling the extratextual “specific intent” requirement that California courts have read into the Bane Act; 2) a provision eliminating state law immunities that shield officer misconduct, and explicitly rejecting protections analogous to qualified immunity under federal law; and 3) a provision for additional special damages when the unlawful conduct is shown to be racially motivated.
- Create forms of expression, acknowledgment, and remembrance of the trauma of state-sanctioned white supremacist terror, possibly including memorials, and funding a long-term truth and reconciliation commission.
- Estimate the value of Black-owned businesses and property in California stolen or destroyed through acts of racial terror, distribute this amount back to Black Californians, and make housing grants, zero-interest business and housing loans and grants available to Black Californians.

Political Disenfranchisement
- Create forms of acknowledgment and apology for acts of political disenfranchisement.
- Pass legislation that is in alignment of the objectives stated in AB 2576 (Aguiar-Curry) and establish separate funding:
  - for voter education and outreach
  - to provide state funding and charge the Secretary of State office with making grants to county registrars for programs that integrate voter registration and preregistration with civic education for programs that increase voter registration within the county’s underrepresented communities and high school students.
- Consider legislation to prevent dilution of the Black vote through redistricting.
- Require legislative policy committees to conduct racial impact analyses of all proposed legislation and require the Administration to include a comprehensive
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Racial Impact Analysis for all Budget Proposals and Proposed Regulations

- Allow individuals with felony convictions to serve on juries and prohibit judges and attorneys from excluding jurors solely for having a criminal record.

Housing Segregation

- Identify and eliminate anti-Black housing discrimination policies practices.
- Compensate individuals forcibly removed from their homes due to state action, including but not limited to park construction, highway construction, and urban renewal.
- Prevent current banking and mortgage related discrimination, including but not limited to discriminatory actions as a result of artificial intelligence and automated data analytics.
- Repeal Article 34 of the California Constitution.
- Repeal or counteract the effects of crime-free housing policies that disproportionately limit Black residents’ access to housing.
- Establish a state-subsidized mortgage system that guarantees low interest rates for qualified California Black mortgage applicants.
- Identify previous, and eliminate current, policies and practices that overwhelmingly contribute to the vast overrepresentation of African Americans among the unhoused population.
- Identify and eliminate any policies with blatant anti-Black residency requirements or preferences; invalidate and deem unlawful, any contract with anti-Black racial covenants.
- Provide clean and secure public housing for vulnerable populations including those persons who are formerly incarcerated, in the foster care system, and unhoused individuals.
- Provide development incentives for businesses that provide healthy foods, specifically grocery stores, in predominantly-Black neighborhoods to address increasingly prevalent food swamps.

Separate and Unequal Education

- Add Black students to the existing three student groups listed in the Supplemental Grants provisions of the Local Control Funding Formula (LCFF). Methodically guide this funding to provide instructional supports, enrichment, and counseling to Black students.
- Identify and eliminate racial bias and discriminatory practices in standardized testing, inclusive of statewide K-12 proficiency assessments, undergraduate and postgraduate eligibility assessments, and professional career exams (ex. STAR, ACT, SAT, LSAT, GRE, MCAT, State Bar Exam).
- Provide funding for free tuition to California colleges and universities.
- Provide funding for African American/American Freedmen owned and controlled K-12 schools, colleges and universities, trade and professional schools.
- Adopt mandatory curriculum for teacher credentialing that includes culturally responsive pedagogy, anti-bias training, and restorative practices and develop strategies to proactively recruit African American teachers to teach in K-12 public schools.
- Reduce arbitrary segregation within California public schools and the resulting harms to Black students at majority-nonwhite under-resourced schools, by creating porous school district boundaries that allow students from neighboring districts to attend.
- Increase the availability of inter-district transfers to increase the critical mass of diverse students at each school so that students are assigned, or able to attend, public schools based on factors independent of their parents’ income level and ability to afford housing in a particular neighborhood or city.
- Provide scholarships for Black high school graduates to cover four years of undergraduate education (similar to the G.I. Bill model) to address specific and ongoing discrimination faced in California schools.
- Implement systematic review of public and private school disciplinary records to determine levels of racial bias and require all schools to implement racially equitable disciplinary practices.
- Require that curriculum at all levels and in all subjects be inclusive, free of bias, and honor the contributions
and experiences of all peoples regardless of ethnicity, race, gender, or sexual orientation.

- Advance the timeline for ethnic studies classes in public and private high schools
- Adopt a K-12 Black Studies curriculum that introduces students to concepts of race and racial identity; accurately depicts historic racial inequities and systemic racism; honors Black lives, fully represents contributions of Black people in society, and advances the ideology of Black liberation.
- Encourage identification and support of teachers who give culturally nurturing instructions and adopt new models for teacher development to improve teacher habits in the classroom.
- Improve funding and access for educational opportunities for all incarcerated people in both juvenile and adult correctional facilities.

**Racism in Environment and Infrastructure**

- Identify and address the impact of environmental racism on predominantly Black communities including, but not limited to, unequal exposure to pollutants associated with roadway and heavy truck traffic, oil drilling, drinking water contamination, and current or former heavily-industrial and other potential pollutants in Black neighborhoods.
- Require and fund the statewide planting of trees to create shade equity and minimize heat islands in Black neighborhoods.
- Ensure that state and local allocation of resources to public transit systems is equitable on a per-rider basis for methods of transit that are disproportionately utilized by low-income, urban, and Black residents.
- Support development of policies and practices that limit the unequal citing of vice retail businesses (e.g., liquor stores, tobacco retail) in Black neighborhoods.
- Support Black neighborhoods to develop policies and practices that promote locating healthy retailers (e.g., grocery stores, farmers markets) within Black neighborhoods.
- Support the work of community-based organizations in identifying Black resident interests and needs within neighborhoods (e.g., farmers markets, public transportation).
- Support the work of community-based organizations to ensure safe access to neighborhood-level physical activity spaces (e.g., public parks).
- Reduce the density of food swamps (i.e., high densities of fast-food restaurants) in Black neighborhoods.
- Introduce climate change mitigation and adaptive capacity strategies and measures (e.g., cooling centers, increasing greenspaces that reduce urban heat island effects and air pollutant concentrations).
- Equalize community benefit infrastructure funding among Black and white neighborhoods (i.e. bike trails, drinking water pipes, sidewalks, etc.)

**Pathologizing Black Families**

- Compensate families who were denied familial inheritances by way of racist anti-miscegenation statutes, laws, or precedents, that denied Black heirs resources they would have received had they been white.
- Realign federal Temporary Assistance to Needy Families funding devoted to direct assistance to impoverished families in order to provide greater funding to poor Black families that have historically been denied equal welfare benefits pursuant to a variety of subversive racist policies and practices.
- Address the severely disparate involvement of Black families within the child welfare and foster care systems.
- Review and adopt policies that caregivers in the child welfare system are allowed to meet the requirements and have access to resources to care for family members.
- Ensure that Black men and women have access to effective, high quality, trauma-informed, culturally competent intimate partner and/or guardian violence treatment and services outside of the criminal legal system.
- Eliminate past-due child support owed to the government for non-custodial parents.
- Eliminate the collection of child support as a means to reimburse the state for current or past government assistance.
- Ensure that all child support payments are provided directly to the custodial parent and the child.
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• Eliminate the annual interest charged for past due child support.

• Allow incarcerated parents, when appropriate, to strengthen and maintain their relationships with their children by doing the following:
  » Provide on-going wrap around family reunification and maintenance services to incarcerated people and their families.
  » Provide mental health support designed specifically to heal trauma and strengthen family ties, including both individual and family treatment when needed.
  » Develop spaces and programs for incarcerated people to spend time with their children in non-institutional, non-punitive settings when appropriate.
  » Prohibit the state prison system and local jails from cancelling family visits as a form of punishment.
  » Require that all visitation policies be culturally competent, trauma-informed, and non-threatening for the family members.
  » Allow free telephone and video calls to allow incarcerated parents to maintain connections to their children and other family members, for cases not involving domestic or familial abuse.
  » Accommodate telephone and video meetings between incarcerated parents and their children’s caregivers, physicians, and teachers to allow parents to participate in decision making regarding their children’s care, needs, and education.

Stolen Labor and Hindered Opportunity

• Identify and eliminate racial bias in employment and advancement, especially for Black Californians seeking public employment or promotion to higher-paying positions in government. Pass legislation to advance pay equity.

• Adopt a clean slate policy for both young people and adults to ensure that eligible criminal record expungements are done quickly and equitably.

• Remove unnecessary barriers to employment for individuals with criminal records.

• Raise the minimum wage and require scaling-up of the minimum wage for more experienced workers, require provision of health benefits and paid time off, and provide other missing protections for workers in food and hospitality services, agricultural, food processing, and domestic worker industries.

• Require or incentivize private and public employers to undergo training regarding bias in employment practices and measures to address bias in hiring, promotion, pay, and workplace practices.

• Create a fund to support the development and sustainment of Black-owned businesses and eliminate barriers to licensure that are not strictly necessary and that harm Black workers.

• Create and fund intensive training programs that enable Black Californians to access employment opportunities from which they have been excluded.

• Ban employment practices that lock in and perpetuate historic and continuing discrimination and should make eligibility for public contracts contingent on elimination of employment practices that disproportionately harm Black workers.

• Address disparities in transportation that limit access to jobs.

Control Over Creative Cultural and Intellectual Life

• Identify and eliminate anti-Black discrimination policies in the areas of artistic, cultural, creative, athletic, and intellectual life.

• Provide financial restitution and compensation to athletes or their heirs for injuries sustained in their work if those injuries can be linked to anti-Black discrimination policies.

• Compensate individuals who have been deprived of rightful profits for their artistic, creative, athletic, and intellectual work.

• Identify and eliminate discrimination in the industries of art, culture, invention, sports, leisure, and business, including but not limited to: ensuring access to patents and royalties for cultural, intellectual, and artistic production; prohibiting discrimination and glass ceilings that harm Black artists and entrepreneurs; removing anti-Black memorials and monuments; placing clear restrictions on the use of artistic works in disciplinary or law enforcement actions; and providing a pathway to compensation for student athletes.
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- Increase funding to the California Department of Fair Employment and Housing and other relevant state agencies to effectively enforce civil rights laws and regulations.

An Unjust Legal System
- Eliminate discriminatory policing and particularly killings, use of force, and racial profiling of African Americans.
- Eliminate and reverse the effects of discrimination within the criminal justice system including, reviewing the cases of incarcerated African Americans in order to determine whether they have been wrongfully convicted or have received longer or harsher sentences than white people convicted of the same or similar crimes.
- Review the security level determinations made by the California Department of Corrections and Rehabilitation in order to eliminate and reverse anti-Black discriminatory policies and decisions that have resulted in a disproportionate number of Black incarcerated people being identified as members of security threat groups, held in segregated housing, or housed in higher security levels than their white peers.
- Prevent discrimination by algorithms in new policing technologies.
- Eliminate the racial disparities in police stops.
- Eliminate the racial disparities in criminal sentencing and the over-incarceration of African Americans.
- Eliminate the over-policing of predominantly Black communities.
- Eliminate the racial disparities and discrimination against African Americans in the parole hearing process (including in the criminal risk assessments used to determine suitability for parole).
- Eliminate both implicit and explicit bias in the criminal justice system, including implementing training and accountability for prosecutors, judges, parole commissioners, and parole and probation officers.
- Reduce the scope of law enforcement jurisdiction within the public safety system and shift more funding for prevention and mental health care.
- Invest in institutions that reduce the likelihood of criminal activity such as care based services, youth development, job training and increasing the minimum wage.
- Require the Board of State and Community Corrections (BSCC), CDCR, the Judicial Council and the Commission on Peace Officer Standards and Training, and the Board of Parole Hearings to work with the Attorney General to collect comprehensive data on policing, convictions, sentencing, and incarceration, including the use of less lethal weapons by law enforcement and demographic characteristics on a regular (monthly, quarterly, annual) basis. As part of the data collection, mandate that law enforcement (at all levels) report the data accurately and in a timely manner. In addition, require that the data be made available through an open data system that can be accessed and downloaded by researchers, advocates, policy makers and the public.

Mental & Physical Harm and Neglect
- Eliminate anti-Black healthcare laws and policies and anti-Black discrimination in healthcare.
- Compensate, both financially and with cost-free high quality comprehensive services and supports, individuals whose mental and physical health has been permanently damaged by anti-Black healthcare system policies and treatment, including, but not limited to, those subjected to forced sterilization, medical experimentation, racist sentencing disparities, police violence, environmental racism, and psychological harm from race-related stress.
- Identify and eliminate discrimination and systemic racism, including but not limited to, discrimination by healthcare providers; inequity in access to healthcare; inaccessibility of health insurance; funding needs of health-focused community organizations; the dearth of clinical research on health conditions that affect African Americans; the underrepresentation of African Americans among medical and mental health providers; and the lack of race-conscious public health policy.
- Create free healthcare programs.
- Provide ongoing medical education, particularly on illnesses and other issues that historically impact health of African Americans; provide medical clinics.
- Implement Medi-Cal reforms to increase flexibility for the use of community evidence practices designed, tested and implemented by the Black community and
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reduce the tendency to use culturally bankrupt evidence-based practices that are not field tested.

• Identify and eliminate the biases and discriminatory policies that lead to the higher rate of maternal injury and death among Black women.

• Ensure that Black women have access to competent, trained medical staff and services for all of their lifetime reproductive healthcare needs including birth control, prenatal and postnatal care, labor and delivery, abortion services, and perimenopause, menopause and post-menopause care.

The Wealth Gap

• Implement a detailed program of reparations for African Americans.

• Develop and implement other policies, programs, and measures to close the racial wealth gap in California.

• Provide funding and technical assistance to Black-led and Black community-based land trusts to support wealth building and affordable housing.

The California African American Freedmen Affairs Agency

• Establish a cabinet-level secretary position over an African American/Freedmen Affairs Agency tasked with implementing the recommendations of this task force. The role of the agency is to identify past harms, prevent future harm, work with other state agencies and branches of California’s government to mitigate harms, suggest policies to the Governor and the Legislature designed to compensate for the harms caused by the legacy of anti-Black discrimination, and work to eliminate systemic racism that has developed as a result of the enslavement of African Americans in the United States.

• The Agency should include the following:

  » A branch to process claims with the state and assist claimants in filing for eligibility.
  » A genealogy branch in order to support potential claimants with genealogical research and to confirm eligibility.
  » A reparations tribunal in order to adjudicate substantive claims for past harms
  » An office of immediate relief to expedite claims.
  » A civic engagement branch to support ongoing political education on African American history and to support civic engagement among African American youth.
  » A freedmen education branch to offer free education and to facilitate the free tuition initiative between claimants and California schools.
  » A social services and family affairs branch to identify and mitigate the ways that current and previous policies have damaged and destabilized Black families. Services might include treatment for trauma and family healing services to strengthen the family unit, stress resiliency services, financial planning services, career planning, civil and family court services.
  » A cultural affairs branch to restore African American cultural/historical sites; establish monuments; advocate for removal of racist relics; support knowledge production and archival research; and to provide support for African Americans in the entertainment industry, including identifying and removing barriers to advancement into leadership and decision-making positions in the arts, entertainment, and sports industries.
  » A legal affairs office to coordinate a range of free legal services, including criminal defense attorneys for criminal trials and parole hearings; free arbitration and mediation services; and to advocate for civil and criminal justice reforms.
  » A division of medical services for public and environmental health.
  » A business affairs office to provide ongoing education related to entrepreneurialism and financial literacy; to provide business grants; and to establish public-private reparative justice-oriented partnerships.
Endnotes

1Pres. Proc. No. 95, (Jan. 1, 1863); U.S. Const. amend. XIII, §1.
5See generally Chapter 3 Political Disenfranchisement
8See generally Chapter 12. Harm and Neglect Mental Physical and Public Health;
10Chapter 2, section V.B.
11Baptist, supra, at p. xxiii.
12Chapter 2, Section IV.C.
13Baptist, supra, at pp. 9 – 11. For an in depth discussion, see Chapter 2, Section IV.C.
15Weil and Adrian Blanco, More than 1,700 Congressmen Once Enslaved Black People. This Is Who They Were, and How They Shaped the Nation (Jan. 20, 2022) Washington Post (As of January 24, 2022) (Weil and Blanco).
17Id. at pp. 112 – 115.
21Baptist, supra, at pp. 116-124. For an in depth discussion of the horrors suffered by enslaved people, see Chapter 2, section V
23Thomas Jefferson, Letter to Joel Yancey, Jan. 17, 1819 (as of May 9, 2022)
24U.S. Census of 1860, Introduction, p. vii (as of May 9, 2022)
25Kendi, supra, at pp. 38–41.
26Kendi, supra, at p. 48.
30An act concerning Servants and Slaves XXXIV (1705), Records of the American Colonies, p. 459 (as of Apr. 24, 2022).
31See e.g., US Constitution, Article I, Section 2; Kolchin, supra, at pp. 17 – 18, Dred Scott v. Sandford, 60 U.S. 393; Darlene Goring, The History of Slave Marriage in the United States, 39 J. Marshall L. Rev. 299 (2006) (Abolitionist William Goodell described the way that American law treated the families of enslaved people in 1853 as: “The slave has no rights. Of course, he or she cannot have the rights of a husband, a wife. The slave is a chattel, and chattels do not marry. The slave is not ranked among sentient beings, but among things;’ and things are not married.”); Campbell, Making Black Los Angeles: Class, Gender, and Community, 1850-1917 (2016). (The 1850 and 1860 federal censuses did not list most enslaved people by name, as they did for white Americans, but en masse in “slave schedules.”)
32See Chapter 3 and 4.
34See Chapters 2, 4, 6, 10, 11
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26 Smith, Remaking Slavery in a Free State: Masters and Slaves in Gold Rush California (Feb. 2011) 80 Pacific Hist. Rev. 33


28 Id. at pp. 40, 257.


31 See e.g., A Slave Fledged in San Jose (Feb. 16, 1850) Daily Alta California, p. 2, col. 3; Slaveholding in California (Aug. 30, 1850), Liberator, p. 140, col. 5.

32 An Act Respecting Fugitives from Labor, and Slaves brought to this State prior to her Admission into the Union, April 15, 1852, ch. 33, California Statutes, at 67–69, Freedom’s Frontier, supra, at pp. 67-68.

33 Freedom’s Frontier, supra, at pp. 71 – 72.

34 Waite, Early California lawmakers also preached #resistance—but against immigration (Aug. 3, 2018) Los Angeles Times (as of Jan. 26, 2022); Cottrell, It took 92 years for California to ratify the 15th Amendment (June 26, 2020) The Union (as of March 15, 2022)


38 See, e.g., Brockell, Tulsa isn’t the only race massacre you were never taught in school. Here are others., The Washington Post


41 EJI 2015, supra, at p. 23.

42 Ibid.


46 Brinhurst, The Ku Klux Klan in a Central California Community: Tulare County During the 1920s and 1930s (Winter 2000) 82(4), Southern California Quarterly 365, 370; Hudson, supra, at pp. 171-72.

47 Hudson, supra, at p. 172.

48 Ibid.


50 Hudson, supra, at p. 168.

51 See Chapter 3 IV J.5.


56 Nat. Park Service, supra, p. 6: Black Officeholders in the South, (as of Nov. 19, 2021).

57 Foner, Reconstruction, supra, at pp. 581-82.

58 Chapter 4, Section IV.


60 Foner, Forever Free, supra, p. 143.


62 Nat. Park Service, supra, p. 6; Black Officeholders in the South. (as of Nov. 19, 2021).

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[29] Ibid.


20 Moehling, Mother’s Pensions and Female Headship (2002) Yale University, pp. 2-3, 12-18, 31 table 9 (analyzing data from Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia).


196 Id. at p. 132.

197 Ibid.


200 Ibid.

201 Tiano, Los Angeles’ Plan to Address the Overrepresentation of Black and LGBTQ Youth in Foster Care (May 22, 2019) The Imprint (as of Aug. 25, 2021).


203 Compare Ibid. with Children’s Bureau, supra, pp. 2-3.

204 KidsData, supra.


206 See, e.g., Paggett, Cultural Incompetence: My Son was Kicked out of Class Because of His Hair (March 8, 2018), ACLU of Northern California (as of March 21, 2022).


209 Desmarais, Historic Wrongs on a Pedestal: Ugly Past Doesn’t Vanish When the Artwork Does (Feb. 27, 2018) (as of March 21, 2022).


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235 Toxic Communities supra, p. 184; Sundown Towns, supra, p. at 76; Rothstein, supra, at pp. 72-73.

236 Lohrentz, The Impact of Proposition 209 on California’s MWBE’s (Jan. 2015), Equal Justice Society, p. 2 (as of Mar. 18, 2022).

237 Ibid.
THE FORGOTTEN 40 ACRES:
HOW REAL PROPERTY, PROBATE & TAX LAWS CONTRIBUTED TO THE RACIAL WEALTH GAP
AND HOW TAX POLICY COULD REPAIR IT

Sarah Moore Johnson* & Raymond C. Odom**

Authors’ Synopsis: American racial history has been intertwined with land and wealth since the dawn of our nation. Slavery and the country’s continued policies of institutionalized racism have resulted in a median ten-to-one wealth disparity between White and Black Americans. Throughout history, reparations have been a recognized method for reversing and repairing the government-sponsored dehumanization of a people group, both within the United States and in other countries.

Before ideas for redress can be appreciated, however, it is important to understand the multiple attempts the federal government made to grant freed people forty tillable acres, and how close the country came to making good on that promise. After being denied any sort of restitution for slavery, Black Americans continued to be excluded from wealth-building opportunities through the Black Codes, sharecropping, incarceration, and discriminatory housing policies. The New Deal, G.I. Bill, and a shift to more regressive tax policies exacerbated the racial wealth gap by promoting White wealth, and state probate rules all too often lead to a forfeiture of inherited wealth in Black families. The larger the racial wealth gap grows, the further we, as a nation, move away from our original and continuing vision of equal opportunity for all Americans.

It seems fitting that any solution for repairing the racial wealth gap be funded through tax policy tied to wealth and land. This Article proposes earmarking estate tax revenues from America’s swollen

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With heartfelt thanks to our friend and colleague, Vanesa Browne, for her contributions to Part IV of this Article.
concentrations of wealth to repair and redress the stolen Black wealth extracted from slavery and the ensuing 157 years of broken promises that began with the “Forgotten Forty Acres.”

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I. INTRODUCTION

The story of America’s racial history is inextricably bound up with land and wealth. In the infancy of our country, land was limitless and inexpensive, but labor to turn that land into profit was in short supply. Expansion of our country to the Western territories and the question of
whether slavery would follow suit ignited the sparks of the Civil War.¹ Confederate fought the Union in part out of fear that, not only would the institution of slavery be abolished, but that their land would be stripped from them and awarded to their slaves.²

After the war, the South remained short on cash but rich in land, so rather than paying fair wages, Black Codes and sharecropping were instituted to lock in a labor force.³ When the Black⁴ population spread west and north in the Great Migration, segregationist policies created barriers to land ownership.⁵ For people of color who managed to overcome the odds and acquire land or money, our probate laws have allowed it to slip away at death. After the progress of the civil rights movement, anti-tax policies implemented in the 1980s and continued today have created an economic segregation that threatens the continued success of our democracy.⁶

Reparations were expected and were attempted to be awarded after the conclusion of the Civil War, but a series of ill-fated and ill-willed efforts precluded it.⁷ Instead, many of the people and governments of this country, including the federal government, reverted to the same racial narrative used to dehumanize Black people and justify slavery. By dehumanizing Black Americans, federal, state, and local governments systematically deprived Black Americans of property and rights after the

³ See infra Parts III.A & III.B.
⁴ In accordance with the AP Stylebook, this Article will capitalize the terms “Black” and “White” when used as an adjective to describe Black and White people in the United States, except when the lowercase adjective is used in quoted sources. The decision of whether to capitalize White is an issue that is currently up for debate, but the National Association of Black Journalists in June of 2020 issued a statement recommending that whenever a color is used to appropriately describe a race, it should be capitalized, including White and Brown. See Kanya Stewart, NABJ Statement on Capitalizing Black and Other Racial Identifiers, NAT’L ASSOC. OF BLACK JOURNALISTS (June 11, 2020), https://www.nabj.org/news/512370/NABJ-Statement-on-Capitalizing-Black-and-Other-Racial-Identifiers.htm. The term “African American” will be used when describing an American Black person of African descent. Immediately after slavery, most Black people in America were African Americans. The same cannot be said today. The term “Black American” can include persons of Caribbean descent or Europeans who do not trace their history back to Africa.
⁵ See infra Parts III.C, III.D & III.E.
⁶ See infra Part III.G.
⁷ See infra Part II.B.
Civil War, until race discrimination was officially outlawed by the Civil Rights Act of 1964\textsuperscript{8} and the Fair Housing Act of 1968.\textsuperscript{9} Other civilized countries have made monetary awards and sacrifices to correct past wrongs, such as South Africa after apartheid and Germany after the Holocaust.\textsuperscript{10} Additionally, the United States has attempted reparations for other groups it has mistreated, such as Native Americans and Asian Americans after World War II.\textsuperscript{11}

Our failure as a nation to address the issue of reparations for Black Americans has contributed to a new form of racial segregation—economic segregation—in the form of income disparity and the racial wealth gap, which is taking us further away from the democratic ideals on which our country was founded. This Article proposes to use tax policy to repair the racial wealth gap, not just in the form of slave reparations, but as “Black reparations.” These reparations can be achieved by using the estate tax and new charitable contribution rules to create a public and private partnership that makes both direct payments and community-based payments to Black Americans with a focus on the cornerstone of all American rights—property.

Part II begins by providing a historical background on slavery in America and post-Civil War attempts to provide slavery reparations. Part III explores the ways in which federal and state real property and tax laws have further discriminated against and continue to harm Black Americans. Part IV provides specific examples of reparations paid by other countries in connection to the Holocaust and Apartheid, as well as examples of reparations paid by the United States in connection to government seizure of Native American land and the internment of Japanese Americans. Part V discusses options for funding reparations to Black Americans through taxes on wealth and property at the local, state, and federal levels.

II. HISTORICAL BACKGROUND

A. History of Slavery in America

This Article begins in August 1619, when Jamestown colonists were the first in the New World to purchase enslaved Africans, marking what

\textsuperscript{10} See infra Parts IV.A & IV.B.
\textsuperscript{11} See infra Parts IV.C & IV.D.
many believe was the beginning of slavery in America. Other historians argue that slavery in America began much earlier, on September 8, 1565, when Spanish Admiral Pedro Menendez de Aviles founded St. Augustine, Florida, arriving on Florida’s shores in “ships filled with soldiers, wives, children and Africans, who were mostly slaves.”

Over 400,000 Africans were stolen from their homes in Africa and sold into slavery in America before the abolishment of the international slave trade. From 1619 to 1865, almost 250 years, slave owners flourished under a cruel system of unpaid labor.

### 1. Origins of Servitude in America

An unfortunate truth is that forms of involuntary servitude have been practiced throughout human history. Typically, such slavery occurred as a result of war or other armed conflict, but this was not the case in America.

When the Mayflower arrived at Plymouth in 1620, it carried indentured servants to the New World. Indentured servitude was the original model for growing a tobacco labor force in America. Investors would secure low wage citizens from England to migrate to America in exchange for a set number of years of labor. Failure of an indentured servant to be productive resulted in a court-imposed lengthening of their indenture. There is some dispute as to exactly when and how the

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14 See Hannah-Jones, supra note 12.

15 See id.


17 See id.
preferred source of labor became African slaves rather than indentured White servants. There is, however, no dispute that it happened.\textsuperscript{18}

One theory for the origins of chattel slavery originates with Bacon’s Rebellion in 1676.\textsuperscript{19} Nathaniel Bacon led a coalition of poor White farmers, African enslaved people, and White indentured servants frustrated with the inability to find farmland and disappointed that the Virginia governor (a relative of Bacon’s) would not aid them in their vigilante killing and plunder of peaceful Native Americans to drive them off their lands.\textsuperscript{20} Bacon and his supporters set fire to Jamestown in a rebellion against the Governor and other land-owning elites.\textsuperscript{21}

After Bacon’s Rebellion, White planters reacted with alarm to the anger they had seen among the Black Virginians who had joined Bacon. Worried about their inability to control this rowdy labor force of servants and slaves, laws were enacted making the Africans “hereditary slaves,” and the system of White indentured servitude was slowly dismantled.\textsuperscript{22} This backlash from Bacon’s Rebellion is said to have caused landowners to make a “racial bribe”\textsuperscript{23} with poor Whites, elevating them to a preferred status by giving them the right to join in the legally permitted dehumanizing of African slaves to the status of non-person property-chattel.

\begin{itemize}
\item \textsuperscript{18} See DARITY, supra note 16, at 67 (“Black people overwhelmingly were the objects of enslavement. . . . Moreover, black enslavement had a unique severity that obviates any equivalence that might be drawn to white indentured servitude.”). Digital History reports: To meet planters’ growing demand for slaves, the English government established the Royal African Company in 1672. After 1698, when Britain ended the Royal African Company’s monopoly of the slave trade, the number of enslaved Africans brought into the colonies soared. Between 1700 and 1775, more than 350,000 African slaves entered the American colonies. By the mid-18th century, blacks made up almost 70 percent of the population of South Carolina, 40 percent in Virginia, 8 percent in Pennsylvania, and 4 percent in New England.
\item \textsuperscript{19} See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 24 (rev. ed. 1975).
\item \textsuperscript{21} See id.
\item \textsuperscript{22} See id.; see also Enactment of Hereditary Slavery Law Virginia 1662- ACT XII (explaining that under English law, a child received his or her status from the father. This Virginia colonial law of December 1662 made a child of an enslaved mother also a slave for life), https://hsi.wm.edu/cases/anthony/documents.html.
\item \textsuperscript{23} See ALEXANDER, supra note 19, at 25.
\end{itemize}
Perhaps the idea of a racial bribe is a good description of the birth of racism, but historian Edmund Morgan provides a more practical insight as to why state governments codified white supremacy into a racist caste system. An indentured servant coming to Virginia in the first half of the seventeenth century cost about half as much as an African slave. Then, the supply of indentured servants began to decline at about the same time as the need for more labor began to sharply increase. As more African slaves were imported to meet the demand, an obvious problem began to manifest: indentured servants could not be controlled by physical coercion (English law prevented the maiming or killing of an English indentured servant), but they could be motivated by the threat of extending their term of service. There was no similar way to motivate African slaves, who had a life sentence.

2. Importation of the Racial Caste System

In Barbados, the English enacted a law that permitted the beating, maiming, and death of Africans by libelously labeling Africans as a “brutish sort of people,” and because they were viewed as such, it was necessary “or at least convenient” to kill or maim them in order to make them work. Similarly, in 1705, Virginia passed a law that allowed the dismemberment of unruly slaves, but prohibited the whipping of a Christian, White servant without an order from the justice of the peace. Slavery required new methods of labor discipline that became inextricably bound to contempt for African Americans. Government-sanctioned, judicially-enforced white supremacy had arrived in America as a necessary tool of American mercantilism. Historian Edmund Morgan boldly asserts that “to a large degree it may be said that Americans bought their independence with slave labor.”

Thus, to justify the inhumane institution of slavery, a false narrative became entrenched in the psyche of our nation—that people of northern European descent labeled as “White” were a superior race. John C.

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24 See EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM 297 n.4 (1975) (“A newly arrived English servant with 5 years or more to serve cost 1,000 pounds of tobacco more or less in the 1640s and early 1650s. The earliest surviving contract for importation of Negroes, in 1649, called for their sale on arrival at 2000 pounds apiece.”).
25 See id.
26 See id.
27 Id. at 314, 315, 325.
29 MORGAN, supra note 24, at 5.
Calhoun, the senior Senator from South Carolina, was one of the most outspoken and formidable Congressional advocates for the lie that would undergird slavery and its ensuing African American dehumanization. He argued on the Senate floor in 1848 that “the two great divisions of society are not the rich and poor, but white and black, and all of the former, the poor as well as the rich, belong to the upper class and are respected and treated as equals.”

3. Stolen Wealth Builds America

Slavery was also the backbone of America’s financial success. By 1840, cotton produced by slave labor accounted for 59% of all U.S. exports and 66% of the world’s supply. The stolen wealth accumulated in America from slavery was not just in the crops farmed by uncompensated slave labor, but in the slaves themselves. Yale historian David W. Blight noted, “In 1860, slaves as an asset were worth more than all of America’s manufacturing, all of the railroads, all of the productive capacity of the United States put together.” In the Mississippi Delta, the richest cotton-farming land in the country, there were more millionaires per capita in the 1860s than anywhere else in the country.

America owes a great debt to the enslaved people that built it. As so eloquently written by Nikole Hannah-Jones, the creator of The New York Times’ 1619 Project:

They built the plantations of George Washington, Thomas Jefferson and James Madison, sprawling properties that today attract thousands of visitors from across the globe captivated by the history of the world’s greatest democracy. They laid the foundations of the White House and the Capitol, even placing with their unfree hands the Statue of Freedom atop the Capitol dome. They lugged the heavy wooden tracks of the railroads that crisscrossed the South and that helped take the cotton they picked to the Northern textile mills, fueling the Industrial Revo-

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31 See id.; see also Hannah-Jones, supra note 12.


33 See id.
ution. They built vast fortunes for white people North and South—at one time, the second-richest man in the nation was a Rhode Island “slave trader.” Profits from black people’s stolen labor helped the young nation pay off its war debts and financed some of our most prestigious universities. It was the relentless buying, selling, insuring and financing of their bodies and the products of their labor that made Wall Street a thriving banking, insurance and trading sector and New York City the financial capital of the world.34

Because the South was agrarian and the North was industrial, the North was able to gradually abolish slavery, although the North was by no means innocent of racist policies.35 While some in the South cloaked their arguments for secession from the Union in the defense of states’ rights and southern honor, the South’s defense of its slave-based economy led to the first shots of the Civil War being fired on Fort Sumter in Charleston, South Carolina on April 12, 1861.36 What follows in the rest of this Part is the

34 Hannah-Jones, supra note 12.
35 Between 1774 and 1817, all Northern states abolished slavery, even though emancipation was gradual. See J. Gordon Hylton, Before There Were “Red States” and “Blue States,” There Were “Free States” and “Slave States,” MARQUETTE UNIV. L. SCH. FACULTY BLOG (Dec. 20, 2012), https://law.marquette.edu/facultyblog/2012/12/before-there-were-red-and-blue-states-there-were-free-states-and-slave-states/. As evidence of racist policies among Northern states, Article 13 of Indiana’s Constitution of 1851 stated, “No negro or mulatto shall come into or settle in the State, after the adoption of this Constitution.” Anyone employing an African American would be fined between $10 and $500. See Article 13 — Negroes and Mulattoes, IND. HIST. BUREAU, https://www.in.gov/history/about-indiana-history-and-trivia/explore-indiana-history-by-topic/indiana-documents-leading-to-statehood/constitution-of-1851/article-13-negroes-and-mulattoes/. This law may have been inspired by neighboring Illinois, which is said to have had “the harshest of all discriminatory Black Laws passed by Northern states before the Civil War.” 100 Most Valuable Documents at the Illinois State Archives, OFF. OF THE ILL. SEC’Y OF STATE, https://www.ilsos.gov/departments/archives/online_exhibits/100_documents/1853-black-law.html. Illinois’ 1853 Black Law charged any African American who entered the state with a misdemeanor and a heavy fine. See id. If the fine could not be paid, the sheriff was authorized to sell the African American’s labor to the lowest bidder, essentially returning the freed person to slavery. See id.
36 See NAT’L PARK SERV., supra note 1 (quoting Alexander H. Stephens, Vice Pres. of the Confederate States of Am., in SAVANNAH REPUBLICAN, March 21, 1861, https://www.nps.gov/libo/learn/historyculture/slavery-cause-civil-war.htm (“The new [Confederate] constitution has put at rest, forever, all the agitating questions relating to our peculiar institution—African slavery as it exists amongst us—the proper status of the negro
story of our country’s first attempts to repay its “great debt” created from stolen labor and stolen lives.

B. Civil War Era Attempts at Reparations

1. Port Royal and the Sea Islands

In November 1861, a fleet from the Union navy arrived at Port Royal, South Carolina to capture the harbor, which was ideally located between Charleston and Savannah. Surrounding the harbor were several of the sea islands that stretch along the Atlantic coastline, including Edisto, St. Helena, Hunting, Parris, Hilton Head, and Daufuskie Islands. Aside from harnessing the strategic military worth of Port Royal, the generals also planned to harvest the area’s rich Sea Island cotton and rice fields there to finance the Northern war efforts. The plantation owners were easily outnumbered by the Northern troops and were forced to flee, leaving over 10,000 Black men, women, and children behind. They were not yet freed, as the Emancipation Proclamation was still two years away, but they were no longer slaves. Thus began the “Port Royal Experiment,” as the abolitionists called it.

There was no plan for what to do with the formerly enslaved people, called “freedmen,” and there were competing interests, summarized by Katherine Franke as follows:

The military was interested in the profits that could be generated from the agricultural work the freed people could undertake. Otherwise they wanted them out of the way. Northern missionaries were determined to save the souls and educate the minds of these people who had been subjected to a life of barbarism, and Northern land speculators were soon to arrive eager to turn a profit through the use of a cheap source of labor.

in our form of civilization. This was the immediate cause of the late rupture and present revolution.”) (emphasis omitted).

38 Today, the sea islands are home to luxury resorts, state parks, and military training grounds. See “Sea Islands,” BRITANNICA, https://www.britannica.com/place/Sea-Islands.
39 See FRANKE, supra note 37, at 20–23.
40 See id. at 22.
42 See FRANKE, supra note 37, at 23.
The person responsible for managing these competing interests and deciding what to do with the abandoned cotton plantations and former slaves who had worked them was Salmon P. Chase, head of the Department of the Treasury and one of the staunchest abolitionists in Lincoln’s cabinet.\footnote{See id. at 23; see also ALBERT BUSHNELL HART, SALMON PORTLAND CHASE 258 (1899) (“Chase had come forward as the leading anti-slavery spirit in the cabinet.”).} For Chase, the Sea Islands presented an opportunity to demonstrate the value and productivity of freed Black labor.\footnote{See HART, supra note 42, at 23.}

For a time, Chase and his team staved off the capitalists and turned to anti-slavery religious leaders from Northern cities to oversee the farming operations and teach the children.\footnote{See FRANKE, supra note 37, at 25.} In April 1862, Chase was joined by Brigadier-General Rufus Saxton, who assumed governorship of the Sea Islands when the responsibility for overseeing abandoned Confederate lands shifted from the Treasury to the War Department.\footnote{See id. at 32–33.} Along with Chase, Generals Saxton and William T. Sherman shared the view that “an essential part of their mission was the reallocation of confiscated land to the freed people so that they could fend for themselves.”\footnote{Id. at 33.}

To further this mission, Saxton embraced a land allocation plan that Chase’s administration had recommended: “two acres of land were assigned to each working hand, plus an additional five-sixteenths of an acre for each child. In exchange for working the government’s cotton fields, Black workers were permitted to raise corn and potatoes sufficient for their own use.”\footnote{Id. at 34.}

In time, the federal government was able to seize abandoned Confederate lands through a series of Confiscation Acts passed in the summer of 1862.\footnote{See Act of June 7, 1862, 37th Cong., Sess. II, Chapter 98, 12 Stat. 589 (June 7, 1862) (concerning collection of direct taxes in insurrectionary districts within the United States, and for other purposes); see also Act of July 17, 1862, 37th Cong., Sess. II, Chapter 195, 589–92 (concerning suppression of insurrection, to punishing treason and rebellion, to seizing and confiscating the property of rebels, and for other purposes). Section Five of the Confiscation Act of 1862 stated that to insure [sic] the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same and the proceeds thereof for the support of the army of the United States.} Under these laws, the federal government seized
almost 77,000 acres of land in the Sea Islands. Despite uncertain legal grounds, the land was to be sold in lots of about thirty-two acres to “loyal citizens” at an open auction.

Saxton wrote to Secretary of War Edwin Stanton in December 1862 to persuade him to alter the plan. There was a widespread view throughout the Union that the seized Confederate lands should be allocated to the freed people as a kind of reparation for enslavement, and the prospect of the freed people being outbid by Northern speculators alarmed the friends of the freedmen. Saxton, Stanton, Chase, and others desperately—and successfully—lobbied Congress to change the course of the impending auction.

Congress asked Abram Smith, one of the three tax commissioners sent by the federal government to inventory and administer the land auctions, to draft an amendment to the 1862 Direct Tax Act that would ensure the government “could reserve enough lands for all of the Sea Islands’ freedmen,” and the amendment became law on February 6, 1863—a mere five days before the auction was to take place. Of the 77,000 acres available, about 60,000 were reserved for the freed people. Of the remaining 17,000 acres sold at public option, 2,595 acres were purchased by freed people, for about $1 per acre, using pooled savings they had earned from selling pigs, chickens, and eggs, and from their meager wages from the government.

See Franke, supra note 37, at 35.

There was concern that the Confiscation Acts were unconstitutional, and the Kentucky Supreme Court held them to be so in 1863. See Norris v. Doniphan, 61 Ky. (4 Met.) 385, 436–40 (1863). The U.S. Supreme Court upheld the Confiscation Acts after the close of the war as a legitimate exercise of the war power in seizing enemy property. See Tyler v. Defrees, 78 U.S. 268, 349 (1871).

See id. at 35–36.

See id. at 36–37.

Id.; see also Act of February 6, 1863, ch. 21, 37 Stat. 640, 640–41 (amending collection of direct taxes in insurrectionary districts). https://babel.hathitrust.org/cgi/pt?id=uc1.5h79462&view=1up&seq=43&skin=2021&q1=February%206,%201863.

See Franke, supra note 37, at 35, 45.

See id. at 38. Importantly, given that the Confiscation Act permitted the auction of land to “loyal citizens,” the fact that the freed people participated in this sale made them de facto citizens. “Indeed, their successful participation in the first Port Royal land auction should be understood as the first ‘acts of citizenship’ by freed people.” Id. at 42.
After much politicking, Secretary Chase and his friend Reverend Mansfield French persuaded Lincoln to make the full 60,000 or so acres of land that had been reserved from the first auction available to the freed people in a second auction.\(^5\) Lincoln issued an order with the instructions that those who had resided on the land for the last six months or were currently cultivating the land had a preferred, preemptive right to purchase up to 40 acres of land at a price of $1.25 per acre.\(^6\) This is the first mention in history of the 40-acre reparations proposal.\(^6\)

Within two weeks of Lincoln’s order, over a thousand freed people and their families filed applications for land.\(^5\) Based on various accounts of this time period, the freed people’s spirit of entrepreneurship was high, and their excitement was palpable.\(^6\) Imagine the disappointment then, when, in February 1864, the Tax Commissioners reversed course and eliminated the preemptive right of the freed people to buy the land at a fixed $1.25 per acre.\(^4\) Saxton described the feeling of the freed people as follows: “The action of the commissioners proved a sad blow to their hopes, and the disappointment and grief of all were in proportion to their previous exaltation in the hope of soon becoming independent proprietors, free men upon their own free soil.”\(^6\)

In the aftermath of the tax auctions, freed people who were not able to purchase land were forced to choose between again working for a White overseer under labor contracts for poor wages or leaving the land on which they had spent their entire lives for an uncertain future.\(^6\)

Outside of the Sea Islands, the amount of land actually confiscated during or after the war was not great.\(^7\) Aside from slaves, cotton was the primary property confiscated by the Union.\(^8\)

\(^5\) See Abraham Lincoln, Additional Instructions to the Direct Tax Commissioners for the District of South Carolina in Relation to the Disposition of Lands, in 4 WAR OF THE REBELLION, OFFICIAL RECORDS, no. 3, 120 (Fred Ainsworth & Joseph King ed. 1900) (1863).

\(^6\) See id.; see also Fleming, supra note 2, at 724 (1906).

\(^6\) See Lincoln, supra note 59, at 120.


\(^6\) See id. at 49.

\(^6\) See id. at 52.


\(^6\) See FRANKE, supra note 37, at 56.

\(^6\) See id. at 59.

2. **Lincoln’s Proclamation of Amnesty and Reconstruction**

At the same time as Secretary Chase and Reverend French were persuading Lincoln to allocate land to freed people in the second Port Royal auction, Lincoln was considering plans for the post-war South. On December 8, 1863, Lincoln issued a Proclamation of Amnesty and Reconstruction. Referred to as the “Ten Percent Plan,” the proclamation addressed three main areas of concern.

First, it allowed for a full pardon for and restoration of property to all engaged in the rebellion with the exception of the highest Confederate officials and military leaders. Second, it allowed for a new state government to be formed when 10 percent of the eligible voters had taken an oath of allegiance to the United States. Third, the Southern states admitted in this fashion were encouraged to enact plans to deal with the formerly enslaved people so long as their freedom was not compromised.

Lincoln’s Proclamation of Amnesty and Reconstruction wrested control of reconstruction from Congress, put it in the hands of the Southern states, and minimized the chances that the former slaves would be granted their own land to farm.

3. **Sherman Refugees and Special Field Order No. 15**

As General Sherman and his troops marched from Atlanta to the sea, many enslaved deserters and newly freed people began caravanning behind the troops. At the peak, estimates suggest nearly 17,000 formerly enslaved people were trailing the Union troops. The refugees were a hindrance to the Union soldiers on their campaign, and Sherman sought

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69 See id.
70 See id.
71 See Proclamation No. 11 (Dec. 8, 1863).
73 See id.
75 See id. at 12.
some way to address both their destitution and his need to continue his military mission, unencumbered.76

On January 12, 1865, Sherman and War Secretary Stanton gathered Black leaders to seek their opinion on a solution to the refugee problem.77 Garrison Frazier, a former slave from North Carolina who bought his and his wife’s freedom before joining Sherman’s military operation, told Sherman, “[t]he way we can best take care of ourselves is to have land and turn it and till it by our own labor. . . . We want to be placed on land until we are able to buy it and make it our own.”78 When Sherman asked whether the freed people would rather live mixed with Whites or on their own, Frazier replied that his people preferred to live apart from White people, “for there is a prejudice against us in the South that it will take years to get over.”79

Five days after this meeting, on January 16, 1865, General Sherman issued Special Field Order No. 15, which set aside for Black settlement the entire Sea Islands area, as well as a strip of land thirty miles wide from the coast inland that stretched from Charleston, South Carolina all the way to St. John’s River in Florida.80 Under the order, each “respectable” family was to be allotted forty acres of tillable land, which, along with a preceding promise by President Lincoln, provided the source of the demand that freed Blacks receive “forty acres and a mule.”81 The order also prohibited White people from living on the land, unless they were military officers or soldiers assigned to live there for duty.82 Furthermore, freed people were “left to their own control.” As Katherine Franke noted, “This is what most of the freed people imagined freedom would look like: land, tools, and complete independence from white people.”83

The question remained whether the land reserved by Sherman’s order was within the federal government’s purview to give, and so the land was granted to the freed people with only possessory titles—it was theirs unless

76 See Fleming, supra note 2, at 725.
78 Id. at 20.
79 FRANKE, supra note 37, at 58.
80 See id. For the text of Sherman’s Special Field Order No. 15 and a map showing the 400,000 acres of land granted by Sherman to the freed people, see Gen. William T. Sherman, Special Field Order No. 15, BLACKPAST (Sept. 29, 2008), https://www.blackpast.org/african-american-history/special-field-orders-no-15/.
81 FRANKE, supra note 37, at 58.
82 See id.
83 Id.
someone else made a claim to the land by presenting a valid deed.\textsuperscript{84} Given
that the possessory titles were likely to be revoked once the Confederate
soldiers returned from the war,\textsuperscript{85} General Saxton was reluctant to allocate
the land to the refugees, fearing he would “be responsible for disappoint-
ing the freed people once again in their claims for land.”\textsuperscript{86} Nevertheless,
Saxton’s men started to distribute thousands of possessory titles to male
and married freed people (single women were excluded) in the lands that
Sherman had set aside.\textsuperscript{87} With their vulnerable possessory titles, the freed
people began their spring planting as the Civil War drew to a close.\textsuperscript{88}

4. \textit{Freedmen’s Bureau}

On March 3, 1865, Congress established the Freedmen’s Bureau,
formally known as the Bureau of Refugees, Freedmen, and Abandoned
Lands, with the purpose of providing “food, shelter, clothing, medical
services, and land to displaced Southerners, including newly freed African
Americans.”\textsuperscript{89} The Freedmen’s Bureau Act effectively authorized
Sherman’s Special Field Order No. 15; the Act authorized the Bureau to
assign to male freedmen forty acres of abandoned or confiscated land,
which freedmen could lease for three years.\textsuperscript{90} After three years, the land’s
occupants could purchase the land from the government and receive “such
title as is could convey.”\textsuperscript{91} By recognizing a potential limitation on the
government’s ability to convey title to this property, the Freedmen’s
Bureau Act acknowledged that title to the property was vulnerable to legal
challenge.\textsuperscript{92}

5. \textit{Davis Bend}

At the same time as Sherman’s Special Field Order No. 15 was being
implemented on the Southern coast, another important area of land was set

\textsuperscript{84}See id. at 59.
\textsuperscript{85}See id.
\textsuperscript{86}Id.
\textsuperscript{87}See id. at 59–60.
\textsuperscript{88}See id. at 61.
gov/artandhistory/history/common/generic/FreedmensBureau.htm.
\textsuperscript{90}FRANKE, supra note 37, at 60.
\textsuperscript{91}Id.
\textsuperscript{92}See id.
aside for freed people in Mississippi.93 Even before the end of the Civil War, Ulysses S. Grant decided that the lands of Jefferson Davis and his family should be used as a “paradise” for the freed people.94 Near what is today Vicksburg, Mississippi, three large plantations owned by Jefferson Davis and his brother, Joseph Davis, and known collectively as “Davis Bend” were confiscated by the Union and set aside for the “colonization, residence, and support of freedmen.”95 General Dana declared it to be “a suitable place to furnish means of support and security for the unfortunate race which [Jefferson Davis was] so instrumental in oppressing.”96 At Davis Bend, as with other colonies formed for freed people by Bureau agents throughout the South, no White people were permitted to reside on the property, and the colony was guarded by a regiment of freed people.97

What made Davis Bend unique was that it had already been managed and run independently of White control, even before the Union troops arrived.98 Joseph Davis “preferred persuasion to compulsion,” and he implemented a capitalistic form of governance on the plantations that he referred to as a “community of cooperation,” offering “incentives and rewards for exceptional cotton picking,” allowing his servants to run and operate their own store, and even implementing a plantation trial court with a jury of peers.99 Because of this background, Davis Bend was easily converted to a cooperative community after the Union leaders turned the land over to the freed people.100

6. Public Policy Debate

There had been much debate in the Union about how to best transition the freed people from enslavement to paid labor.101 Many believed the government would run plantations and pay the freed people fair wages. Others argued the freed people should be granted their own land to farm

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94 See id. at 214.
95 FRANKE, supra note 37, at 90–91.
96 Id. (quoting Fleming, supra note 2, at 724).
97 See id. at 91.
98 See id. at 85.
100 See FRANKE, supra note 37, at 93.
101 See id. at 60.
and support themselves, free from White involvement. A third group, sympathetic to the Confederate cause, believed life should return to as close as pre-war normal as possible, with freed people working as contract laborers on White-owned plantations. The third plan, arguably the worst, became the reality upon the assassination of President Lincoln and the installation of Andrew Johnson as President on April 15, 1865.

7. Amnesty Proclamation

Once in office, Johnson focused on quickly restoring the Southern states to the Union. On May 29, 1865, he issued an Amnesty Proclamation of his own that granted amnesty to most former Confederates and allowed “the restoration of all rights in property, except as to slaves.” The proclamation created seemingly unanswerable questions related to land ownership. It was unclear whether the March 3, 1865 Freedmen’s Bureau Act or the May 29, 1865 Amnesty Proclamation controlled the disposition of lands falling under Sherman’s Special Field Order No. 15.

8. Conflicting Orders Regarding Land

The head of the Freedmen’s Bureau, General O. O. Howard (also the founder of Howard University), consulted with Stanton, Saxton, and the Attorney General. He issued an order “that the lands set apart for the freed people [under Sherman’s Field Order and the Freedmen’s Bureau] Act were not subject to [Johnson’s] Amnesty Proclamation, and that the Bureau should continue to convey the land to freed people in forty-acre lots.” In September 1865, President Johnson fought back and issued an order “to all Bureau agents demanding that they restore all land except that which had already been sold under a court decree.” General Howard traveled to South Carolina to personally “deliver the terrible news to the freed people” that not only would they lose the land they had farmed all

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102 See id.
103 See id.
104 See id. at 60–61. For a timeline of Lincoln’s assassination on April 14, 1865 and death on April 15, 1865, see Abraham Lincoln’s Assassination, Hist. (Oct. 27, 2009, updated Jan. 28, 2022), https://www.history.com/topics/american-civil-war/abraham-lincoln-assassination.
105 Id. at 61.
106 See id. at 61–62.
107 Id. at 62 (citing George R. Bentley, A History of the Freedmen’s Bureau 93 (1955).
108 Franke, supra note 37, at 62.
year, but they would also be asked to remain on as contract laborers to the returning Confederates.\textsuperscript{109} General Howard did all he could to slow the implementation of President Johnson’s Amnesty Proclamation.

9. \textit{Attempted Assist from Congress}

In December 1865, the Thirteenth Amendment\textsuperscript{110} abolishing slavery became effective, and Congress later passed a new Freedmen’s Bureau bill\textsuperscript{111} and a Civil Rights Act.\textsuperscript{112} The Freedmen’s Bureau bill would have statutorily recognized the Sherman land grants and protected the possessory titles to that land for three years while Congress sought alternate land to offer to the freed people in the event title was reclaimed by the former Confederate owners.\textsuperscript{113} The bill would have reserved three million acres of public land in Florida, Mississippi, Alabama, Louisiana, and Arkansas for the freed people.\textsuperscript{114}

President Johnson vetoed the bill, thus ending the hopes for reparations to formerly enslaved people in the form of property.\textsuperscript{115} It was this veto and others to follow that would lead to his impeachment.\textsuperscript{116} Johnson brought the Freedmen’s Bureau under the control of the military, which in turn seized control of the land restoration process.\textsuperscript{117}

In stripping the freedmen of their possessory Sherman titles and granting “Johnson titles” back to the White planters, the economic dynamics of the Sea Islands were forever changed. Of the 190,000 or so people who live today in Beaufort County, South Carolina (which includes the towns of Beaufort and Hilton Head Island), 77% are White, and the rest are majority African American.\textsuperscript{118} “Much of the wealth held by

\begin{itemize}
\item \textsuperscript{109} Id.; see also Fleming, supra note 2, at 726.
\item \textsuperscript{110} See U.S. CONST. amend. XIII, §§ 1–2.
\item \textsuperscript{111} See Freedmen’s Bureau Act, ch. 90, 13 Stat. 507 (1865).
\item \textsuperscript{113} See Freedmen’s Bureau Act, supra note 111.
\item \textsuperscript{114} See generally Freedmen’s Bureau Act of 1866, ch. 90 xiii Stat. 507 (continuing in force and amending the Freedmen’s Bureau Act of 1865).
\item \textsuperscript{115} See, e.g., \textit{Impeachment of President Andrew Johnson, 1868}, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-johnson.htm.
\item \textsuperscript{116} See id.
\item \textsuperscript{117} See FRANKE, supra note 37, at 62–73
\item \textsuperscript{118} See id. at 73; see also \textit{QuickFacts: Beaufort County, South Carolina; United States}, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/beaufortcountysouthcarolinaUS/PST045219 (providing that the percentage of people who live in Beaufort County, South Carolina that are White has increased to about 78%).
\end{itemize}
residents of Beaufort County today is reflected in the value of property. And nearly all of the most valuable property is owned by white people.”

Land returned to the Confederates or purchased by Northern speculators in the Port Royal auctions ended up in the hands of stockbrokers, like E.F. Hutton; mining barons, like Solomon Guggenheim; and future governors and U.S. Senators, like Mark Sanford.

At Davis Bend, a different story prevailed. After Joseph Davis reclaimed his property, he sold it to his favorite former slaves, Benjamin Montgomery and his son Isaiah Montgomery, “for $300,000 at very liberal terms.”

The Montgomery family “became the third largest cotton producers in Mississippi. They improved the land, diversified their crops, restored the buildings, and produced prize-winning long-staple cotton. . . . They established . . . [two] mercantile store[s]. White people sometimes remarked that they were ‘the best planter[s] in the county and perhaps in the state.’”

Davis Bend showed what the South could have looked like if Johnson did not veto the second Freedmen’s Bureau Bill and the Civil Rights Act passed by Congress in late 1865. Black farmers, free from White oversight and control, were able to be independently successful.

10. Southern Homestead Act

In June 1866, Congress tried again to assist the freed people by enacting the Southern Homestead Act. It was designed exclusively to give freed people and White Southern loyalists first choice of the remaining public lands from five Southern states (the same land attempted to be offered to ex-slaves under the second Freedmen’s Bureau Bill that was vetoed by President Johnson) until January 1, 1867.

But homesteading was problematic for several reasons. The short, six-month period allotted by Congress prevented freed people from taking action because most were under contract to work or had leased land, through the Bureau’s contract labor policy, until the end of the year.

Moreover, many Southern bureaucrats tasked with enforcing the law did

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119 FRANKE, supra note 37, at 73 (footnote omitted).
120 See id. at 75–76.
121 McMillen, supra note 99.
122 Id. (alteration in original) (quoting another source).
124 See generally id.
125 See generally Fleming, supra note 2.
not inform the freed people of their opportunity to acquire land. In addition, the quality of the land was poor and, even though prices were reduced, the land was still too expensive for freed people to afford. In the end, only about 1,000 freed people acquired title to land as part of the Southern Homestead Act.

Thaddeus Stevens of Pennsylvania, then Speaker of the U.S. House of Representatives and an ardent abolitionist, introduced H.R. 29 on March 11, 1867, in an attempt to resuscitate the forty acres promise. Section four of the bill stated:

Out of the lands thus seized and confiscated, the slaves who have been liberated . . ., who resided in said “confederate States” on the 4th day of March, A.D. 1861 or since, shall have distributed to them as follows namely: to each male person who is the head of a family, forty acres; to each adult male, whether the head of the family or not, forty acres; to each widow who is the head of a family, forty acres; to be held by them in fee simple, but to be inalienable for the next ten years after they become seized thereof . . . At the end of ten years the absolute title to said homesteads shall be conveyed to said owners or to the heirs of such as are then dead.

In support of his bill, Stevens stated, “Withhold from them all their rights and leave them destitute of the means of earning a livelihood, [and they will become] the victims of the hatred or cupidity of the rebels whom they helped to conquer.” Although Stevens’ bill failed to pass, Republicans

126 See id.
127 See id.
131 Id.
132 Id.
campaigned on the promise of forty acres and a mule during the 1868 election season.133

C. Other Attempts at Reparations for Slavery

The history, laws, and policies reflected in Section B of this Part are enumerated to reveal that, although there were differences of opinion, there was a clear intent on the part of the federal government to allocate land to former slaves. The federal government’s plan to provide tillable land to freed people reflected the freed people’s idea of what it meant to be free (as opposed to simply “freed”)—living autonomous lives independent of White people.

The belief that former slaves would be granted land was widely held—by Northerners as morally just, by freed people as reason for hope, and by Confederates as fear-based motivation.134 Reparations was not a novel concept—there were cases of reparations for slavery dating all the way back to the colonial era.

1. Reparations in the Colonial Era

During the colonial era, it was customary (and even the law in the colony of Maryland) for masters to pay “freedom dues” to indentured servants at the expiration of their term of service.135 Where freedom dues included land, it was usually fifty acres, but the payments more typically consisted of clothing, corn, and tools.136 Freedom dues were “aimed at

133 See id.

134 See Fleming, supra note 2, at 723 (“I have been assured by old negroes that a general topic of conversation in some negro ‘quarters’ was the intention of the Federals to confiscate the lands and divide them among the blacks. They heard about this from the ‘big house’ and from ‘word that was saunt in.’ The Confiscation Acts of the Federal Congress were constantly referred to by the Confederates as showing what the policy of the North would be in case the South were conquered. Through fear of confiscation and division of lands, the Southerners were rallied to fresh exertion . . . . The last address of the Confederate[s] Congress, in March, 1865, reminded the people that the penalty for failure would probably be confiscation of estates, which would be given to their former bondsmen.” (alteration in original)).


136 Id.
enabling ex-servants to start afresh, as free settlers.” This history likely informed the abolitionists’ push for forty acres and a mule after the Civil War.

2. Belinda Royall

In his influential piece, “The Case for Reparations” published in The Atlantic, Ta-Nehisi Coates reports on two early examples of slave reparations. First was Belinda Royall, who “was kidnapped as a child [from what is now Ghana] and sold into slavery. She endured the Middle Passage and 50 years of enslavement at the hands of Isaac Royall and his son.” Isaac Royall was famous not only as the benefactor of Harvard Law School, but also for having tortured and burned alive at the stake seventy-seven of his slaves in Antigua who were accused of planning a rebellion against their masters.

Isaac Royall fled the country during the Revolution and, in 1783, Belinda Royall asked the Massachusetts legislature for an allowance to be paid to her from Isaac’s estate, given that his wealth was accumulated in part on behalf of her uncompensated labor. The legislature granted her a pension of 15 pounds and 12 shillings from the estate, making her petition for reparations one of the earliest successful attempts.

3. Quakers

Coates’ second example of early reparations is that of the Quakers. Quaker John Woolman wrote in 1769, “A heavy account lies against us as a civil society for oppressions committed against people who did not injure us . . . and that if the particular case of many individuals were fairly stated, it would appear that there was considerable due to them.” Indeed, in New York, New England, and Baltimore, Quakers made “membership

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139 See HARVARD UNIV. PRESS BLOG, supra note 138.

140 Coates, supra note 32.

contingent upon compensating one’s former slaves.”142 Following this ideology, Quaker Robert Pleasants, in 1782, emancipated his seventy-eight slaves and granted them 350 acres.143 He also built a school on their property and provided for their education.144 As Pleasants explained, “The doing of this justice to the injured Africans . . . would be an acceptable offering to him who ‘Rules the kingdom of men.’”145

The forty acres promised at the end of the Civil War was not a novel concept—there was an established pattern already existing in the country for giving those who had been freed a fresh start. After 1868, however, the reparations rhetoric went silent. Public sentiment in favor of aiding the freed people faded with people’s memories of the war. The prominent publication The Nation published editorials warning that the allocation of land to formerly enslaved people violated the American ideals of hard work, contending that “[n]o man in America has any right to anything which he [had] not honestly earned, or which the lawful owner[s] [have] not thought proper to give him.”146 Apparently, lifetimes of unpaid labor did not count as “honest work” to the editors of The Nation. Eventually, former slaves and their descendants picked up the mantle of the quest for reparations.

4. First Ex-Slave Pension Bill

After the Civil War, military service pensions were granted to both White and Black veterans.147 However, many Black veterans had no birth certificates, military papers, or hospital records, and, thus, they could not complete the paperwork needed to qualify.148 Partly for this reason, “the first ex-slave pension bill (H.R. 11119) was introduced by Rep. William Connell of Nebraska in 1890 . . . at the request of [his constituent] Walter

142 Coates, supra note 32.
143 See id.
144 See id.
145 Id.
146 Land for the Landless, THE NATION, May 16, 1867, at 394, 394–95.
148 See id.
The plan called for one-time payments as well as monthly benefits that were based on a person’s age and would increase in time. The older a former slave, the higher the one-time payment (called a “bounty”) and the higher the monthly pension.150

Vaughan, a White Democrat, politician, and newspaper editor, “did not believe that [H.R. 11119] . . . should be identified as a pension bill but instead as ‘a Southern-tax relief bill.’”151 Although “Vaughan recognized that pensions would financially benefit former slaves and would be a semblance of justice for their years of forced labor,” his motivation for the pension program was also to increase spending among the recipients of the pension in order to stimulate the devastated Southern economy.152

5. Callie House

Callie House was a former slave, born near the end of the Civil War, who demanded reparations for ex-slaves a full seventy years before the Civil Rights Movement. A widowed mother of five, working as a laundress in Nashville, Callie House fought for African American pensions based on those offered to Union soldiers, the logic being that if men who had served in the Union army were entitled to a pension to recognize their service, so too were the former slaves entitled to compensation for their years of involuntary labor.153 The National Ex-Slave Mutual Relief, Bounty and Pension Association (“MRB&PA”), created and led by Ms. House alongside Isaiah H. Dickerson, grew so influential, with a membership of around 300,000 by 1900, that it became the target of government interference.154

149 Perry, supra note 130; see generally H.R. 11119, 51st Cong. (1890); S. 1389, 53d Cong. (1894); S. 1978, 54th Cong. (1896); S. 1176, 56th Cong. (1899); H.R. 11404, 57th Cong. (1902) (showing that all the bills contained the same provisions); see also Mary F. Berry, Reparations for Freedmen, 1890-1916: Fraudulent Practices or Justice Deferred?, 57 J. OF NEGRO HIST. 219, 220–21 (1972) (“Vaughn drafted his own bill and asked his Congressman, William J. Connell . . . to introduce it.”).

150 See H.R. 11119, supra note 149.

151 Perry, supra note 130.

152 Id.; see Goldy-Brown, supra note 147, at 36.


154 See Berry, supra note 153, at 7, 50–51, 87.
The Department of Justice investigated the organization’s leaders, hoping to find actionable offenses, and the United States Post Office used its extensive anti-fraud powers to block MRB&PA’s mailings to its members, claiming the Association was spreading false hope to freed people and thus committing mail fraud. In 1917, Callie House was charged and sentenced to a year in jail for mail fraud, accused of sending misleading circulars through the mail that guaranteed pensions to association members, even though the Post Office offered no definitive evidence to that effect.  

6. Johnson v. McAdoo

In 1915, the National Ex-Slave Mutual Relief, Bounty and Pension Association filed a class action lawsuit against the U.S. Treasury in federal court for around $68 million. The lawsuit asserted that the plaintiffs were owed this sum, which the Secretary of Treasury collected between 1862 and 1868 as a tax on cotton, because they and their ancestors had produced the cotton as a result of their “involuntary servitude.” The Johnson v. McAdoo cotton tax lawsuit is the first documented African American reparations litigation in the United States at the federal level. On appeal, the U.S. Supreme Court in 1916 sided with Court of Appeals for the District of Columbia in denying the claim based on governmental immunity. Callie House’s arrest and imprisonment in 1917 is thought to be in response to her “audacity” to bring the Johnson v. McAdoo suit. At the close of the 1910s, the reparations movement went dormant for decades.

155 See id. at 142, 148, 156.
156 See id. at 156, 189, 192; see also Qualls, supra note 153.
157 See Johnson v. McAdoo, 45 App. D.C. 440 (1916), aff’d 244 U.S. 643 (1917); see also Perry, supra note 130; Arica L. Coleman, The House Hearing on Slavery Reparations is Part of a Long History, TIME (June 18, 2019), https://time.com/5609044/reparations-hearing-history/.
158 Johnson, 45 App. D.C. 440; Perry, supra note 130.
159 See id.; see also Coleman, supra note 157.
160 See Johnson, 244 U.S. at 649–50; Perry, supra note 130.
161 Coleman, supra note 157.
162 The authors could not find examples of advocates for Black reparations from the jailing of Callie House until the start of the civil rights movement. Audley “Queen Mother” Moore is thought to be the founder of the modern reparations movement, beginning in 1955. See Ashley D. Farmer, The Black Woman Who Launched the Modern Fight for Reparations, THE WASH. POST (Jun. 24, 2019), https://www.washingtonpost.com/outlook/2019/06/24/black-woman-who-launched-modern-fight-reparations/.
7. **House Resolution 40**

Former Michigan Congressman John Conyers first introduced H.R. 40 in 1989, and he doggedly re-introduced the Bill in every session of Congress thereafter until he retired in 2017. HR 40 would establish “a commission to examine slavery and discrimination in the United States from 1619 to the present and recommend appropriate remedies.” 163 After Conyers retired, his colleagues continue to introduce H.R. 40 each year. 164 “Conyers contended that raising the topic was not meant to be divisive or controversial but rather that it was necessary.” 165 In Conyers’ words, “Slavery is a blemish on this nation’s history, and until it is addressed, our country’s story will remain marked.” 166

The House of Representatives held hearings on the Bill in 2007 and 2019. 167 On April 14, 2021, the House Judiciary Committee voted 25-17 to send H.R. 40 out of committee and to the floor of the House for mark-up and vote. 168 This was the first time H.R. 40 left committee and made it to the House floor. 169

Officially cited as the “Commission to Study and Develop Reparation Proposals for African Americans Act,” H.R. 40 recites as its purpose:

To address the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to study and consider a national apology and proposal for reparations for the institution of slavery, its subsequent de jure and de facto racial and economic discrimination against African-Americans, and

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165 Coleman, supra note 157.

166 Id.

167 See id.


169 Id. H.R. 40 specifically asks that the empowered commission determine “how Federal laws and policies that continue to disproportionately and negatively affect African Americans as a group, and those that perpetuate the lingering effects, materially and psycho-social, can be eliminated.” H.R. 40.
the impact of these forces on living African-Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes.\textsuperscript{170}

H.R. 40 has often been characterized as a Bill that would only study reparations. However, the Bill has been altered to clearly indicate that the appointed Commission of thirteen individuals suggested by the Bill are to make concrete proposals for actual reparations.\textsuperscript{171}

\textbf{III. How Real Property, Probate & Tax Laws Codified White Supremacy}

As the purpose of H.R. 40 reveals, the issue of reparations now goes beyond slavery, to our country’s “subsequent de jure and de facto racial and economic discrimination against African-Americans.”\textsuperscript{172} This Part explores the ways in which federal and state real property and tax laws have further discriminated against and harmed Black Americans. In addition, this Part will briefly address how probate laws have also had an indirect but decidedly negative effect on wealth transmission within the African-American community. Although many other laws, from labor laws to voting laws to the criminal justice system in general, have implemented discriminatory policies that have harmed Black Americans,\textsuperscript{173} we limit the scope of this Article to the laws that fall within the realm of the real property, trust, and estate practice areas.

\textbf{A. Black Codes, Radical Reconstruction, and Jim Crow Laws}

While Black Codes and Jim Crow laws were not real property laws, \textit{per se}, they used labor laws and segregation to lock in an economic system in which Whites were landowners and Blacks were tenants, helping Whites to gain wealth through property, and suppressing Blacks from doing the same.\textsuperscript{174}

\textsuperscript{170} H.R. 40.
\textsuperscript{171} See id.
\textsuperscript{172} Id.
\textsuperscript{173} See, e.g., Meilan Solly, \textit{158 Resources to Understand Racism in America}, \textsc{Smithsonian Mag.} (June 4, 2020), \url{https://www.smithsonianmag.com/history/158-resources-understanding-systemic-racism-america-180975029/}.
\textsuperscript{174} See \textit{Housing Discrimination in the Jim Crow US and The Case for Reparations}, \textsc{AAIHS}, \url{https://www.aaihs.org/housing-discrimination-in-the-jim-crow-us/}.
1. **Black Codes**

In May 1865, President Andrew Johnson laid out his plans for Reconstruction, which imposed three essential requirements on the Southern states: (1) uphold the abolition of slavery in compliance with the Thirteenth Amendment to the Constitution, (2) “swear loyalty to the Union,” and (3) “pay off their war debt.”\textsuperscript{175} In return, Southern state governments were given free rein to govern and rebuild themselves.\textsuperscript{176}

In part due to the freed people’s widely held belief, supported by Congressional bills and campaign rhetoric, that they were imminently to receive allotments of forty acres, some refused to work for the White planters.\textsuperscript{177} In response, in late 1865, Mississippi and South Carolina were the first Southern states to enact Black Codes that were designed to restrict the freed people’s activities, ensure their availability for labor, and fix their compensation, thereby legalizing a new form of indentured servitude.\textsuperscript{178} Freed people who refused to enter into labor contracts with the White landowners were subject to arrest under the Black Codes for violating vagrancy laws, which prohibited freed people from being “idle” or unemployed.\textsuperscript{179}

Mississippi’s law subjected to arrest any freedman who had not entered into an employment contract by January 2, 1866, and any person who broke or deserted an employment contract was also subject to arrest and surrender of their wages for the year.\textsuperscript{180} Any orphaned minor was to be returned to his or her former master or mistress as their apprentice, allowing for their unpaid labor and corporal punishment until the age of majority was reached.\textsuperscript{181}

In South Carolina, a Black person could only work as a farmer or servant; anyone seeking a different job was required to pay an annual tax of $10 to $100.\textsuperscript{182} This provision hit especially hard for the blacksmiths

\textsuperscript{176} See id.
\textsuperscript{178} See Black Codes, Hist. (June 1, 2010), https://history.com/topics/black-history/black-codes (last updated Jan. 21, 2021).
\textsuperscript{180} See (1866) Mississippi Black Codes, BlackPast (Dec. 15, 2010), §§ 1.6, 3.2, https://www.blackpast.org/african-american-history/1866-mississippi-black-codes/.
\textsuperscript{181} See id. § 2.1.
\textsuperscript{182} See Hist., supra note 178.
and other artisans living in Charleston who had specialized expertise and no experience in farming. By the end of 1866, nearly all the Southern states had enacted Black Codes that not only forced freed people into contract labor, but also forbade interracial marriage and imposed segregation of schools, hospitals, and other public institutions. Black Codes did grant freed people the right to own property and pass property to their heirs in the same manner as White people, but forbade them from serving as landlords.

It is worth noting that, while the Thirteenth Amendment to the Constitution abolishes slavery, it expressly permits involuntary servitude “as a punishment for crime whereof the party shall have been duly convicted.” This exception to the Thirteenth Amendment incentivized Southern Whites to arrest and convict freed people under the Black Codes and, later, under Jim Crow laws, which are discussed below.

2. Radical Reconstruction

After growing concern in the North over Black Codes, the Reconstruction Act of 1867 was passed by Congress over President Johnson’s veto, placing the South under martial law. The Reconstruction Act required Southern states to (1) ratify the Fourteenth Amendment, which broadened the definition of citizenship and granted “equal protection of the laws” to people who had been enslaved, and (2) enact universal male suffrage before those states could rejoin the Union.

During this period of “Radical Reconstruction” from 1867 to 1877, federal troops were sent South “to oversee the establishment of state governments that were more democratic,” and the Black Codes were reformed. The Republican Party controlled the governments of nearly

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183 See id.
184 See id.
185 See BLACKPAST, supra note 180, § 1.1.
186 U.S. CONST. amend. XIII, § 1.
188 U.S. CONST. amend. XIV, § 1.
189 See Reconstruction Act of 1867 §§ 5–6.
190 Jeff Wallenfeldt, Radical Reconstruction, BRITANNICA (Jun. 23, 2020) ("Reconstruction-era legislatures introduced public funding for schooling and the goal of access to schooling for all, authorized the use of public funds for infrastructure development, established fairer systems of taxation, and promoted the general rebuilding of the devastated landscape in the south. Their mission, effectively, was to create a public sector in the southern states. Nevertheless, the story of Reconstruction has been reduced to a story..."
every Southern state, overwhelming the votes of the native-born White Democrats with the infusion of Freedmen’s Bureau agents, former Union soldiers, businessmen and teachers, so-called “scalawags” (native born White Republicans who had been loyal to the Union during the war), and freed people.  

Black men won election to Southern state governments, and sixteen were elected to the U.S. Congress.  

“Throughout the South, more than 600 African Americans served in state legislatures, and hundreds more held local offices from sheriff to justice of the peace.”  


Economic programs provided funding for railroads and other development, but also produced corruption.  

White Southerners’ violent opposition to Reconstruction led to the rise of white supremacist organizations, such as the Ku Klux Klan, which “targeted local Republican leaders for beatings or assassination.”  

Violence and lynchings on the eve of elections was one way the white supremacist organizations suppressed the Black vote.  

Under Republican President Ulysses S. Grant, the Fifteenth Amendment was ratified in 1870, guaranteeing a citizen’s right to vote would not be denied because of race, color, or previous servitude.  

Congress also enacted a series of Force Acts authorizing national action to suppress political violence.  


See id.  

See id.  

Id.  

Id.  

See id.  

Id.  

See Coates, supra note 32 (referring to Mississippi’s dark history of lynching Black people, Coates quotes Theodore Bilbo, a Mississippi senator and a proud Klansman: “‘You and I know what’s the best way to keep the n[ ] from voting,’ . . . . ‘You do it the night before the election.’”).  

See U.S. CONST. amend. XV, §§ 1–2.  

3. Jim Crow Laws

Reconstruction drew to a close as the older Radical Republicans such as Thaddeus Stevens began to retire or die. A disputed presidential election in 1876 was resolved by a compromise that elected Rutherford B. Hayes as President in exchange for the withdrawal of federal troops who had been protecting African Americans in the defeated Confederate states. The last federal soldiers left the South in 1877. Southern Whites, alarmed at the progress of Blacks during Reconstruction, regained control of their states and the Jim Crow era began.

Rooted in the Black Codes, Jim Crow laws legalized racial segregation at the state and local levels. The laws marginalized African Americans by creating segregated water fountains, restrooms, building entrances, and even entire towns. They also restricted Black progress by denying African Americans the right to vote, seek certain jobs, or attend the same schools as Whites. Violators of Jim Crow laws often faced arrest, fines, jail sentences, violence, and death. Jim Crow laws spawned the “Great Migration” of Black Americans fleeing to the North beginning in 1916.

B. Sharecropping, Tenant Farming, and Convict Leasing

1. Sharecropping

Immediately after the Civil War, the Freedmen’s Bureau attempted to implement a contract labor system. The Bureau’s goal was to negotiate

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200 See Wallenfeldt, supra note 190.
201 See RICHARD ROTHSTEIN, THE COLOR OF LAW 39 (Liveright Publ’g 2017).
203 See id.
204 See id.
205 See id.
206 See id.
207 See Isabel Wilkerson, The Long-Lasting Legacy of the Great Migration, SMITHSONIAN MAG. (Sept. 2016); see also ISABEL WILKERSON, THE WARMTH OF OTHER SUNS 10 (2010) (“The Great Migration would not end until the 1970s, when the South began finally to change—the whites-only signs came down, the all-white schools opened up, and everyone could vote. By then nearly half of all black Americans—some forty-seven percent—would be living outside the South, compared to ten percent when the Migration began.”).
deals between White landowners and freed people, but the freed people were resentful of the system and often refused to participate (leading to the Black Codes, discussed above).\(^{209}\)

Without land of their own, freed people had no choice but to work for White landowners.\(^{210}\) However, the destruction of the Civil War and loss of revenue from free slave labor left southern landowners without the cash needed to pay a labor force.\(^{211}\) Sharecropping developed as “a system that theoretically benefited both parties.”\(^{212}\) Landowners could have access to the large labor force necessary to grow cash crops such as tobacco, cotton, and rice, but they did not need to pay these laborers in cash.\(^{213}\) “The workers, in turn, were free to negotiate a place to work and had the possibility of clearing enough profit at the end of the year to buy farm equipment or even land” of their own.\(^{214}\)

Freed people saw sharecropping as preferable to labor contracts, as they could move their families out from direct supervision of White employers.\(^{215}\) However, sharecroppers needed more than just land from their landlords. “[T]he landlords or nearby merchants would lease equipment to the renters, and offer seed, fertilizer, food, and other items on credit until the harvest season. At that time, the tenant and landlord or merchant would settle up, figuring out who owed whom and how much.”\(^{216}\)

The sharecropping system was rife with trickery and thievery. Instead of splitting profits with the farmers, landowners would undercount the bales of cotton delivered to them by the sharecroppers or change the price per pound on a whim.\(^{217}\) Inevitably, the tenant would have little to no profit at the end of a season and was more likely to have found his debt to the landlord to have increased, forcing year after year of servitude to the landlord.\(^{218}\)

The southern states passed laws that solidified the White landowners’ advantage. For example, North Carolina formally established a crop lien

\(^{209}\) See id.
\(^{210}\) See id.
\(^{211}\) See id.
\(^{212}\) Id.
\(^{213}\) See id.
\(^{214}\) Id.
\(^{217}\) See Coates, supra note 32.
\(^{218}\) See id.
system in March 1867, with the General Assembly’s passage of an “Act to Secure Advances for Agricultural Purposes.” The law allowed landowners to seize crops from their tenants if the tenant attempted to sell the crops to anyone other than the landlord in an attempt to get a better price. North Carolina laws reinforced White landowners’ dominance over Black farmers by “defin[ing] sharecropping as wage labor.” This allowed the landlord to exert more managerial supervision over sharecroppers than they could over “tenants who merely rented land from planters and provided their own supplies.”

2. Tenant Farming

Tenant farming is the other agricultural system that emerged in the South after the Civil War. Sharecroppers “aspired to be tenant farmers,” as the tenant farming system was slightly more favorable. A tenant farmer typically had enough money to buy (or already owned) the implements he needed to cultivate crops; all he needed was access to land. “The farmer rented the land, paying the landlord in cash or crops . . . . At the end of the harvest, the landowner would typically be paid one-third the value of the crops or would receive one-third of the crop directly from the farmer.” While some tenant farmers were successful, many more found themselves in debt to the landlord, again due to store credit being extended based on a crop’s expected yield: “If conditions were poor or market prices for a crop decreased, the farmer became indebted to the . . . landowner.” As with sharecroppers, a tenant’s debts to the landowner would keep him locked in servitude.

3. Convict Leasing

As noted above, the Thirteenth Amendment expressly permits involuntary servitude as punishment for crime, and Southern Whites used Black Codes and Jim Crow laws to liberally arrest and convict African
Americans. According to a manuscript titled “Convict Lease System” by Frederick Douglas, Southern states leased prisoners in bulk . . . to railroads and other corporations, and to plantations. The state throws off the entire responsibility of caring for her convicts, and turns them over into the hands of the lessee, whose only interest in them is, to secure for himself, what profit he can for their labor.226

Convict laborers were forced to work in “inhumane, dangerous, and often deadly work conditions” with no pay.227 Author Douglas A. Blackmon calls convict leasing “slavery by another name” and has said in an interview that “at least 200,000 African Americans were subjected to the convict leasing system in Alabama.”228 He estimates that “over the 80-year period before the [convict leasing] system was formally ended in 1941, . . . tens of millions were either forced to live on a farm, in a lumber camp or forced into convict leasing by the justice system.”229

C. Racial and Exclusionary Zoning

In the late 1890s and early 1900s, Blacks outside of the South were enjoying a degree of freedom and integration. In his book, The Color of Law, Richard Rothstein cites Montana as an example: “By 1890, Black settlers were living in every Montana county.”230 In Helena in 1910, 420 residents were Black, making up 3.4% of the population.231 Black Americans during this time enjoyed middle class status from their work as laborers on the railroads and in Montana’s mines.232 “The city had black newspapers, black-owned businesses, and a black literary society.”233 But in 1909, Helena banned marriages between Blacks and Whites, and nearby towns “adopted policies forbidding African Americans from residing or

229 Id.
230 Rothstein, supra note 201, at 41–42.
231 See id. at 42.
232 See id.
233 Id.
even from being within town borders after dark.”234 Mob violence forced
the African American community to flee.235 By 1970, only 45 Blacks
remained in Helena.236 Throughout the country at the turn of the century,
segregation ordinances and violence systematically drove African
Americans out of communities that had once been peacefully integrated.

1. Early Racial Segregation Ordinances

While smaller towns relied on mob violence and ordinances like that
of Helena, Montana to expel their Black population, cities with large
numbers of Black residents turned to different tactics, such as zoning rules,
to create separate living areas for Black and White families.237

In 1910, Baltimore adopted an ordinance that prohibited African
Americans from buying homes on White majority blocks and vice versa.238
Cities like Atlanta, Birmingham, Charleston, Dallas, Louisville, New
Orleans, Oklahoma City, and St. Louis followed suit.239

2. Buchanan v. Warley

In 1917, the Supreme Court overturned the racial zoning ordinance of
Louisville, Kentucky with its holding in Buchanan v. Warley.240 In
Buchanan, the seller of the property, who was White, sought to enforce a
contract for the purchase of a home entered into by a Black man on an
integrated block where there were already two Black and eight White
households.241 The purchaser claimed that he could not complete the
purchase because of Louisville’s 1914 ordinance, which prohibited Black
persons from occupying houses in blocks where the greater number of
houses are occupied by White persons.242 Because the practical effect of
the ordinance was to prevent the sale of lots in such blocks to persons of
color, the city ordinance was found to be an unconstitutional violation of
the Fourteenth Amendment, which prevents state interference with
property rights except by due process of law.243 Rather than denouncing

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234 Id.
235 See id.
236 See id.
237 See id. at 44.
238 See id.
239 See id. at 45.
240 See 245 U.S. 60 (1917).
241 See id. at 70.
242 See id. at 69–70.
243 See id. at 82.
segregation, the Court focused its arguments on the freedom of contract, arguing that individuals should be free to sell their property to whomever they wished.244

The Buchanan decision was largely ignored by city planners throughout the country. In Atlanta, Indianapolis, and New Orleans, racial zoning ordinances were adopted after Buchanan on the grounds that because these cities’ policies differed slightly from the Louisville ordinance, their ordinances would withstand challenge.245 Atlanta designated entire separate neighborhoods for Black people and White people, and Indianapolis and New Orleans permitted Black residents to move into a White area only if a majority of the White residents gave their consent.246 The ordinances were justified as being needed to preserve the peace, welfare, and prosperity of both races.247 Georgia’s supreme court rejected the Atlanta City Planning Commission’s race zoning in 1924,248 but the city continued to use its racial zoning map for decades to come. In 1927, the Supreme Court overturned the New Orleans law.249 Similar laws and reversals occurred in Richmond, Virginia and Birmingham, Alabama.250

3. Exclusionary Zoning

Given that residential ordinances based on race were technically unconstitutional after the Buchanan decision, municipalities turned to economic or exclusionary zoning to segregate their White and Black residents without mentioning race in the statute. Zoning is believed to have originally developed in Los Angeles, California in 1908 with the purpose of separating residential uses from industrial uses.251 Zoning as a practice was upheld by the Supreme Court in Euclid v. Ambler as a reasonable use

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244 See id. at 81 (“The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.”).

245 See Rothstein, supra note 201, at 46.

246 See id. at 46–47.

247 See Buchanan, 245 U.S. at 81 (“It is urged that this proposed segregation will promote the public peace by preventing race conflicts.”); see also Rothstein, supra note 201, at 46 (citing the Atlanta City Planning Commission).

248 See generally Bowen v. City of Atlanta, 125 S.E. 199 (Ga. 1924).


250 See Rothstein, supra note 201, at 47.

of police power. 252 Structures were categorized as single-family residential, multifamily residential, commercial, or industrial, and then maps were laid out to direct where new structures of the various categories could be built.253 St. Louis adopted such a zoning ordinance in 1919, two years after the Buchanan decision.254

Even though the St. Louis ordinance made no mention of race, race became the primary driver of variance requests and administration of the zoning plan.255 Richard Rothstein cites occasions where “the commission changed an area’s zoning from residential to industrial if [Black] families had begun to move into it.”256 The change in zoning allowed “polluting industry, . . . taverns, liquor stores, nightclubs, and houses of prostitution to open in [Black] neighborhoods” but prohibited such activities in the single-family residential White neighborhoods.257 Because there were so few places where people of color could live, “rooming houses sprang up [in industrial-zoned areas] to accommodate the overcrowded [Black] population.”258

4. Federal Government Involvement

In 1921, Herbert Hoover as Secretary of Commerce “organized an Advisory Committee on Zoning to develop a manual explaining why every municipality should develop a zoning ordinance.” 259 The Advisory Committee was populated by “outspoken segregationists whose speeches and writings demonstrated that race was one basis of their zoning advocacy.”260 One famous member, Frederick Law Olmsted Jr. (whose father was the renowned city park designer), told the National Conference on City Planning in 1918 that “in any housing developments which are to succeed, . . . racial divisions . . . have to be taken into account.” 261 Another member of the Advisory Committee was Irving B. Hiett, who in his role as President of the National Association of Real Estate Boards

254 See ROTHSTEIN, supra note 201, at 49.
255 See id.
256 Id. at 50.
257 Id.
258 Id.
259 Id. at 51.
260 Id.
261 Id.
oversaw adoption of a code of ethics in 1924 that warned, “a realtor should never be instrumental in introducing into a neighborhood . . . members of any race or nationality . . . whose presence will clearly be detrimental to property values in that neighborhood.” 262

The Advisory Committee on Zoning drafted and issued the Standard State Zoning Enabling Act of 1922. 263 This model law “grant[ed] states the power to regulate land use for the ‘health, safety, morals, or the general welfare of the community’” and was adopted by numerous states to enable zoning regulations in their jurisdiction. 264 As was the case in St. Louis, zoning laws modeled on the 1922 Act restricted industrial use in pre-existing White residential neighborhoods and allowed industrial and commercial uses in existing Black communities. 265

During the Clinton administration, the Environmental Protection Agency issued a report confirming that a disproportionate number of toxic waste facilities were found in Black communities nationwide. President Clinton issued an executive order requiring that such disparate impact be avoided in future decisions, but that order has seen little enforcement. 266

Thus, while zoning began as a tool to protect the property values of White homeowners by keeping away people of color, industrial, or environmentally unsafe businesses, it also led to overcrowding in urban areas and purposefully located undesirable and environmentally dangerous businesses in areas where people of color lived.

D. The New Deal and Redlining

While the New Deal was celebrated as a model for progressive government policies, its home ownership component rested on the

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262 Id. at 52.
266 See Mizutani, supra note 264, at 380.
foundation of segregationist zoning policies. When Franklin D. Roosevelt became President in 1933, “[h]omeownership remained prohibitively expensive for working-class and middle-class families: bank mortgages typically required 50% down, interest-only payments, and repayment in full after five to seven years.” As a result of the Depression, many families were unable to pay their mortgages and faced foreclosure. Additionally, most others could not afford to buy a home, and the construction industry stalled.

The New Deal took a two-pronged approach, implementing one program for existing homeowners who could not afford their mortgages, and another to enable the middle class to become first-time home buyers.

1. Home Owners’ Loan Corporation

As part of the New Deal’s rescue plan, the Home Owners’ Loan Corporation (“HOLC”) was created in 1933, and it pioneered “redlining” to mark Black neighborhoods. The HOLC purchased existing mortgages that faced imminent foreclosure, and it then refinanced the mortgages, providing new mortgages with repayment schedules of up to fifteen years, which it later extended to twenty-five years. In addition, so the borrower could build up equity in their home as the loan was repaid, HOLC amortized the new mortgages so that each month’s payment included some principal and some interest.

As the issuer of these refinanced mortgages, the government sought ways to protect itself from the risk of default. HOLC devised a strategy to

267 See Derrick Johnson, Viewing Social Security Through the Civil Rights Lens, NAACP: The Crisis (Aug. 14, 2020), https://naacp.org/articles/viewing-social-security-through-civil-rights-lens. The employment component of the New Deal carried forward the Jim Crow-era belief system. See id. The New Deal’s Social Security retirement benefits and unemployment insurance provided a safety net for the White working-class. See id. Farmworkers and domestic employees, overwhelmingly people of color, were specifically excluded. See id. When President Roosevelt signed Social Security into law in 1935, 65% of African Americans nationally, and an even higher percentage in the South, were ineligible for its protections. See id. “The exemptions were finally repealed in the 1950s, but they had significantly worsened the economic gap between Blacks and Whites.” Id.

268 See id.

269 See id.

270 See id.

271 See id.

272 See id. at 63–64.

273 See id.

274 See id.
know which homes would likely retain their value. 275 It hired local real estate agents, who were trained to believe that racial diversity would be detrimental to property values, as noted above, to create “color-coded maps of every metropolitan area in the nation, with the safest neighborhoods colored green and the riskiest colored red. A neighborhood earned a red color if African Americans lived in it, even if it was a solid middle-class neighborhood of single-family homes.” 276 A home in a redlined neighborhood typically did not qualify for HOLC refinancing. 277

HOLC, a public institution funded by federal tax dollars, “pioneered the practice of redlining” such that White families received government-backed loans, but Black families did not. 278 As a result of this New Deal policy, “[m]illions of dollars flowed from [federal] tax coffers into segregated white neighborhoods.” 279

The racist attitudes, language, and underpinnings of the HOLC Residential Security Maps gave federal support to racist real-estate practices that helped segregate America throughout the twentieth century. A study released in 2018 found that “74 percent [of the neighborhoods] that HOLC graded as high-risk or ‘Hazardous’ eight decades ago are low-to-moderate income today.” 280 Another study, published in 2017, found that areas deemed high-risk by HOLC maps saw an increase in racial segregation over the next thirty to thirty-five years, as well as a long-run decline in home ownership, house values, and credit scores. 281

2. Federal Housing Administration

The second prong of the New Deal’s housing plan was enacted to allow more middle-class families to purchase single-family homes for the first time. 282 Congress and President Roosevelt created the Federal

275 See id. at 64.
276 Id.
277 See id.
278 Coates, supra note 32.
279 Id.
282 See ROTHSTEIN, supra note 201, at 64.
Housing Administration in 1934. The FHA insured bank mortgages that, like the HOLC refinancing loans, covered up to 80% of the appraised value, had terms of up to twenty years, and were fully amortized. 

Thomas J. Sugrue, a historian at the University of Pennsylvania, wrote, “Without federal intervention in the housing market, massive suburbanization would have been impossible.” He further wrote, “In 1930, only about 30 percent of Americans owned their own homes; by 1960, more than 60 percent were home owners. Home ownership became an emblem of American citizenship.” But, as Ta-Nehisi Coates notes, “that emblem was not to be awarded to Blacks.”

During this explosion in home ownership from the 1930s through the 1960s, Black Americans “were largely cut out of the legitimate home-mortgage market” by both legal and nefarious methods. The FHA adopted the same system of maps as the one used by the HOLC that rated neighborhoods based on the expected stability of property values. “On the maps, green areas, rated ‘A,’ indicated ‘in-demand’ neighborhoods” that were predominantly White. Neighborhoods where Black people lived were rated ‘D’ [colored red on maps] and were usually considered ineligible for FHA backing.

Racially mixed neighborhoods and even White neighborhoods that bordered predominantly Black neighborhoods were deemed too risky for FHA backing. To guide its appraisers, the FHA issued an Underwriting Manual that defined a stable neighborhood eligible for a mortgage as one that “shall continue to be occupied by the same social and racial classes.” Further, the FHA discouraged banks from making loans in urban neighborhoods, preferring newly built suburbs where boulevards or highways separated White families from Black families.

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283 See Coates, supra note 32.
284 See Aaronson et al., supra note 281, at 5, 52.
285 Coates, supra note 32.
286 Id.
287 Id.
288 Id.
289 Id.
290 Id.
291 See Rothstein, supra note 201, at 65.
293 See id. at para. 908–31, 957.
Redlining was not contained to FHA-backed loans; it spread to the entire mortgage industry, where racism was already prevalent.294 Thus, redlining prevented Black people “from most legitimate means of obtaining a mortgage.”295 Not being able to buy homes through the mortgage lending process, Black families bought “on contract,” which meant that they purchased a property from a prospecting middleman, who would hold legal title until all of the loan payments were made.296 The purchasing family was not able to build equity as one normally would with mortgage payments.297 If the purchasing family defaulted on the loan by not being able to make a payment or pay for a repair (not having access to a line of credit), they would be evicted.298 The prospector would keep the family’s down payment and all prior monthly payments, then turn around and enter into a similar contract with another family.299

The government could have required a nondiscrimination policy, but it chose not to do so until the 1964 Housing Act.300 Urban studies expert Charles Adams said in 1955, “Instead, the FHA adopted a racial policy that could well have been culled from the Nuremberg laws.”301 Following the passage of the Fair Housing Act in 1968,302 there was little decrease in housing segregation, and violence arose from Black efforts to seek housing in White neighborhoods.303 Moreover, in just thirty years, the Black population in urban areas increased significantly, from 6.1 million in 1950 to 15.3 million in 1980.304

294 See Coates, supra note 32.
295 Id.
296 See id.
297 See id.
298 See id.
299 See id.
301 Coates, supra note 32.
303 See, e.g., Michelle Adams, The Unfulfilled Promise of the Fair Housing Act, The New Yorker (April 11, 2018) (“[I]n 1968 residential segregation was stratospherically high. Whites were deeply committed to it. They used all legal and illegal means, including cross burnings, arson, and physical attacks, to keep blacks out of their neighborhoods.”).
E. GI Bill and Restrictive Covenants

The celebrated GI Bill\textsuperscript{305} also failed Black Americans by accepting and strengthening the nation’s racist housing policies initiated by the New Deal. Title III of the Bill created a low-interest home loan program for returning veterans.\textsuperscript{306} The Veterans Administration (“VA”) adopted FHA housing policies, and VA appraisers relied on the FHA \textit{Underwriting Manual}, which continued to include racially discriminatory language through its 1952 version.\textsuperscript{307} Black veterans seeking VA loans were at the mercy of their local, White-controlled VA offices and the same banks “that had, for years, refused to grant mortgages to [B]lacks.”\textsuperscript{308}

By 1950, about half of all new mortgages nationwide were insured by either the FHA or the VA.\textsuperscript{309} Together, the agencies shaped discriminatory housing practices by “financing entire subdivisions, and in many cases entire suburbs, as racially exclusive White enclaves.”\textsuperscript{310} In thousands of locales, “mass-production builders created entire suburbs with the FHA-or VA-imposed condition that these suburbs be all White.”\textsuperscript{311} This popularized the use of restrictive covenants in suburban communities. Homes built in new suburban neighborhoods that contained restrictive covenants against ownership by Blacks and other minorities automatically qualified for FHA-backed loans.\textsuperscript{312}

Restrictive covenants pre-dated the FHA. In the 1920s, communities used restrictive covenants to avoid the Supreme Court’s 1917 racial zoning decision in \textit{Buchanan}; for example, in Brookline, Massachusetts a provision in a restrictive covenant “forbade resale of property to ‘any negro or native of Ireland’”\textsuperscript{313} Almost all restrictive covenants created exceptions for live-in household or childcare workers.\textsuperscript{314} A restrictive covenant in the

\begin{itemize}
\item \textsuperscript{305} See S. Res. 767, 78th Cong. (1994) (enacted).
\item \textsuperscript{306} See Coates, supra note 32.
\item \textsuperscript{307} See \textit{ROTHSTEIN, supra note 201}, at 70; see also \textit{Richard Rothstein, The Intentional Segregation of America’s Cities, AMERICAN EDUCATOR} (Spring 2021) (“The 1952 Underwriting Manual continued to base property valuations, in part, on whether properties were located in neighborhoods where there was ‘compatibility among the neighborhood occupants.’”), \url{https://www.aft.org/ae/spring2021/rothstein}.
\item \textsuperscript{308} Coates, supra note 32.
\item \textsuperscript{309} See \textit{ROTHSTEIN, supra note 201}, at 70.
\item \textsuperscript{310} \textit{Id}.
\item \textsuperscript{311} \textit{Id}.
\item \textsuperscript{312} See \textit{id.} at 71.
\item \textsuperscript{313} \textit{Id} at 78.
\item \textsuperscript{314} See \textit{id.} at 78–79.
\end{itemize}
deed to author Sarah Moore Johnson’s home in a Maryland suburb just over the border from the District of Columbia stated (prior to being stricken by said author upon her acquisition of the property):

No part of the land hereby conveyed shall ever be used or occupied by, or sold, demised, transferred, conveyed unto, or in trust for, leased, or rented, or given, to negroes, or any person or persons of negro blood or extraction, or to any person of the Semitic Race, blood, or origin, which racial description shall be deemed to include Armenians, Jews, Hebrews, Persians and Syrians except that this paragraph shall not be held to exclude partial occupancy of the premises by domestic servants of the said [homeowners].

Restrictive covenants are enforceable as a contract among all homeowners in a neighborhood. Therefore, if a Black family purchased a home in the neighborhood, a neighbor could sue. Alternatively, many subdivision developers restricted the sale of homes within a neighborhood to Black families by requiring membership in a community association as a condition of purchase. The community association’s bylaws usually restricted membership to Whites.

All levels of government helped to promote and enforce restrictive covenants. Courts throughout the nation evicted Black families from homes they had purchased by upholding the covenants. Judges in Alabama, California, Colorado, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, New York, North Carolina, West Virginia, and Wisconsin “endorsed the view that restrictive covenants did not violate the Constitution because they were private agreements.”

316 See ROTHSTEIN, supra note 201, at 79.
317 See id.
318 See id.
319 See id.
320 See id. at 81.
321 See id.
322 Id. at 81–82.
Racially restrictive covenants were ruled unconstitutional in 1948 by the Supreme Court in *Shelley v. Kraemer*.

However, much like the *Buchanan* decision in 1917, the *Shelley* decision was largely ignored—this time not by state and local governments, but by federal agencies. Just two weeks after the Court’s decision in *Shelley*, FHA Commissioner Franklin D. Richards pronounced that *Shelley* would “‘in no way affect the programs of this agency’ [and] would make ‘no change in our basic concepts or procedures.’”

It was not until 1962, when President John F. Kennedy issued an executive order prohibiting the use of federal funds to support racial discrimination in housing, that the FHA ceased “financing subdivision developments whose builders openly refused to sell to [B]lack buyers.”

**F. State Intestacy Laws**

The laws, policies, and practices described in the preceding Subsections of this Part all contributed to the racial wealth gap in America. The Federal Reserve’s 2019 Survey of Consumer Finances documented a staggering difference between the median family wealth level of White and Black families. Specifically, with a median family wealth level of $188,200 for White families and $24,100 for Black families—White Americans had almost eight times the wealth of Black Americans.

Sociologists Fabian Pfeffer and Alexandra Killewald have established that intergenerational downward mobility is much greater and upward

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323 See 334 U.S. 1 (1984). In a majority opinion that was joined by the other five participating justices, Chief Justice Vinson struck down a restrictive covenant on a house in St. Louis, Missouri, holding that the Fourteenth Amendment’s Equal Protection Clause prohibits racially restrictive housing covenants from being enforced. Vinson held that private parties could voluntarily abide by the terms of a racially restrictive covenant, but that judicial enforcement of the covenant qualified as a state action and was thus prohibited by the Equal Protection Clause. See id. at 13-23; see also ROTHSTEIN, supra note 201, at 91 (“Three of the nine justices excused themselves from participating because . . . there were racial restrictions covering the homes in which they lived.”).

324 ROTHSTEIN, supra note 201, at 86.


326 ROTHSTEIN, supra note 201, at 88.

mobility is much lower for Blacks than Whites. Federal data from 2019 shows that about one of every five Black families has a negative median net worth compared to less than one out of every ten White families. When Black families do accumulate wealth, state probate and intestacy laws often impede the ability of these families to preserve and pass on the wealth to their heirs.

1. Hardship Created by Probate Process

Unless bond is waived by a decedent’s will or by the consent of all interested parties in the estate, most states require that an individual serving as personal representative of an estate with a gross value over a certain nominal threshold secure bond. In fact, even if the personal representative is excused from giving bond, an interested person or creditor of the estate may still request that bond be provided in an amount deemed sufficient by the court to secure the payment of the estate’s debts and any state tax due. If the appointed personal representative does not meet certain credit requirements, he or she may be unable to secure bond.

This is particularly detrimental to the Black community because bonding companies usually perform a credit check as part of the bonding process. Due to the legacy of discriminatory lending practices, such as redlining, and predatory lending practices that prey on the poor, such as payday loans, only about 20% of Black Americans (compared with 51% of White Americans) have a credit score of 700 or higher, which is considered a good, credit-worthy score. Meanwhile, 54% of Black

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331 See, e.g., MD. CODE ANN., EST. & TRUSTS §§ 5-604, 6-102.

332 See, e.g., UNIF. PROB. CODE §§ 3-603 to 3-605.


334 See id.

335 See Jung Hyun Choi et al., Explaining the Black-White Homeownership Gap: A Closer Look at Disparities Across Local Markets, URB. INST. (Nov. 2019),
Americans have either a fair to poor credit score or do not even have a credit score, compared to only 37% of White Americans having no credit or bad credit. In other words, half of all Black Americans appointed to serve as personal representative of a family member’s estate may be disqualified from serving due to the bond requirement.

If no individual appointed under the will is able to secure bond, the interested parties must consent to the appointment of another individual, which may delay the opening of the estate and cause intrafamily strife.

2. Liquidity Problems During Estate Administration

Lack of access to liquid funds during the estate administration period can compound financial difficulties. In addition to the time it takes to find a will, identify a personal representative, secure bond, and open an estate, a personal representative generally cannot distribute the decedent’s assets without the risk of personal liability during the creditor claims period, which usually ends four months to a year after the decedent’s death with respect to any unknown creditor.

If the decedent was providing financial support for all or any portion of his or her family, this lack of access to funds can drain the family’s wealth through late fees, forced sales of assets at less than fair market value, and repossession or foreclosure. While this may pose a hardship for a low-net-worth family of any background, families of color are more likely to be negatively impacted by such restricted access, as they are likely to have considerably less in liquid savings than the average White family.

States that have enacted the Uniform Probate Code, and many that have not, attempt to deal with the access-to-liquidity problem by creating homestead and family allowance exceptions. These allowances permit up to a certain amount to be paid to a surviving spouse or minor children


336 See Leonhardt, supra note 335.

337 See, e.g., 20 PA. CONS. STAT. § 3383 (Pennsylvania has a one-year creditor claims period); UNIF. PROB. CODE § 3-109 (UPC states have a four-month creditor claims period).

338 The Federal Reserve found that the typical Black or Hispanic family had $2,000 or less in liquid savings in 2019, while the typical White family had more than $8,000 of liquid assets. See Bhutta et al., supra note 327, at 10.

339 See, e.g., UNIF. PROB. CODE §§ 2-402, 2-404.
of a decedent. The homestead allowance ranges from $5,000 to $22,500, with only a few states including a cost-of-living adjustment to these thresholds. The family allowance attempts to match the support actually provided by the decedent to his or her spouse and minor children for up to a year from date of death. However, homestead and allowance exceptions may not provide enough financial support to see a family through the creditor period if the family lacks a monetary safety net. For families with nontraditional structures that lack a spouse or minor child, there is no allowance at all.

3. Heirs’ Property

State intestacy laws may lead to the unnecessary division of real estate and subsequent loss of real estate wealth among families of color. If a person dies without a will, the decedent’s estate may be divided among the decedent’s spouse and children, with more remote descendants inheriting the shares of any predeceased children. Additionally, in the absence of both a surviving spouse and children, the decedent’s property may be further divided among the decedent’s parents, siblings, and siblings’ descendants. This intestate succession can and does result in what is commonly referred to as “heirs’ property,” with multiple family members owning undivided interests in the property as tenants in common. If property passes by intestate succession upon successive deaths within a family, property ownership can become unstable due to the tangled web of owners. Commentators have noted that it is not uncommon for thirty or more individuals to own fractional shares in property as tenants in common because of intestate succession. The prefatory note to the Uniform Partition of Heirs’ Property Act explains that tenancy in

340 See, e.g., id. § 2-402 & cmt. (amended 2008).
341 See id. § 2-404.
342 See Goode, supra note 330.
343 See id.
344 See id.
345 See, e.g., UNIF. PROB. CODE §§ 2-102, 2-106 (setting forth laws of intestate succession adopted by nearly half the states).
346 See, e.g., id. § 2-103.
347 UNIF. PARTITION OF HEIRS PROP. ACT prefatory note, at 4 (UNIF. LAW COMM’N 2010).
common ownership has many undesirable effects, the most relevant to this discussion being

the universal right of any cotenant to file a lawsuit petitioning a court to partition the property, even if that cotenant only recently acquired its interest in property that the other cotenants had owned within their family for a long time and even if that interest is very small (e.g., a five percent or even smaller interest).

In resolving a partition action, the two principal remedies that a court may order are partition in kind of the property into separate subparcels, . . . or partition by sale . . . Despite a preference for partition-in-kind, courts in a large number of states typically resolve partition actions by ordering partition by sale which usually results in forcing property owners off of their land without their consent.349

Partitions by sale can lead to homelessness and loss of ancestral homes at below-market sales prices. Partition by sale is usually done through court-ordered auctions, which yield below-market sales prices.350 These forced sales at auctions deprive the tenants in common from receiving a fair price for their property and also gives the buyers “unjustified windfall[s].”351

A common occurrence with heirs’ property, particularly in gentrifying neighborhoods, is that an unscrupulous real estate speculator will purchase a very small interest in family-owned, tenancy-in-common property just so they can ask a court to order a partition by sale.352 In the subsequent auction of the property, the speculator often submits the winning bid, which may represent just a fraction of the property’s market value.353

Adding insult to injury, many states’ laws require a co-tenant who has unsuccessfully resisted a partition to pay a portion of the attorney’s fees and costs of the real estate speculator who bought the small fractional interest and petitioned the court for the partition by sale, thus “forcing them in effect to pay for the deprivation of their property rights and their

352 See id.
353 See id.
resulting loss of wealth."\(^{354}\) Moreover, the unsuccessful cotenant must pay their own attorney’s fees incurred in their attempt to resist the sale of their property and maintain ownership of their property.\(^{355}\)

The loss of heirs’ property through partition impacts communities of color more frequently than White communities. As the Preamble to the Uniform Partition of Heirs Property Act provides:

[A]lthough African Americans acquired between sixteen and nineteen million acres of agricultural land between the end of the Civil War and 1920, African Americans retain ownership of approximately just seven million acres of agricultural land today. Scholars and advocates who have analyzed patterns of landownership within the African American community agree that partition sales of heirs property have been one of the leading causes of involuntary land loss within the African-American community.\(^{356}\)

This loss is in part due to the larger percentage of decedents of color who die intestate. For example, economists in a working paper issued by the National Bureau of Economic Research found that, of respondents with a college education and above, 72% of Whites had a will, as compared to only 32.3% of Blacks.\(^{357}\) Additionally, as mentioned above, families of color are less likely to have the necessary credit history or liquid assets to be able to purchase a problematic co-tenant’s interest. This leaves families whose wealth is concentrated in an ancestral home without recourse to preserve such wealth for their benefit.

\(^{354}\) Id.

\(^{355}\) See id.


4. Fictive Kin Deprived of Inheritance

The dispositive scheme of state intestate succession laws can be traced back to English common law. Thus, as a country, we began from a culturally narrow place in deciding how and to whom an intestate decedent’s property should be distributed. While most states have made changes to their intestacy laws over the years, those changes have focused almost exclusively on adjusting the share of property allocated to a surviving spouse, adding stepchildren as takers of last resort, and tinkering with the definition of a child in light of advances in reproductive technology.358

Social science research has shown that race may be correlated to different desired testamentary dispositions. For example, researchers who reviewed five-hundred wills probated in Florida noted that Black decedents were far more likely than White decedents to leave their property to their children rather than their surviving spouse.359

Families of color are also more likely to incorporate into a single family unit certain extended family members or “fictive kin” (i.e., unrelated individuals who are assigned a familial role) whose interests may not be addressed by intestacy laws.360 For example, researchers have documented the prevalence of informal adoption of children by relatives and neighbors within Black families, with the number of Black children living in extended-family households rising from 13% to 16% from 1970 to 1990 and 41% of those children being raised in the home of a relative without the presence of a biological or formally adoptive parent.361

If the intestate succession laws prioritize support of a decedent’s family members in a manner that is out of step with the way in which the decedent has structured his or her family, the family members or others who are financially reliant on a decedent may be left without financial support or in an otherwise unstable financial situation following the decedent’s death.

For example, if a grandmother is informally raising her grandchild due to an absence, but not death, of the child’s parent and this grandmother

358 See Goode, supra note 330, at 18.
361 See Hill., supra note 360.
dies intestate, the grandmother’s estate will be left to such grandchild’s living parent under state intestate succession laws, despite the grandchild’s financial dependency on the grandmother as established during her lifetime. This would likely result in financial hardship for the grandchild, which would then negatively impact the grandchild’s ability to generate wealth in future years. As research indicates that this scenario is more likely to occur in a family of color than in a White family, this disconnect between a statutorily-defined family and actual family and the financial fallout that results therefrom is likely to have a disproportionate impact on the Black community.

G. “Anti-Tax” Movement Entrenches White Supremacy

On the heels of civil rights victories in the 1960s, America’s tax policies began to shift from progressive to regressive, or “anti-tax,” which some now recognize as the newest form of racism\(^{362}\) perpetuated by the United States. Anti-tax systems create and enforce economic segregation, solidifying and boosting White advantage, while further inhibiting the creation of Black wealth. As will be explained below, this economic segregation occurs at every level of government and with most types of tax systems.

1. **Property Tax**

In the 1970s, the country was swept by a wave of tax protests, often called the Tax Revolt.\(^{363}\) States were pressured into placing limits on property taxes, the most widely publicized being California’s Proposition 13,\(^{364}\) a constitutional amendment approved by California voters in 1978 that protected landowners from any increase in property taxes that were

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\(^{362}\) Many people use the terms prejudice and racism interchangeably. In his book, *Portraits of White Racism*, David Wellman argues that limiting our understanding of racism to prejudice does not offer a sufficient explanation for the persistence of racism. He defines racism as a “system from which advantage is derived on the basis of race,” which is what the federal and state tax systems have promoted. David Wellman, *Portraits of White Racism* 210 (Cambridge Univ. Press 2d ed. 1993). Another related definition of racism, commonly used by antiracist educators and consultants, is “prejudice plus power.” Beverly Daniel Tatum, *Why Are All the Black Kids Sitting Together in the Cafeteria?* 87–88 (Twentieth Anniversary ed. 2017) (“While I think this definition also captures the idea that racism is more than individual beliefs and attitudes, I prefer Wellman’s definition because the idea of systematic advantage and disadvantage is critical to an understanding of how racism operates in American society.”).


\(^{364}\) See CAL. CONST. art. XIII A §§ 1–7.
greater than 2% year over year. Almost every state enacted a form of a homestead exemption to shield primary residences from aggressive property taxes. Limits on property taxes for primary residences protect those who have the fortune to own a home. U.S. Census Bureau data for 2019 shows that 73.3% of White Americans own their own home, as compared with only 42.1% of Black Americans. This gap—31.2% points—is the largest gap since the Census began collecting the data in 1994.

For Black families who are homeowners, the implementation of the property tax system works against them. Economists Troup Howard of the University of California, Berkeley and Carlos Avenancio-León of Indiana University looked at more than a decade of tax assessment and sales data for 118 million homes around the country in their new working paper, and they found that “[s]tate by state, neighborhood by neighborhood, [B]lack families pay 13 percent more in property taxes each year than a White family would in the same situation,” due to their homes being assessed at higher values than actual sales prices. Property tax assessments in virtually every state increased in areas with greater numbers of Black and Hispanic residents.

2. Income Tax

The Reagan-era tax cuts of the 1980s shifted the tax burden away from wealthy taxpayers. The highest top income tax rate in our country’s history was in 1944, when the top rate of 94% was imposed on taxable income over $200,000 (which is the equivalent of about $2.5 million in today’s dollars). From the 1950s through the 1970s, the top income tax rate

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367 See id.


369 See id.

never dipped below 70%. The Tax Reform Act of 1986 ended progressive taxation, implementing a top rate of 28%. Since then, the top rate has fluctuated in a narrow range of 28% to 39.6% (or 43.4% if the Obama administration’s net investment income tax is included).

Since the Reagan-era tax cuts were implemented, the racial wealth gap has increased. Statistics maintained by the Federal Reserve show that “the racial wealth gap between Black and White families grew from about $100,000 in 1992 to $154,000 in 2016, in part because White families gained significantly more wealth (with the median increasing by $54,000), while median wealth for Black families did not grow at all [in real terms] over that period.”

The Reagan-era promise of trickle-down economics did not come to fruition. A study by David Hope of the London School of Economics and Julian Limberg of King’s College London “examines 18 developed countries—from Australia to the United States—over a 50-year period from 1965 to 2015. The study compared countries that passed tax cuts in a specific year, such as the U.S. in 1982 when President Ronald Reagan slashed taxes on the wealthy, with those that [did not], and then examined their economic outcomes.” The study found that while macroeconomic data such as per capita gross domestic product and unemployment rates were nearly identical after five years in countries that cut taxes on the rich and in those that did not, “the incomes of the rich grew much faster in countries where tax rates were lowered.”

The researchers argue that the economic rationale for lowering the tax rates of the rich is weak. The period through history with highest economic

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371 See I.R.S., supra note 370.
372 See id.
375 Id.
growth and lowest unemployment was also the period with the highest taxes on the rich—the postwar period.376

3. Tax Expenditures

Substantial federal tax expenditures subsidize this wealth-building. Tax expenditures are carve-outs to taxes that would otherwise be owed, such as the itemized deductions or credits on an individual income tax return.377 Tax-expenditures reflect governmental policy supporting home equity, pensions, medical insurance, K–12 education, and college.378 Because these are largely itemized deductions, they offer the greatest advantage to high income earners who own their own home and who can elect to take itemized deductions instead of the standard deduction. This, in turn, benefits White taxpayers more than Black taxpayers. A recent American Bar Association article calling for an anti-racist restructuring of the U.S. tax systems notes, “The indirect nature of these tax expenditures obscures what is effectively government welfare for wealthy white taxpayers. The tax system today is the stealth equivalent of historical whites-only wealth-building.”379

4. Capital Gains

Our system of taxing wealth only at realization events, combined with the charitable income tax deduction and basis adjustment at death,380 further promotes, preserves, and protects White wealth advantage. Higher-income earners are more able to invest in appreciating assets such as stocks, bonds, and real estate.381 As these assets increase in value over time, there is no corresponding increase in the tax burden of their owners. The authors of the recent American Bar Association article point out that “[t]hese ‘unrealized capital gains’ make up a large portion of the wealth gap. In 2018, 69 percent of unrealized capital gains were held by the top 1 percent of income earners.”382

376 See id.
378 See id.
380 See I.R.C. §§ 1001, 170(a), 1014.
381 See Lipman, supra note 379.
382 Id.
Thus, the top 1% can control when and whether to pay capital gains tax by timing sales to occur in lower income years, or by giving the asset to charity to both further decrease the tax bill and avoid a realization event altogether. Asset owners can also choose to avoid a realization event by retaining the assets until death, when IRC section 1014 permits an adjustment of basis to equal the date of death value. Thus, at death, assets can be liquidated and passed on to heirs with a “stepped up” basis. Some argue that the basis adjustment at death prevents a double-taxation caused by the estate tax, but, as we will see, most taxpayers will never pay an estate tax.

5. Estate Tax

The estate tax will be discussed in more detail in Part V of this Article, but there is perhaps no greater promoter of the racial wealth gap than the untaxed gifts and inheritances received by White families. Members of White families are three times more likely to receive an inheritance than members of Black families. And, increasingly, that inheritance is not subject to estate tax.

The estate tax was implemented in 1916, and from 1941 to 1976 the highest estate tax rate was 77% with exemptions of only $40,000 to $60,000. Since 1976, the exemptions have increased and the top tax rates have come down, dramatically so beginning with the George W. Bush administration’s Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001. Prior to EGTRRA, the estate tax exemption was $675,000 and the top estate tax rate was 55%. EGTRRA grew the exemption and lowered the estate tax rate over a 10-year period. However, EGTRRA included a sunset provision that set many of its

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383 See I.R.C. § 1014.
384 See, e.g., Lawrence Zelenak, Taxing Gains at Death, 46 VANDERBILT L. REV. 361 (1993) (discussion at footnotes 7 through 14 and accompanying text for various theories regarding the purpose of the basis adjustment at death).
386 See Bhutta, supra note 327.
390 See id.
provisions to expire in 2010, and in 2011, the estate tax rates would return to those set by pre-2001 law, with an individual exemption of $1 million and a top estate tax rate of 55%. 391 In December 2011, Congress forestalled the estate tax rate reset for 2011 and 2012 with the tax-cut compromise, which raised the exemption to $5 million for individuals ($10 million for married couples) and lowered the marginal estate tax rate to 35%.392

To avoid another sunset to pre-2001 levels in 2013, Congress again enacted last minute legislation to make a $5 million exemption (adjusted for inflation) and a 40% estate tax rate permanent.393

The Trump-era Tax Cuts and Jobs Act doubled the exemption beginning in 2018 so that the exemption is now $12.06 million in 2022 and the estate tax rate is 40%.394 This “bonus” exemption will expire after 2025, and the exemption amount will revert to its pre-2018 level (adjusted for inflation) in 2026 unless Congress acts to renew the legislation.395

6. State and Local Tax

State and local tax systems have also led to increased wealth disparity. In their important article on tax policy, Palma Joy Strand and Nicholas A. Mirkay write:

One of the primary reasons for such inequality is states’ heavy reliance on sales and other consumption taxes, which often disproportionately affect low-income families because they spend a larger percentage of their income on consumables rather than on saving or investments. This inequality is exacerbated by the doubling of most states’ sales tax rates since 1970, with little if any


392 See Brunet, supra note 391.


change on the top income tax rate. Further, as states and localities increasingly cut or avoid raising taxes (particularly, income taxes) but nonetheless search for additional revenue, many have increased their reliance on fees (e.g., admission to government-funded museums and state parks, costs for drivers’ licenses and identification cards, and toll fees for roads and bridges), resulting in even greater regressivity than reported in recent studies.396

Even through the tax policies of the federal government, states, and localities are not racist on their face, they have perpetuated racial disparities for decades.

IV. PRIOR EXAMPLES OF REPARATIONS

In his 2014 seminal article The Case for Reparations, Ta-Nehisi Coates notes that as to the need for national repair of past wrongs, “We are not the first to be summoned to such a challenge.”397 Coates is right—reparations are a part of the history of many nations, including our own. This Part of the Article is divided into two halves. In this first half, we delve into two examples of reparations paid by other nations in relation to the Holocaust and apartheid. In the second half, we explore two examples of reparations paid by the United States in connection to the seizure of Native American land and the internment of Japanese Americans.

While we are limiting our examination to four examples, many more—both international and domestic—exist, including (but not limited to) the ones listed below:

- **Emancipation of Russian Serfs.** Following the Emancipation Manifesto of 1861,398 by which Alexander II freed over twenty-three million people in a major agrarian reform, each Russian serf received “three acres of land and agricultural implements with which to begin his career of liberty and independence.”399

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397 Coates, supra note 32, Part X.


399 Darity, supra note 16, at 9. The Russian emancipation was not perfect. The landlords were paid generously for the lands (of their choosing) redistributed to the serfs,
• **Rosewood Massacre.** On January 1, 1923, in collusion with law enforcement officials, White aggressors attacked the prosperous Black town of Rosewood, Florida, murdering eight Black residents, injuring dozens more, as well as looting and burning down the town. More than seventy years later, the Florida Legislature passed the Rosewood Compensation Act (the “Rosewood Act”) acknowledging the role of its officials in not preventing the massacre. The Rosewood Act granted each resident $150,000 and provided reimbursements to each family between $20,000 to $100,000 for losses suffered. The Act also established a scholarship fund which annually provides grants of up to $4,000 for college tuition and fees to the direct descendants of the Rosewood families and other minority students.

• **Tuskegee Syphilis Study.** Starting in 1932, the U.S. Public Health Service recruited 399 Black men from Alabama for a study entitled the Tuskegee Study of Untreated Syphilis in the Negro Male. As part of this study, the men were told they had “bad blood” when in fact they had syphilis—a disease that can cause mental illness and lead to death. Even after penicillin became a widely available treatment for syphilis in the 1940s, the researchers continued the study for decades and withheld and the serfs were required to purchase the land through government-sponsored loans. Nevertheless, modern Russian historian Alexander Chubarov compares Russian and U.S. emancipation: “The [Russian] emancipation was carried out on an infinitely larger scale than the emancipation of slaves in the U.S., and was achieved without civil war and without devastation or armed coercion.” ALEXANDER CHUBAROV, THE FRAGILE EMPIRE 75 (1999); see, e.g., Michael Lynch, *The Emancipation of the Russian Serfs, 1861*, HIS. REV., no. 47, 2003.


401 See H.B. 591, 13 Leg. 2d Sess. (Fla. 1994).

402 See id.

403 See id.


405 See id.
treatment. As part of a class action settlement, the U.S. government paid the victims and their heirs $10 million. Subsequently, President William J. Clinton issued an official apology admitting that the government “did something that was wrong—deeply, profoundly, morally wrong. It was an outrage to our commitment to integrity and equality for all our citizens.” At the time of the apology, President Clinton also announced the government’s creation of post-graduate fellowships in bioethics, which emphasized recruiting minority students, along with a $200,000 grant for the establishment of a Center for Bioethics in Research and Health Care at Tuskegee University in Alabama.

As we keep in mind that the history of reparations is long and complex, we start our review by examining the reparations paid in connection to the Holocaust.

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407 Id.

408 While a class action settlement may not fit within the traditional definition of reparations, this case settled for “unique reasons,” including the following ones noted by the presiding judge:

[T]he United States was rightfully and grievously embarrassed at being exposed for having sponsored, financed, and operated a project that for forty years callously experimented with and risked the very lives and health of a large number of unknowing black citizens. It is evident that at this particular time it was in the best interest of the United States Government to close the last chapter of this sordid book as expeditiously and honorably as possible.


409 See Mitchell, supra note 404.

410 Id.

411 See id.; see also Eric A. Posner & Adrian Vermeule, Reparations for Slavery and Other Historical Injustices, 103 COLUM. L. REV. 689, 695 n.19 (2003).
A. Holocaust Victims

During World War II, the Nazi regime—along with its allies and collaborators—systematically murdered six million Jews in a genocide known as the Holocaust. 412 Murders were carried out in gas vans and chambers as well as mass shootings; meanwhile, other victims were imprisoned and forced into slave labor in concentration camps. 413 The end of World War II in 1945 marked the demise of the Nazi regime and the beginning of the reparations process for the Holocaust. 414 As Ta-Nehisi Coates states in The Case for Reparations, “[r]eparations could not make up for the murder perpetrated by the Nazis. But they did launch Germany’s reckoning with itself, and perhaps provided a road map for how a great civilization might make itself worthy of the name.” 415

1. Initial Resistance to Reparations

A survey of West Germans in 1952 showed that the journey to reparations would be an uphill climb:

- 5% felt guilt about the Holocaust;
- 29% believed their country owed Jews restitution; and
- The remaining 66% either thought that Jews bore at least some of the responsibility for what happened to them, or that only people who committed the atrocities should pay reparations. 416

2. Conference on Jewish Material Claims against Germany

Despite the resistance, the work on reparations persisted. In 1951, over twenty Jewish national and international organizations met in New York City. 417 This meeting resulted in the creation of a non-political and non-partisan body focused on the negotiation of reparations for Holocaust

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415 Coates, supra note 32.
survivors. As its upcoming negotiations would focus on material claims only, the body became known as the Conference on Jewish Material Claims Against Germany, or the Claims Conference.

After six months of negotiations, the Claims Conference, the State of Israel, and the German government reached an agreement. The German government committed to making payments directly to the victims of the Holocaust as well as paying Israel three billion deutschmark annually over a 12-year period for the resettlement of Holocaust survivors. Furthermore, the German government agreed to pay 450 million deutschmark over a twelve year period for the benefit of the Claims Conference. The Claims Conference used these funds to rebuild Jewish communities throughout Europe and to support Holocaust survivors through social service agencies.

3. United States Involvement

Though miles apart, the U.S. government played an active role in Holocaust reparations. The U.S. government put pressure on Swiss banks to settle a class action lawsuit for their questionable actions during the Holocaust. During the Holocaust, Jews deposited funds in Swiss bank accounts to prevent their wealth being stolen by the Nazis. However, when the owners or their direct heirs tried to reclaim their funds after World War II, the banks denied the existence of their accounts and recategorized the funds as the banks’ own profits. Ultimately, the banks offered $1.25 billion as a settlement.

Separately, the executives from over a dozen German corporations admitted to using slave labor, including Jews but the majority were Eastern

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418 See id.
419 See id.
420 See id.
422 See id.
423 See CONF. ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, supra note 417.
426 See id.
427 See Waldman, supra note 424, at A8.
Europeans, during the Holocaust. The U.S. government pressured the corporations to pay several billion dollars in reparations to those victims and their families. These examples show that while the U.S. was not the party paying reparations, it was indeed a participant in the reparations process for the Holocaust.

B. Post-Apartheid

1. Apartheid Regime

The second example of international reparations comes from South Africa. From 1948 through the early 1990s, South Africa had a system of institutionalized racism, known as Apartheid. During this period, the government passed a series of laws that expressly discriminated against the non-white population in South Africa. For example, in 1950, the Group Areas Act “created the legal framework for varying levels of government to establish particular neighbourhoods [sic] as ‘group areas,’ where only people of a particular race were able to reside” and own homes. The law applied retroactively, so once an area was declared a group area, all of the people who were not a part of the designated racial group were displaced and their houses demolished. In addition to government-mandated segregation, the laws of the apartheid regime significantly limited non-White South African’s land ownership and also enabled business owners to refuse service to non-white South Africans.

2. Truth and Reconciliation Commission (TRC)

As a democratic government formed in 1994, restitution for Apartheid’s victims became one of the government’s most urgent tasks. In 1995, the

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429 See id.
433 See id.
434 See Zinkel, supra note 431, at 233–34.
Promotion of National Unity and Reconciliation Act established the Truth and Reconciliation Commission (TRC)—designed to build a bridge between “the apartheid past and the democratic future.” The TRC took on the tasks of investigating human rights violations from 1960 to 1994 as well as enabling victims to share their stories, granting amnesty, and drafting recommendations for reparations. In order to accomplish its tasks, the TRC created three committees:

- **The Committee on Human Rights Violations.** In an effort to restore the dignity of the nation and its citizens, the Committee on Human Rights Violations (CHRV) created a space for the victims of Apartheid to talk about what they endured as well as Apartheid’s effects on them, their families, and their communities. With the help of community-based organizations, the CHRV collected statements from over 21,000 victims. The CHRV then invited approximately 2,000 victims to tell their stories in public hearings. The CHRV designed the hearings in a way that enabled the victims to freely tell their stories, so the hearings did not become court trials. In this spirit, the CHRV did not permit cross-examination at the hearings and did not have any technical legal rules, such as the hearsay rule of evidence.

- **Committee on Amnesty.** While international law deemed Apartheid to be a crime against humanity, the TRC decided to view the crimes of Apartheid as “individual acts of gross violations of human rights.” So rather than granting blanket amnesty, the Committee on Amnesty (CA) possessed the author-

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436 Id. at 1163; see also Desmond Tutu, South Africa, BRITANNICA, https://www.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa.
437 See BRITANNICA, supra note 436.
439 See id. at 367.
440 See id.
441 See id.
442 See id.
443 Andrews, supra note 435, at 1166.
ity to grant amnesty to individual applicants. The two main criteria for amnesty were that the applicant (1) fully disclosed his or her actions and (2) that the applicant’s act, omission, or offense was associated with a political objective. When the CA granted amnesty, victims were precluded from suing the applicant in civil court; however, if the CA declined amnesty, victims could pursue an action against the applicant in civil court. As Sam Garkawe mentions in his article about the TRC, “[f]or this reason, the amnesty process was often described as a ‘carrot’ (the allure of amnesty) and ‘stick’ (the threat of prosecutions) approach to inducing perpetrators to come forward.” Ultimately, the CA granted amnesty to 849 applicants, but refused amnesty to 5,392 applicants.

- The Committee on Reparation and Rehabilitation. While the prior two committees primarily focused on the truth of what occurred during Apartheid, the Committee on Reparation and Rehabilitation (CRR) envisioned a post-Apartheid South Africa and set out steps to make its vision a reality. In determining its reparations policies, the CRR outlined five guiding principles: “redress, restitution, rehabilitation, restoration of dignity and reassurance of non-repetition.”

While the CRR recommended making urgent—but interim—payments to victims who could demonstrate an immediate need, it also noted that reparations should extend beyond monetary payments to victims. Accordingly, the CRR also outlined a series of non-monetary reparations:

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446 See Garkawe, supra note 438, at 354.
447 Id. The author states, “The ‘carrot and stick’ terminology was used by the then Minister of Justice, Dullah Omar, who was responsible for the establishment of the TRC.” Id. at n.190.
449 Garkawe, supra note 438, at 374.
450 See id. at 375.
(a) **Legal and Administrative.** “[I]ssuing of death [certificates], exhumations, reburials and ceremonies, provision of headstones and tombstones, declarations of death, expungement of criminal records and the expediting of outstanding legal matters.” 451

(b) **Community.** “[R]enaming streets and facilities, erecting memorials and monuments, and conducting culturally appropriate ceremonies to commemorate the victims of repression during the apartheid era.” 452

(c) **National.** “[R]enaming of public facilities, the erection of memorials and monuments, and possibly the institution of a day of remembrance.” 453

(d) **Community Rehabilitation.** Improving the “health and social services, skills training,” developing “specialized trauma counselling services, family-based therapy,” and helping with “education and housing provision.” 454

Ultimately, the TRC recommended that “victims and survivors of human rights violations should receive reparation payments totaling $430 million paid over several years.” 455 The recommendation, however, was never fully implemented. In 2003, the government announced a one-time payment of approximately $4,000 for each victim identified by the CHRV and community rehabilitation programs that would be a part of “broader development programs for all South Africans.” 456

C. **Native Americans**

The previous examples show that reparations are not a novel concept. Moreover, reparations are not limited to international settings. Reparations appear throughout U.S. history. The following Subsections explore the reparations paid to two groups by the U.S. government—Native

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451 Id.
452 Id.
453 Id. at 374.
454 Id.
455 Feagin & McFadden, supra note 444, at 67.
Americans and Japanese Americans, beginning in chronological order with reparations paid to Native Americans.  

1. Theft of Native American Land  

The eighteenth and nineteenth centuries in the United States are stained with the genocide of Native Americans. This period of conquest and colonization included the forced relocation of Native Americans to reservations and, for the children, relocation to what was known as “Kill the Indian, Save the Man” boarding schools, the goal of which was to remove Native Americans from their culture and assimilate them into White society. One of the defining harms of this period was the theft of Native American land “under the cover of law.”

Disproportionately high numbers of Native Americans enlisted in World War II, igniting a movement to compensate Native American for the theft of their lands. Out of this momentum came the first reparations program of the U.S. government.

2. Indian Claims Commission  

Historically, Native Americans experienced a disjointed system of justice for their claims against the U.S. government. In 1946, Congress established the Indian Claims Commission Act (the “ICC Act”) in an effort to give tribes a designated path by which to address their future claims, including ones involving property. Additionally, the ICC Act established the Indian Claims Commission (“ICC”) and tasked it with investigating

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457 See id.
460 Id.
462 See id.
and resolving any and all claims that arose before 1946. Under the ICC Act, reparations would be based on each tribe’s history as well as the proportionate responsibility of the U.S. government for the tribe’s losses.

Pursuant to the ICC Act, the ICC was designed to hear all types of claims—from theft of land by treaties that were signed under duress to treaty violations. In practice, the ICC adopted the structure of a claims court. Under this structure, the ICC could only grant monetary damages and even those were limited. Additionally, its adversarial system pitted the U.S. Department of Justice against each tribe.

Ultimately, the ICC awarded approximately $1.3 billion to 176 tribes and bands, averaging “about $1,000 per person of Native American ancestry.” Most of the funds were put in trust accounts for which the U.S. government serves as trustee.

A formal apology came in 2009 within the 2010 defense appropriations bill. The bill stated that the United States apologizes for the “many instances of violence, maltreatment, and neglect inflicted on Native Peoples by citizens of the United States.”

D. Internment of Persons of Japanese Descent During World War II

1. The Internment

The second example of reparations paid by the United States also has ties to World War II. During this war, President Franklin D. Roosevelt issued an executive order authorizing the designation of “Military Areas” within the United States that permitted the forcible removal of any or all persons in these spaces. Under the authority of the executive order and

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465 See id.
466 See Newton, supra note 463, at 469.
467 See Posner & Vermeule, supra note 411, at 694.
468 See Newton, supra note 463, at 469.
469 See id.
470 See id.; see generally Newton, supra note 458, at 779–84 (discussing, inter alia, refusal to compensate Apache Tribe for 27 years of wrongful imprisonment).
471 Blakemore, supra note 461.
472 See id.
474 Blakemore, supra note 461.
operating under a fear that “Japanese-Americans on the West Coast might aid an invading Japanese army or commit acts of espionage and sabotage,” the West Coast was designated a Military Area and all persons of Japanese ancestry were to be excluded. This designation led to the displacement, including the forcible removal, of approximately 120,000 United States citizens and residents of Japanese descent and their subsequent detention in concentration camps.

2. **Commission on Wartime Relocation and Internment of Civilians**

Public discussion of the internment did not immediately commence upon the conclusion of the war. Rather, the discussion gained traction during the Civil Rights Movement as the third generation of Japanese Americans were coming of age.

In 1980, Congress created the Commission on Wartime Relocation and Internment of Civilians, which hosted hearings throughout the country. As legal scholar Natsu Taylor Saito notes, “These events were really the heart of the struggle for reparations—an instance in which the government actually sought and recorded the truth, and people finally came forward to tell their stories, many of them for the first time ever.”

3. **Civil Liberties Act of 1988**

Based on the Commission’s recommendations, Congress passed the Civil Liberties Act of 1988. As part of the Act, each internment survivor received a $20,000 check accompanied by a letter of apology from President Clinton stating the following:

In passing the Civil Liberties Act of 1988, we acknowledged the wrongs of the past and offered redress.

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476 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 654 (Richard A. Epstein et al. eds., 2005); see also JOHN L. DEWITT, FINAL REPORT, JAPANESE EVACUATION FROM THE WEST COAST ch. 1–2 (1942).

477 See CHEMERINSKY, supra note 476, at 654; see also Natsu Taylor Saito, Beyond Reparations: Accommodating Wrongs or Honoring Resistance?, 1 HASTINGS RACE & POVERTY L.J. 27, 29 (Fall 2003).


479 See id.

480 See id. at 31.


to those who endured such grave injustice. In retrospect, we understand that the nation’s actions were rooted deeply in racial prejudice, wartime hysteria, and a lack of political leadership. We must learn from the past and dedicate ourselves as a nation to renewing the spirit of equality and our love of freedom. Together, we can guarantee a future with liberty and justice for all.483

Additionally, the U.S. government created a public education fund to support “creative work in the fields of elementary and secondary education, legal analysis and education, the production of documentary films, art programs, and various kinds of memorials.”484

E. Analysis of Reparations Examples

All the examples we referenced in this Part provide unique elements for consideration in the development of any reparations program:

- traveling to local communities to create a space for the victims to be heard in a non-adversarial setting;
- forming a coalition to address reparations from diverse perspectives;
- issuing compensatory payments directly to the injured or their descendants;
- funding educational and community-based programs; and
- issuing a formal apology from the highest-ranking government leader.

But perhaps the most impactful element of these examples is simply their existence. Reparations are not a new concept; rather, they are sewn into the historical fabric of our nation and others around the world. The next Part of this Article addresses how we might approach the funding and implementation of reparations for slavery in the U.S.

483 Letter from Bill Clinton, President of the U.S., to recipients of reparation checks (Oct. 1, 1993) (on file with Cal. St. Univ.).
484 Saito, supra note 477, at 32.
V. OPTIONS FOR REPARATIONS IN THE UNITED STATES

A. Federal Level - Estate Tax as a Funding Source

The physical, psychological, and financial pain inflicted upon African Americans by chattel slavery and the de facto and de jure racial discrimination that followed makes full reparations both imperative and impossible. Perhaps this is why some legal commentators are sympathetically opposed to any legal claim for reparations. Reparations seem most implausible when the focus is on slavery alone, given the difficulty of quantifying the magnitude of the initial wrongs in order to determine an appropriate remedy for the biological descendants of Black slaves.

This Article attempts to change both the focus and framework of reparations dialogue. The focus, as revealed in the Congressional and Executive Administration actions outlined in Parts II and III of this Article, is instead on government-encouraged, endorsed, sponsored, codified, and enforced subjugation of Black Americans. The economic damages of such actions are revealed in today’s racial wealth gap. The framework for this discussion is America’s breach of its most fundamental ideals of “equitability” as equality of opportunity. Viewing Black reparations through the framework of equality of opportunity leads us to a unique source of funds to begin repairing the breach.

America was racialized by the theory of Whiteness as superior. The basis for race-based denigration of Africans is referred to by sociologists

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486 See, e.g., Boris I. Bittker, The Case for Black Reparations 12 (First Beacon Press, 2d ed. 2003) (“But to concentrate on slavery is to understake the case for compensation, so much so that one might suspect that the distant past is serving to suppress the ugly facts of the recent past and of contemporary life. In actuality, slavery was followed not by a century of equality but by a mere decade of faltering progress, repeatedly checked by violence . . . .” Thus, as slavery receded into the background, it was succeeded by a caste system embodying white supremacy.).

487 See supra Parts II & III.

488 James L. Huston, Securing the Fruits of Labor 22 (2015) (“Of course, virtually all individuals who commented on the distribution of wealth qualified their claims of egalitarianism by insisting that some inequalities would always and rightfully exist. In most of the leaders’ discourses, equal really meant equitability, and the revolutionaries hoped to achieve an equitable distribution of wealth rather than an equal one.”).

489 See supra Part V.
and racial commentators as “white supremacy.” 490 The malevolence of European degradation of Africans permitted chattel slavery to create a racial “caste system” 491 that denied and continues to deny African-Americans the full opportunity to pursue life, liberty, and happiness. The 400 years of intentional deprivation of Blacks their due wages, property, life, liberty, and happiness, when transformed into money, or money’s worth, creates a stolen inheritance. The logical remedy of a government-sponsored theft of Black wealth and inheritance is to use government taxation of inheritances to redistribute the wealth of those most benefiting from America’s ongoing systemic racism to those most hurt by the intrinsic unfairness and injustice of racism.

This concept of stolen inheritances is currently illustrated by the staggering realities of the racial wealth gap—the glaring disparities in the net worth of White and Black families. 492 An interesting and alarming

490 See, e.g., ROBIN DIANGELO, WHITE FRAGILITY: WHY IT’S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM 28 (2018) (“Most white people do not identify [themselves as] white supremacists and so take great umbrage to the term being used more broadly. For sociologists and those involved in current racial justice movements, however, white supremacy is a descriptive and useful term to capture the all-encompassing centrality and assumed superiority of people defined and perceived as white and the practices based on this assumption. White supremacy in this context does not refer to individual White people and their individual intentions or actions but to an overarching political, economic, and social system of domination.”).

491 ISABEL WILKERSON, CASTE 69 (2020) (“[T]he word racism may not stand as the only term or the most useful term to describe the phenomena and tensions we experience in our era. Rather than deploying racism as an either/or accusation against an individual, it may be more constructive to focus on derogatory actions that harm a less powerful group rather than on what is commonly seen as an easily deniable, impossible-to-measure attribute . . . . Caste, on the other hand, predates the notion of race and has survived the era of formal, state-sponsored racism that had long been openly practiced in the mainstream. The modern-day version of easily deniable racism may be able to cloak the invisible structure that created and maintains hierarchy and inequality. But caste does not allow us to ignore structure. Caste is structure. Caste is ranking. Caste is the boundaries that reinforce the fixed assignments based upon what people look like. Caste is a living, breathing entity. It is like a corporation that seeks to sustain itself at all costs.”); see also Higdon, supra note 360 (providing the definition of racism).

492 See William Darity, Jr. et al., WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP, THE SAMUEL DU BOIS CTR. ON SOC. EQUITY (Apr. 2018), at 2, 8–9, https://socialequity.duke.edu/portfolio-item/what-we-get-wrong-about-closing-the-racial-wealth-gap/ (“The racial wealth gap is large and shows no signs of closing. Recent data from the Survey of Income and Program Participation (2014) shows that black households hold less than seven cents on the dollar compared to white households. The white household living near the poverty line typically has about $18,000 in wealth, while black
statistic is the fact that if the current rate of economic growth is maintained, it would take 200 years to eradicate the racial wealth gap.\footnote{See Angela Hanks et al., Systematic Inequality: How America’s Structural Racism Helped Create the Black-White Wealth Gap, CTR. FOR AM. PROGRESS 10 (2018), https://community-wealth.org/content/systematic-inequality-how-americas-structural-racism-helped-create-black-white-wealth-gap.} This is almost as long as the nearly 250 years of government-supported slavery. Discussions of American wealth disparity are now ubiquitous. The specific claim made in this Part is that the much-maligned federal estate, gift, and generation skipping taxes\footnote{See Pub. L. No. 99–514, 100 Stat. 2095 (1986).} (hereafter, collectively, the “Estate Tax”) are perfectly designed to correct the twenty-first century wealth disparity created by .001% of the population owning more than 20% of the nation’s wealth. President Theodore Roosevelt colorfully referred to the wealth owned by the robber barons in the early 1900s as “swollen fortunes”;\footnote{President Theodore Roosevelt coined the term “swollen inheritance.” See infra note 533.} an Estate Tax imposed on swollen fortunes should be used to refund stolen fortunes. The federal government’s use of the Estate Tax to decrease swollen fortunes is not a novel idea.

Suggesting that Estate Tax is the ideally designed to provide for Black reparations is no small matter. Eminent commentator and jurist Professor Eric Posner and his co-author wrote that the design for payment of reparations may be the most important component of any reparations discussion.\footnote{See Posner & Vermeule, supra note 411, at 690 (“Within the normative debates, proponents of reparations often focus monomanically on the historical injustices inflicted upon victim groups, while minimizing the serious problems of policy design that reparations pose. Opponents of reparations, on the other hand, minimize the relevant injustices and portray reparations proposals as outlandish or even unprecedented, overlooking that federal and state governments have often paid reparations in one form or another. Most generally, commentators on all sides of the issue focus excessively on abstract questions about the justice of reparations while ignoring institutional and prudential questions about how reparations schemes should be designed. As we shall see, answers to the design questions will themselves help to determine whether and when reparations should be paid in the first place.”).} The logic of Estate Tax as the funding source to solve one of America’s most “wicked problems”\footnote{See discussion of “wicked problems,” infra Part V.A.10.} will be discussed in this Part, using five contentions:

households in similar economic straits typically have a median wealth near zero. . . . At the other end of America’s economic spectrum, black households constitute less than 2 percent of those in the top one percent of the nation’s wealth distribution; white households constitute more than 96 percent of the wealthiest Americans.”).
1. America’s Jeffersonian equitability claim that all human beings are created with an equal right to “life, liberty and the pursuit of happiness” assumed comparable economic starting positions for all citizens, and those with inherited wealth (i.e. Thomas Jefferson and many of the Declaration of Independence signers) simply were not from the same position as immigrants, indentured servants, and enslaved Africans.

2. The twentieth century introduction of Federal Estate Tax was intended to redistribute the swollen concentrations of wealth that resulted in .001% of America’s population owning swollen owning more than 20% of America’s total wealth.

3. The design of the Federal Estate Tax as a redistribution of wealth from those families with “swollen wealth” dictates that revenue from the Estate Tax be earmarked for the people group that is at the bottom of the wealth disparity continuum. The racial wealth gap shows that descendants of formerly enslaved Africans and other Black Americans are the at the bottom of the wealth disparity continuum because of federally imposed, sanctioned, or implied racism.

4. The current revenue from the Estate Tax on fortunes deemed to be “swollen” is the ideal revenue source to begin replacing “stolen” fortunes of Black people. Congressional study is needed to determine the amount and proper owners of the wealth stolen from Black people by, or with the consent of, the federal government.

5. Private contributions to reduce wealth disparity or the federal debt have always been given favorable tax treatment through the charitable income tax and transfer tax deductions. The complicity of private citizens, religious groups, and social organizations with local, state, and federal theft of Black wealth through slavery and racism makes it is both logical and compelling that the Federal, state and local tax systems provide strong tax incentives for private citizens to join the federal government in repairing the damage of slavery and racism.

The following Subsections will explore each of these arguments and ideas in greater detail.
1. **Jeffersonian Ideals Apply to Reparations Argument**

The entitlement to reparations implies some breach of duty by the American people and their government.498 The underlying promise of America is almost universally understood to be the right to pursue equity because of the universal assumption of the *equality* of opportunity. Interestingly, America’s ideals of equity and equality clashed in two major ways with the individual self-interest of the men in power at the time the country began.

2. **Paradox of Individual Liberty and Slavery**

First, there was the problem of slavery and equality of personhood. How exactly do you declare freedom from servitude to Britain by asserting American equality while importing and then legalizing chattel slavery, the worst form of servitude? The answer was plain and simple—each contradiction was in colonists’ political and economic self-interest.499 Politically, the paradox of individual liberty and slavery was known, but ignored, by America’s early leaders because they desperately needed the assistance of European trading partners, especially France, and the French were the third-largest slave traders, behind Portugal and Britain.500 Before cotton, the colonists’ single most valuable product was tobacco, which required an ever-growing pool of cheap labor.501 It was this economic imperative of cheap labor that drove the statutory creation of involuntary servitude in Virginia and other colonies.502  

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498 The availability of judicially created slavery reparations has been a topic of great interest to legal scholars and was exhaustively reviewed by Boris I. Bittker. See Bittker, *supra* note 486. Court cases have generally been unable to fashion a judicial remedy for slavery, White supremacy, and anti-Black racism. Most notably, the Seventh Circuit has held that plaintiffs suing in their capacity as descendants of former slaves lacked standing to assert claims concerning injuries to their ancestors. See *In re African American Slave Descendants Litig.*, 471 F.3d 754, 759–61 (7th Cir. 2006), *cert. denied* 552 U.S. 941 (2007). As Judge Posner wrote in that decision: “[T]here is a fatal disconnect between the victims and the plaintiffs. When a person is wronged he can seek redress, and if he wins, his descendants may benefit, but the wrong to the ancestor is not a wrong to the descendants.” *Id.* at 759.


501 See id.

502 See id.
3. Paradox of Disavowing Inherited Wealth While Owning Inherited Wealth

The second paradox to be overcome by the founding fathers was the problem of how to handle inherited wealth and its built-in inequality of opportunity. Thomas Jefferson’s view of society was formed “by the ideal of an agrarian society in which the economic functions were performed chiefly by independent small farmers.”

Moreover, one of republicanism’s central tenants required “securing and then maintaining a nearly equal distribution of wealth among the voting citizenry.”

And Thomas Jefferson was an ideal ambassador of this paradox. He combined a forceful argument for freedom from autocratic rulers with his own inherited wealth in both land and slaves. The man best articulating America’s resentment of British aristocracy was America’s most powerful aristocrat.

4. Estate Tax as an Egalitarian Wealth Reallocation System

The equal-starting-line narrative was imperative for the idea of American meritocracy. Yet inherited wealth runs directly counter to the idea that one can achieve success and power by skill and merit alone. America’s initial revulsion to the wealth concentration of primogeniture and fee entails made it easy for populist politicians to promote “breaking up” concentrated wealth through taxation during periods of economic...
volatility, labor unrest, social inequality, and/or progressive activism. And, in the 30 years leading up to the enactment of the Estate Tax, America experienced all of these.508

5. History and Purpose

The Estate Tax began as a revenue raising stamp tax, briefly morphed into a federal inheritance tax to fund wars, and then was rationalized as a wealth redistribution vehicle.509 As Professor Boris Bittker explained, the original proponents of the Estate Tax were clear about their legislative intention to use federal taxes to combat wealth concentration.510 Specifically, “[p]rogressives, including President Theodore Roosevelt, advocated both an inheritance tax and a graduated income tax as tools to address inequalities in wealth.”511

The Estate Tax was not enacted until World War I in 1916,512 with a purpose not only of funding the war, but also to implement Roosevelt’s progressive tax policy ideals and mitigate the negative effects of unearned inheritances. The increases in the Estate Tax exemptions discussed in Part III.G of this Article have left the Estate Tax only a shell of its former self. Only about 1,900 decedents’ estates were subject to estate tax in each of 2018 through 2020,513 and the Estate Tax is the lowest source of revenue

508 See id. at 178 n.2. However, beginning in the 1890s, there was increasingly a climate of public opinion in which the demand for the (progressive) taxation of inheritance was no longer perceived solely as socialist radicalism, but as a necessary measure of reform to enhance equality of opportunity, as a counterweight to the existing concentration of wealth, and as a contribution to tax equity—and thus as an expression of the realization of American values. See id. (citing RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 108 (1954)). Paul also believed that the passage of the estate tax in 1916 was made possible largely by the public political discourse. See id. at 325-26 n.31 (“The estate tax enacted by the 1916 act was a manifestation of a grass roots movement which had been visible for discerning eyes for a good many years.”).

509 See Jacobson, supra note 387.


512 See id. at 120.

at the federal level, accounting for only 0.5% of the nation’s tax revenue in 2019.514

6. Criticism of Estate Tax

Modern commentators starting from the 1950s all the way to 2019 have lamented that the current Federal Estate Tax has lost mooring to any rational legislative purpose, and they argue that it should be abandoned as completely ineffective.515 They note that it does not raise meaningful revenue or redistribute concentrated wealth.516 One commentator described the tax as a “zombie tax”—a sort of dead concept that stalks around creating unjustified fear and not much else.517

Wealth owners and their representatives argue that the Estate Tax is a failed revenue raiser and inhibits capital formation and economic growth.518 These legacy wealth-owners focus on the early history of the estate, inheritance, and stamp taxes as revenue raisers for wars that have already been fought and funded.519 Another of their arguments focuses on the “step-up in basis” rules that serve to completely eliminate income tax on decedents’ appreciated capital assets like stocks and bonds. They suggest that when you add in the lost income tax from decedent capital gains, the Estate Tax may lose more than it collects.520 The path of “swollen fortunes” politics is clear—disable, deny, or disassociate the Estate Tax from the goal of ameliorating wealth disparity and then urge repeal of the tax because it has no purpose and is detrimental those seeking to swell-up their wealth.

Obviously, a tax designed to prevent large accumulations of capital by individuals within a capitalist economy will have some effect on U.S. capitalism. However, a tax on wealth after death, by definition, is not a tax that inhibits the economic activity of the deceased wealth owner because the deceased no longer own their wealth. The inability of the descendants of the decedent to lay claim to their ancestor’s post-mortem estate without

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516 See, e.g., id. at 5.
517 See Samuel D. Brunson, Afterlife of the Death Tax, 94 INDIANA L. J. 355, 356 (2019) (“In many ways, the current estate tax is a zombie, neither fully alive nor fully dead.”).
518 See id. at 359.
519 See id. at 357.
520 See id. at 371.
the affirmative action of the law, the courts, and the government makes a governmental tax on inheritances the fairest of all taxes. For a wealthy decedent subject to estate tax, it is not the family that has the first right to the decedent’s wealth it is the federal government that stands first in line via a lien that attaches at the moment of death.521

7. Estate Tax Embodies Egalitarianism

There is a historical connection between Jefferson’s founding-fear of concentrated wealth and wealth disparity, and the recent social unrest caused, in part, by widening racial wealth disparity. The Estate Tax was and is the logical means to address wealth disparity and especially racial wealth disparity caused by America’s breach of its founding promise to its citizens.

Jens Beckert, a German economic-sociologist makes a strong historical link from Jefferson’s promises to the purpose of the Estate Tax:

This criticism of the dynastic concentration of wealth was not based on the idea of class warfare aimed at a socialist model of equality, but was a direct expression of the liberal meritocratic tradition from the founding period of the United States. . . . One of the principles which controlled the action of Jefferson . . . [was] to give all [citizens] as nearly as practicable an equal start in the race of life. . . . [B]eginning in the 1890s, there was increasingly a climate of public opinion in which the demand for the (progressive) taxation of inheritance was no longer perceived solely as socialist radicalism, but as a necessary measure of reform to enhance equality of opportunity, as a counterweight to the existing concentration of wealth, and as a contribution to tax equity—and thus as an expression of the realization of American values.522

Louis Eisenstein is regarded as having “produced some of the most erudite tax law scholarship from the mid-1940s to the mid-1960s.”523 His article, The Rise and Decline of The Federal Estate Tax, is frequently cited

521 See I.R.C. § 6324 (“Unless the estate tax imposed by chapter 11 is sooner paid in full, or becomes unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years from the date of death . . . . ).

522 Beckert, supra note 503, at 177–78.

for its definitive research and knowledge-based conclusions. Eisenstein carefully describes the well-worn path of Estate Tax opponents that the Estate Tax was designed to raise revenue. Contrary to the conclusion of at least two Estate Tax experts quoting him, Eisenstein does not use the revenue-raising legislative history of the Estate Tax to encourage abolishment of the tax. Quite the contrary, Eisenstein’s final conclusion lines up perfectly with Beckert’s conclusion:

Many years ago John Stuart Mill made a proposal which we would do well to borrow and revise. The estate tax should fix a limit on “what anyone may acquire by the mere favour (sic) of others without any exercise of his faculties.” If “he desires any further accession of fortune, he shall work for it.” Or in Theodore Roosevelt’s exuberant language, he should “show the stuff that is in him when compared with his fellows.” When inheritance does much more, it gravely and inexcusably augments inequality of opportunity. It then becomes hereditary economic power, which is no more tenable than hereditary political power.

If we genuinely believe in a substantial equality of opportunity, then we should cheerfully desire an Estate tax [that] truly levels [the playing field]. We cannot have one unless we also have the other.

Professor Berle has recently reminded us of Jefferson’s “picture of the ideal United States.” It was “a country in which none was very rich; none very poor; all were producers, all owners and consumers.” Within its limitations the estate tax has much to contribute toward the consummation of Jefferson’s vision.

525 See id. at 225.
527 See Eisenstein, supra note 524.
528 See id.
529 Id. at 258–59.
530 Id. at 259.
Thomas Jefferson originally articulated America’s promise of equal opportunity against the tyranny of England’s landed aristocracy. However, it was Andrew Carnegie and the sweeping conclusions of his “Gospel of Wealth” that may have been the most influential articulation of the redistribution imperative. The harshness of Carnegie’s commentary on “swollen fortunes” must be quoted to be believed:

Men who continue hoarding great sums all their lives, the proper use of which for public ends would work good to the community, should be made to feel that the community, in the form of the state, cannot thus be deprived of its proper share. By taxing estates heavily at death the state marks its condemnation of the selfish millionaire’s unworthy life.531

Carnegie’s comments could be easily dismissed as the guilty musings of a gilded era robber-baron, but they were picked up by President Theodore Roosevelt as he advocated for an estate tax.532 In a speech in 1906, Roosevelt declared:

It is important to this people to grapple with the problems connected with the amassing of enormous fortunes, . . . . As a matter of personal conviction, . . . I feel that we shall ultimately have to consider the adoption of some such scheme as that of a progressive tax on all fortunes . . . —a tax so framed as to put it out of the power of the owner of one of these enormous fortunes to hand on more than a certain amount to any one individual; the tax, of course, to be imposed by the National and not the State government. Such taxation should, of course, be aimed merely at the inheritance or transmission in their entirety of those fortunes swollen beyond all healthy limits.533

532 See BITTKER & STONE, supra note 510, at 983 (quoting the 1906 speech of Theodore Roosevelt to Congress advocating for a progressive inheritance tax).
President Roosevelt’s prediction got it exactly right. The prime object of the tax on transferred wealth should be to put a constantly increasing burden on swollen fortunes. At the time of Roosevelt’s words in 1906, those swollen fortunes could have been easily and clearly traced back to the profits of slave labor and the stolen promise of land to the freed slaves.

8. **Earmarking Estate Tax for Reparations**

Following the history of Carnegie and Roosevelt, William Gates, Sr. (an attorney and father of Microsoft Corporation’s co-founder, Bill Gates, Jr.) and Chuck Collins powerfully supported the redistribution of swollen fortunes using estate tax in their book, *Wealth and Our Commonwealth: Why America Should Tax Accumulated Fortunes*, by highlighting the importance of “earmarking” estate tax revenues for a positive public purpose:

For many ordinary Americans, the estate tax is a remote issue in their lives. The vast majority will never pay it, nor do they perceive any particular benefit from it. Its revenue flows into the treasury, paying for general government services, the benefits of which are often difficult to see during the course of daily life. . . . It is our view that public support for the estate tax would greatly increase if people saw a direct connection between the tax and their quality of life. There is something poetic about allocating estate tax revenues to particular initiatives that strengthen equality of opportunity in America.534

As will be shown in the following Subsections, Black reparations is the best earmark for estate taxes because it will strengthen equal opportunity for the group treated most unequally in America.

9. **Measuring Damages through the Racial Wealth Gap Lens**

By far, the largest wealth disparity in the history of the United States is between Black citizens of African ancestry and White citizens of European ancestry.535 The statistics on the wealth disparity between

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535 See Bhutta et al., supra note 327; Fabian T. Pfeffer & Alexandra Killewald, *Intergenerational Wealth Mobility and Racial Inequality*, AM. SOCIO. ASS’N, [https://www.asanet.org/intergenerational-wealth-mobility-and-racial-inequality](https://www.asanet.org/intergenerational-wealth-mobility-and-racial-inequality) (animating the intergenerational aspects of the racial wealth gap); see also Raj Chetty et al., *Race and
Blacks, Latinx, and Whites is made shockingly clear by the Federal Reserve’s annual study of consumer finances. 536 Over the past three decades, a polarizing racial wealth divide has grown between White households and households of color. 537 Since the Reagan-era tax cuts were implemented in the 1980s, median net worth among Black families has been stuck in a range from $8,000 to $24,000. 538 Meanwhile, White household median net worth grew from $124,600 in 1992 to $189,100 in 2019, adjusting for inflation. 539

A 2019 study on the racial wealth divide prepared for the Institute for Policy Studies revealed the following:

- “Between 1983 and 2016, the median Black family saw their wealth drop by more than half after adjusting for inflation, compared to a 33 percent increase for the median White household. Over that same period, the number of households with $10 million or more skyrocketed by 856 percent.”

- “If the trajectory of the past three decades continues,” the racial wealth gap will continue to widen: “[t]he median Black family is on track to reach zero wealth by 2082.”

- “The proportion of all U.S. households with zero or ‘negative’ wealth, meaning their debts exceed the value of their assets, has grown from one in six in 1983 to one in five households today. Families of color are much likelier to be in this precarious financial situation. Twenty-seven percent of Black

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538 See id.
539 See Bhutta et al., supra note 327.
families . . . have zero or negative wealth, compared to just 8 percent of White families.”

The Black/White wealth disparity operates at every level of wealth using accumulated net worth as the measurement. The richest Whites are about eight to ten times richer than the richest Blacks. The poorest decile of Whites are eight to ten times richer than the poorest decile of Blacks. Black people with similarly situated jobs and income to Whites are significantly less likely than their White counterparts to be able to boost the next generation to a standard of living above (or even on par with) their standard of living.

If the population is divided into income quintiles, the lowest 20% of White earners have a median net worth of about $18,000, far exceeding the median net worth of $7,600 of Black earners in the next highest income quintile and coming close to the $22,000 median net worth of Black earners in the middle income quintile. The wealthiest 400 Americans own more wealth than the entire Black population.

Simply stated, racial wealth inequalities in the United States today are the direct result of the previously cataloged patterns of government created and perpetuated racialized social and legal structures and policies that skewed distribution of land, labor, and political voting power.

10. Using Swollen Fortunes to Pay for Stolen Inheritances

In 1973, a city planning professor and a public policy design professor recognized that 1960s protest movements were attempting to change the “underlying systemic processes of contemporary American society” because public policy had failed to do so. Professors Rittel and Webber noted that science, technology, engineering, and mathematics solution tools had solved the “benign” problems impeding our desired standard of

542 See Darity et al., supra note 492, at 9.
543 See id. at 4.
living. However, the besetting social problems of poverty, war, and climate change were not amenable to science and math solutions. Instead, these were “wicked problems.”\textsuperscript{545} Wicked problems are often completely unstructured, hopelessly tangled into adjoining realities, and relentlessly mutating into more malignant forms. A wicked problem is not necessarily wicked in a morally evil sense, but wicked in a fatally viral sense.

Repairing anti-Black racism is an example of a “wicked problem.” As a result, one should not expect reparations to be a solution. At best, reparations would be a type of vaccine that diminishes one debilitating symptom of racism—racial wealth disparity. Opposition to reparation payments because they are not a final solution to racism is a bad faith argument.

Resistance to Black reparations often boils down to two primary objections. First, who should pay for it, given that the greatest sins committed against Black Americans were committed generations ago. Second, how much should be paid, given funding limits and the fact that there is no sum great enough to fully repair the country’s past wrongs against Black people. Various estimates of the reparation cost range from $500 billion to over $17 trillion.\textsuperscript{546} This Section proposes that key objections are easier to overcome by first identifying the source of funding for reparations. The federal Estate Tax should be earmarked to pay for the study, administration, and ongoing distribution of reparations that address all the elements mentioned in H.R. 40 (discussed in Part II.C).

11. Reparations in Evanston, Illinois

At the local level, the City of Evanston, just north of Chicago, adopted an approach to determining reparations that combined the H.R. 40 process with a predetermined funding source. On March 22, 2021, the City Council of Evanston enacted Resolution 37-R-27, “Authorizing the Implementation of the Evanston Local Reparations Restorative Housing Program and Program Budget.”\textsuperscript{547}

\textsuperscript{545} Rittel & Webber, \textit{supra} note 544.


\textsuperscript{547} Memorandum from Kimberly Richardson, Interim Assistant City Manager, City of Evanston, to Honorable Mayor and Members of the City Council, at 1 (Mar. 22, 2021), \url{https://cityofevanston.civicweb.net/document/50624/Adoption%20of%20Resolution%2037-R-27,%20Authorizing%20the.pdf?handle=E11C7B73E1B6470DA42362AB80A50C46}.
Lawmakers carefully identified and then confessed to the city’s historic governmental policy of Black exclusion, redlining and Jim Crow segregation. The Council obtained statistical and testimonial evidence of over-policing of Black people in Evanston that was often justified under cover of enforcing laws against the possession of illegal drugs like cannabis. Certainly, a tax on legalized cannabis use is a logical funding source to repay the victims of the city’s prior racial injustices. Given that Evanston’s history of residential segregation was the harm that most clearly resulted in economic deprivation of the city’s Black people, the City Council decided to make Black residents of Evanston from 1916 to 1969 (or their descendants) the potential beneficiaries of the reparation funds and agreed that the funds would provide benefits in the areas of home ownership, home improvement, and mortgage assistance.

12. Clear Connections Between the Harm, Source, and Recipients

In like manner, the use of Estate Tax ties a current tax to a current problem created by historic and government-sponsored, encouraged, or ignored racism. There is a clear connection between slavery and discriminatory housing policies of the past and the White/Black wealth disparity of today. Addressing the racial wealth gap will require a much more nuanced approach than simply handing out cash payments. This should not cause consternation or surprise because the “40 acre” agreement was not an agreement for cash payments. The 40-acre promise represented an equal starting line—an opportunity to create current income and future wealth through property ownership. Had the 40-acre promise been seen through to fruition, the land set-aside would have allowed for self-sustaining Black communities and provided natural incentives for productivity.

13. Georgetown University Example

Many reparation initiatives under discussion at this time do not necessarily have a compelling benefit/detriment connection. It is often easy to show the monetary benefit to the wrongdoing entity but hard to

548 See id. at 2, 5.
550 See Memorandum, supra note 547, at 2–3.
551 For a discussion of Special Field Order No. 15, see supra Part II.A.
justify the financial enrichment to individuals who were not the original victims. The current effort by Georgetown University is an example. In 1838, two of the nation’s top Jesuit priests sold 272 enslaved men, women, and children to pay the debts and ensure the survival of what would become Georgetown University. A memory project was started by a wealthy alumnus and the school to trace the ancestry of the sold slaves, whose names were all clearly delineated in the school’s records. Today, the identities of the victims’ living descendants have been genetically established, and a debt repayment of some sort is sought. The problem is connecting the benefit that Georgetown gained by sale of the slaves ($3.3 million in today’s dollars) to a compensable detriment being suffered by the descendants.

Georgetown University’s combined endowment is $1.5 billion. A proximate causation argument for damages would say that since the school would not be in existence “but for” the immoral sale of the slaves, the entire endowment should be paid into a reparation fund. In fact, the slave descendants have asked for a billion-dollar fund, and the leaders of the newly created Descendants Trust & Reconciliation Foundation have stated that $1 billion remains the long-term fundraising goal.

The Descendants Trust & Reconciliation Foundation, formed by the GU272 Descendants Association and the Jesuits, will “support the educational aspirations of descendants for future generations and play a prominent role in engaging, promoting and supporting programs and activities that highlight truth, accelerate racial healing and reconciliation, and advance racial justice and equality in America.” This solution

553 See id.
554 See id.
555 See id.
556 See FAQs, GEORGETOWN UNIV. INV. OFF. https://investments.georgetown.edu/FAQs/#3.
carefully avoids discussion of any dollar-for-dollar payments to the descendants.

If the Descendants Trust & Reconciliation Foundation is true to its stated purpose of “supporting the educational aspirations of descendants [of Georgetown’s sold slaves],” the endeavor will almost certainly face the same backlash that is frequently raised as an argument against reparations. Any direct payments will likely be declared to be an unearned and unfair advantage. This is what occurred with affirmative action, which has now become the “reverse discrimination” rallying cry for those who remain actively opposed to racial repair.559

14. Black Reparations, Not Slave Reparations

Estate Tax revenue from “swollen wealth” should be earmarked for redistribution to African Americans who have been victims of, or who are descendants of victims of, “stolen wealth.” We have defined “stolen wealth” as economic theft from slavery, Jim Crow racial terrorism, separate and unequal segregation, redlined housing, or mass incarceration from over-policing. This definition of harm as stolen wealth is objectively measured by the racial wealth gap data. Each Black household showing evidence of racial wealth disparity could be eligible for indirect or direct financial aid from the earmarked Estate Tax revenue. Using the racial wealth gap as the “damages” to Black people avoids the problem faced by the Jesuits of how and whether to provide direct compensation to the identified descendants of the enslaved persons who were sold. The wealth disparity problem in America is well-documented and has led many to advocate for the use of new tax policies as a solution.560 Establishing that historic racism, from the “forgotten 40 acres” to the segregationist policies that followed, placed Black people at the bottom of this already proven


wealth disparity creates the targeted group in need of repair—Black Americans experiencing the racial wealth gap. Statistically, every person identified or identifiable as an African American is a victim of wealth disparity. Even if a Black person has accumulated wealth that groups them in an affluent category, the Black person’s accumulated wealth will be 1/8th to 1/10th what it should be.\(^{561}\) Exactly how to remedy the racial wealth gap is a wicked problem indeed and will require the research of the group described in H.R. 40 and ongoing vigilance of the best and brightest Black people and their allies. Solving for Black reparations should be viewed in the same manner as the problems tackled by the Department of Education, the Department of Housing and Urban Development, and the Department of Labor: worthy of its own federal agency (and one that would likely serve some of the same functions as the agencies listed, thereby moving some tax dollars from the old agencies to the new).

15. **Black Reparations as a Means to Correct Other Ills**

One obstacle to broadening the scope of reparations from the harm of slavery alone to include all the other racially-motivated wrongs that have put Black Americans at the bottom of economic measures of success is that other groups who have been victims of systemic discrimination in the United States may object. Surely, Black Americans felt overlooked when the government turned its attention to Native Americans and Japanese Americans in the 1990s but did not embark on a similar program of reparations for them. Nevertheless, the past has shown us that a financial investment specifically targeted to alleviate the effects of past and current discrimination for one group can also benefit the public as a whole. This was particularly true in the case of the Americans with Disabilities Act (“ADA”),\(^{562}\) which helped more than just the disabled. Ultimately, Congress used tax code expenditures as a reparation-like subsidy to redress discrimination against disabled Americans.\(^{563}\)

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\(^{561}\) See Collins et al., *supra* note 540.

\(^{562}\) See 42 U.S.C. §§ 12101–12213.

\(^{563}\) The Disabled Access Credit provides a non-refundable credit for small businesses that incur expenditures for the purpose of providing access to persons with disabilities. An eligible small business is one that earned $1 million or less or had no more than 30 full time employees in the previous year; they may take the credit each and every year they incur access expenditures. See *Tax Benefits for Businesses Who Have Employees with Disabilities*, I.R.S., [https://www.irs.gov/businesses/small-businesses-self-employed/tax-benefits-for-businesses-who-have-employees-with-disabilities](https://www.irs.gov/businesses/small-businesses-self-employed/tax-benefits-for-businesses-who-have-employees-with-disabilities) (last updated June 26, 2021).
The public access accommodations created by the ADA benefit all Americans and are celebrated each time a mother with a baby stroller, a young athlete with a sports injury, a traveler with a rolling suitcase, a college student moving in with a hand cart or dolly, or a millennial jetting around town on an electric scooter approaches a sidewalk crossing that is level with the street. In like manner, reparations aimed at the racial wealth divide will break down barriers for all Americans. The elimination of the zero-sum, win-lose binary argument is critical to the success of reparations. This and other important win-win commentary relevant to any reparations program is discussed in Heather McGhee’s book, *The Sum of Us*.  

If the Estate Tax is earmarked for the study and implementation of Black reparations, the answer to the question of “how much to pay” will be self-evident—the country will pay what it can afford. In 2020, revenues from federal estate and gift taxes totaled $17.6 billion. One suggestion might be to use the Estate Tax revenue amount as the budget for a new Department of Black Reparations. Interestingly, $16 billion is roughly the current budget for the Department of Commerce. It is imperative that the victimized people determine and administer the reparations due to them. While Estate Tax is a compelling source for Black reparations, the Estate Tax revenues have no relationship to the dollar-value of the reparations that are owed.

In terms of who to pay, the Evanston, Illinois example provides a framework. If you are Black and you or your direct ancestors lived in the United States between 1619 (the inception of slavery) and 1968 (the...
enactment of the Fair Housing Act), you should be eligible for relief. These dates or parameters could change based on an alternative logical premise, but the gist is the same—any Black American who has lived in the United States long enough has been the victim of the country’s caste system. If ancestry must be proved, DNA and genealogy developments are readily available today. One Black-owned company has more DNA samples of Africans than any company in the world.

The final question of what form of payment reparations should take is harder to answer. We propose this should not be answered until a truth-seeking and listening process has been undertaken, following the formula of the past examples of reparations outlined in Part IV of this Article.

16. Charitable Contributions Create Public-Private Partnership in Wealth Reallocation

Racial repair is a matter of justice based on broken promises and human rights violations. By definition, reparations do not and cannot proceed from a request for benevolence. Nonetheless, the tax incentives provided for transfers of wealth that can be categorized as charitable provide an opportunity for a voluntary form of transfers to an injured individual on behalf of the government that inflicted the injury. Individuals have historically sought to help people with disparate wealth (often euphemistically referred to as the “less fortunate”) through philanthropy or charity. The meaning of the word philanthropy is “love of Anthropos-humankind.” Andrew Carnegie was so effective in making lifetime charitable gifts that his descendants were said to be “comfortable” but not rich after his death. Carnegie’s pattern of charitable giving was a motivating factor for the Giving Pledge started by Bill Gates and Warren Buffett.

571 “With its anthro-root, philanthropy means literally love of mankind[.]” Thus, philanthropy is giving money for a purpose or cause benefiting people who you don't personally know.” Philanthropy, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/philanthropy.
573 See Richard Feloni, Warren Buffett Says These Billionaires’ Letters Might Be More Valuable than their Money, BUS. INSIDER (Sept. 21, 2016, 4:01PM), https://www.businessinsider.com/warren-buffett-says-giving-pledge-letters-are-more-valuable-than-money
The charitable deduction from gift and estate taxes is also definitive proof that our transfer tax system was designed for redistribution of wealth. Unlike the federal income tax, the federal transfer taxes are completely avoidable by post-mortem transfers to tax-exempt organizations. The Estate Tax is avoidable by giving everything to a qualifying charity. Therefore it is in essence a voluntary tax because you can choose not to pay it all. In effect, it is a penalty tax for decedents who have swollen fortunes and no accompanying charitable intent.

There are many Black allies who undoubtedly would support and want to personally fund a Black reparations effort, particularly if a charitable deduction from income, gift, and estate taxes could be obtained while doing so. A charitably inclined person should be able to give directly to Black reparations. Under current law, however, a payment to an African American by a private individual may not be expressly permitted as a deductible tax-advantaged transfer under the Internal Revenue Code ("IRC"). A donation must be made to a qualifying charitable organization to be deductible.

The Jesuit reparations fund is tax exempt under the church exemption or school exemption. The City of Evanston is tax exempt as a municipality. If Estate Tax is to be the public source of funds for a federal reparations program, then private efforts to redistribute wealth through reparations should be permitted as well, just as a public-private partnership currently exists for all manner of social welfare programs. A privately

575 See id. at 426. Professor Zelinsky concludes that because Estate Tax is completely avoidable through the charitable deduction it must be amended to be a dependable source of government revenue. See id. at 427.
576 See I.R.C. § 2055 (“For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers—(1) to or for the use of the United States, any State, any political subdivision thereof, or the District of Columbia, for exclusively public purposes; (2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . .“).
577 See I.R.C. §§ 170(a) & (c), 501(c)(3); see also Thomason v. Comm’r, 2 T.C. 441, 443 (T.C. 1943) (“Charity begins where certainty in beneficiaries ends, for it is the uncertainty of the objects and not the mode of relieving them which forms the essential element of charity.”).
578 See I.R.C. § 170(c)(2).
579 See I.R.C. § 170(c)(1).
funded reparations trust or foundation expressly designated to repay a previously acknowledged debt of the U.S. government (i.e., to repay its 40-acres obligation to descendants of formerly enslaved Africans) should qualify as gift to the government which is deductible under IRC section 501(c)(3), and the accompanying exempt provisions for income, estate, and gift taxes under IRC sections 170(c)(1), 2055(a)(1), 2522(a)(1). Public charity status might also be possible if the federal government declared that reversing anti-Black racism is a public policy. Then and only then would a transfer to privately funded reparations trust qualify as a transfer on behalf of the U.S. government.

Even with a public charity status, there are still restrictions that would be counterproductive to the goal of reparations. For example, IRC section 501(c)(3) requires that “no part of the net earnings . . . inure . . . to the benefit of any private individual.” This limitation could be fatal to a fund making regular cash payments to Black individuals. The alternative suggested here is to create a new class of charity by adding an additional subsection to the end of 501(c). Given that IRC section 501(c) currently ends at 501(c)(29), Congress could reserve subsections (30) through (39) of the Code and refer to the new class of charity as a “501(c)(40) Reparations Organization.”

IRC section 501(c)(40) would state the governmental purpose of reversing historic anti-Black racism. It could waive the private inurement rules for non-related individuals and even allow for lobbying activities.

581 See I.R.C. § 170(c)(1) (permitting a charitable deduction for income tax where a payment is made to a State, or the United States, but only if the contribution or gift is made for exclusively public purposes). In Bob Jones University v. United States, the United States Supreme Court implied that preventing racial discrimination is a fundamental public policy, stating: We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not “charitable” should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice. 461 U.S. 574, 592 (1983).
related to its anti-racism exempt purpose. Administratively, the IRC section 501(c)(3) exemption process requires the IRS to affirmatively grant exempt status.\footnote{See Tax Exempt Status for Your Organization, I.R.S. 24 (2021), \url{https://www.irs.gov/pub/irs-pdf/p557.pdf}. Some organizations, such as churches, are automatically exempt under this section. See id.} It should be anticipated that during an era of white supremacy resurgence, the IRS could refuse to grant exempt status to applicants of a 501(c)(40) Reparations Organization. This problem could be addressed by patterning the Reparations Organizations after a 501(c)(4) Social Welfare Organization.

Social Welfare Organizations, under IRC section 501(c)(4),\footnote{See I.R.C. § 501(c)(4)(A): Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.} are typically thought of as lobbying organizations, but also include homeowners' associations and volunteer fire departments.\footnote{See I.R.S., supra note 583, at 47–48.} An individual that transfers money to a 501(c)(4) is not eligible for a charitable income tax deduction but does not have to pay gift tax on the transfer.\footnote{See I.R.C. § 501(a).} As such, social welfare organizations are subject to fewer restrictions than 501(c)(3) public charities.\footnote{See I.R.S., supra note 583, at 28–48.} The application process for tax-exempt status under IRC section 501(c)(4) is a more of a notice than a request for permission.\footnote{See Instructions for Form 1024-A I.R.S. 1 (2021), \url{https://www.irs.gov/pub/irs-pdf/i1024a.pdf}.} Rather than patterning IRC section 501(c)(40) after (c)(3), perhaps it would be easier and better to pattern the new section after Social Welfare Organizations under IRC section 501(c)(4), but without the private inurement prohibition of 501(c)(4)(B),\footnote{See I.R.C. § 501(c)(4)(B) (“Subparagraph (A) shall not apply to an entity unless no part of the net earnings of such entity inures to the benefit of any private shareholder or individual.”).} and with a most favored income tax deduction and an Estate Tax credit that allows dollar for dollar transfers to family in exchange for transfers for reparation.

IRC section 501(c)(40) should be carefully designed to be simple and more advantageous than any other charitable giving vehicle. For income taxes this should mean that there would be no adjusted-gross income...
Giving the 501(c)(40) Reparations Organization the greatest possible advantages would allow the federal government to partially privatize its payment of the “forgotten 40 acres” debt and create a cottage industry of Reparations Organizations having as their mission a redress of White/Black wealth disparity, and would create a welcome tax-reduction strategy drawing the best and brightest minds to develop new tax minimization techniques for taxpayers.

The oversight of 501(c)(40) Reparation Organizations should be performed by a federal agency led by congressionally- and Presidentially-appointed Black administrators to ensure the reparations purpose was being met, even as that purpose evolves over time. A goal of the 501(c)(40) Reparations Organizations would be to distribute funds to create large pools of transferable wealth directly under the control of descendants of formerly enslaved African people. Studies suggest that in order to close the racial wealth gap, Black people must have the ability and incentive to make strategic inter vivos gifts to their grandchildren during the life of the grandchild. Hopefully, the 501(c)(40) could turn private donors into de facto grandparents, creating the possibility of a grandparent-type gift for Black people lacking financial security so that they could take career, housing, and entrepreneurial risks.

Creating a private wealth charitable industry around 501(c)(40) Reparations Organizations would perfectly allow for wealthy donors to be tax motivated to do Black reparations without social objection.

B. State and Local Reparations Efforts

At the state and local level, reparations can address repair in creative ways that avoid the political compromises often necessitated by Congressional legislation. We may find that Congressional efforts drive state and local efforts, but it is perhaps more likely that state and local efforts will drive the Congressional effort. In addition to the example noted in Evanston, Illinois, similar reparations endeavors have been introduced in Asheville, North Carolina; Providence, Rhode Island; and California.591


1. **State and Local Support for H.R. 40**

Since the introduction of H.R. 40 in 1989, the National Coalition of Blacks for Reparations in America (“N’COBRA”) has been instrumental in urging state legislators and city officials to pass resolutions endorsing and supporting H.R. 40.\(^{592}\) For example, in 2020, the United States Conference of Mayors at its 88th conference adopted a resolution urging the passage of H.R. 40.\(^{593}\) City councils governing cities in Arkansas, California, Georgia, Illinois, Maryland, Michigan, Mississippi, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Vermont, Virginia, and the District of Columbia have all passed specific resolutions in support of H.R. 40.\(^ {594}\)

2. **State and Local Commissions on Reparations**

California passed and signed into law AB-3121 Task Force to Study and Develop Reparation Proposals for African Americans, which is virtually identical to H.R. 40.\(^ {595}\) The California mandate has created the first-in-the-nation task force “to study and recommend reparations for African Americans.”\(^ {596}\) The task force consists of nine members—five appointed by the Governor, and two each by the leaders of the state Senate and Assembly—“drawn from diverse backgrounds to represent the interests of communities of color throughout the state, and have experience working to implement racial justice reform.”\(^ {597}\) The task force held its inaugural meeting on June 1, 2021, launching a two-year process to

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\(^{592}\) See NKECHI TAIFA, BLACK POWER, BLACK LAWYER: MY AUDACIOUS QUEST FOR JUSTICE 176 (2020).

\(^{593}\) See 88th Annual Meeting In Support of the Commission to Study & Develop Reparation Proposals for African Americans Act (H.R. 40/S. 1033), U.S. CONF. OF MAYORS, https://www.usmayors.org/the-conference/resolutions/?category=a0F4N00000P dlmjUAF&meeting=88th%20Annual%20Meeting (“NOW, THEREFORE, BE IT RESOLVED, that the United States Conference of Mayors supports the Commission to Study and Develop Reparation Proposals for African-Americans Act[.]”).

\(^{594}\) See Taifa, supra note 592, at 177.


address and repair the harms of slavery and systemic racism within the state of California.  

Kamm Howard, the co-chair of N’COBRA, has published a guide for local reparation efforts. Howard argues that any local reparations effort should have three components: (1) tasking a group of representative Black people to perform an accurate and authoritative study of the wrong; (2) proposals for administration, identification of recipients, and implementation; and (3) funding. H.R. 40 seeks to perform these components in the order listed. Evanston, Illinois developed the commission and study first, then created the funding source before addressing administration and implementation. Several educational and religious organizations have essentially started by identifying an amount of funding, and then performing the study and beginning the administration and implementation phases. This Article suggests that H.R. 40 identify the Estate Tax as a source of funds before addressing administration, recipients, and implementation. If reparations are implemented at the state and local level, there are suitable alternatives to the Estate Tax.

3. State and Local Reparations Funding – Alternatives to Federal Estate Tax

   a. State Estate Tax

   At the state level, an estate tax could also be earmarked to provide a source for reparations. Prior to 2001, all states imposed an estate tax at death. The Internal Revenue Code once offered a dollar-for-dollar credit on the Federal Estate Tax for state estate taxes paid, so the state estate tax

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598 See id. (“California Assembly Bill 3121 establishes the Task Force to Study and Develop Reparation Proposals for African Americans, with a Special Consideration for African Americans Who are Descendants of Persons Enslaved in the United States (Task Force or Reparations Task Force). The purpose of the Task Force is: (1) to study and develop reparation proposals for African Americans; (2) to recommend appropriate ways to educate the California public of the task force’s findings; and (3) to recommend appropriate remedies in consideration of the Task Force’s findings.”); see also CAL. GOV’T CODE § 8301.1 (Deering 2022).

599 See KAMM HOWARD, LAYING THE FOUNDATION FOR LOCAL REPARATIONS (2020).


602 See Richardson, supra note 547.
did not increase a decedent’s overall Estate Tax liability—the states just took their share of the money owed to the federal government, up to a cap of 16% of the taxable estate. 603 The Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”) repealed the state death tax credit, and now there are only twelve states, plus the District of Columbia, that have an estate tax, and six states that have an inheritance tax. 604 Maryland is the only state that has both. 605 State death taxes (including both estate taxes and inheritance taxes) generated a combined $5.3 billion in revenue in 2018. 606 Similar to the Estate Tax at the federal level, redirecting the revenue raised from state estate taxes would not have a significant budgetary impact. Prior to the enactment of EGTRRA, the state estate taxes levied in 2000 “still provided less than 1 percent of combined state and local own-source general revenue.” 607

b. Mansion Property Tax

An “additional tax” on mansions (the plantations of today’s aristocracy) over and above the property tax is another logical way to generate revenue for reparations at the local level. Given that most states’ tax policies are regressive and not progressive, 608 a mansion tax would also tilt the balance in the direction of progressivity. Currently, the wealthy are able avoid paying taxes on many of their most valuable assets, which may include “stocks and bonds, real estate and personal possessions like boats, jewelry and artwork.” 609 A mansion tax would attempt to correct this tax avoidance by taxing arguably the most valuable asset of wealthy tax-payers.

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604 See id.
606 See id.
608 See discussion supra Part III.G.
Real property taxes on the values of homes “are levied at the local level in all states; sixteen states also have state property taxes.” 610 Because governments typically levy taxes annually, “this form of tax would produce revenue from the owners of expensive homes each year; [whereas] real estate transfer taxes produce revenue only when homes are sold.” 611

It is estimated that a “nationwide tax of 1 percent on homes over $1 million could generate about $47 billion per year,” 612 although there are legal barriers (such as constitutional bans on new taxes) in several states. 613

The Urban Institute estimated the revenue potential of a property tax surcharge of 1 percent on homes worth $2 million or more and 2 percent on homes worth $5 million or more in seven states plus the District of Columbia. In all states estimated, such a tax would fall on fewer than 2 percent of all homes, yet it would raise amounts ranging from $29 million (in Maine) to $4.3 billion (in California). 614

Together, the states could bring in more revenue through a mansion tax than the federal government currently generates from the Estate Tax.

4. **Real Estate Transfer Tax**

As a corollary to a mansion tax, a surcharge could also be levied on the real estate transfer tax paid on the sale or transfer of high-value homes. Seven states already do this, with increased rates of transfer tax applying at the following levels: 615

1. Connecticut: Increased tax rates on the transfer of property valued over $800,000 and again at $2.5 million. 616

2. District of Columbia: Higher transfer tax rates for properties exceeding $400,000. 617

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610 Id.
611 Id.
612 Id. at n.9.
613 See id. at n.10.
614 Id. at n.11.
615 See Leachman & Waxman, supra note 609.
3. Hawaii: Seven graduated transfer tax brackets with the highest bracket at $10 million.618

4. New Jersey: Increased rates on the transfer of property valued over $350,000 and again at $1 million.619

5. New York: Higher transfer tax rates for residences of $1 million or more, and in New York City, the tax rate is increased for homes valued at over $3 million, with graduated rates stepping up the tax to the highest bracket for homes over $25 million.620

6. Vermont: Higher transfer tax rates for properties exceeding $100,000.621

7. Washington State: Graduated rates increase for homes sold that are worth over $500,000, $1.5 million, and $3 million.622

Even a mansion tax imposed only on second homes or vacation homes (exempting primary residences from the tax) could conceivably raise significant revenue. If Evanston’s example of using increased tax revenue to provide funds for new home purchases, home improvements, and loan repayment is successful, more states and localities could implement their own systems of reparations using revenue generated from taxing wealthy landowners.

VI. CONCLUSION

The disappointment of partial emancipation suffered by Black people in this country rests, to a significant degree, upon the failure of the Andrew Johnson administration to figure property ownership at the core of what freed people were owed as repair for their enslavement and to recognize their identity as persons, not property. The racial caste system that developed to justify slavery continued in the American psyche, at both the individual level and at all levels of government, for decades to follow. It is not too late to repair the harm. By using the estate tax to fund reparations (starting with a truth-seeking, reconciliation process used in past examples of reparations), we can pivot the country away from the continuing racial wealth divide and shift to the egalitarian promise of Thomas Jefferson, where every person begins life’s journey from the same starting line.

620 See N.Y. Tax Law §§ 1402-a; 1402-b.
622 See Wash. Rev. Code Ann. § 82.45.060(1)(b).
Looking Toward Restorative Justice for Redlined Communities Displaced by Eco-Gentrification

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Looking Toward Restorative Justice for Redlined Communities Displaced by Eco-Gentrification

Helen H. Kang

MJEAL chose to publish Helen Kang’s piece, *Looking Toward Restorative Justice for Redlined Communities Displaced by Eco-Gentrification*, because it offers a unique analytic approach for analyzing the roots of environmental racism and the appropriate tools to help rectify it. She offers an argument for why restorative justice needs to be the framework and explains how we can accomplish this in the context of a whole government solution. MJEAL is excited to offer what will be an influential approach for environmental restorative justice to the broader activist and academic community.
INTRODUCTION

The de jure segregation of the Bayview–Hunters Point community in the famously progressive City of San Francisco, California, has had enduring impacts that current Black residents still face. ¹ The legacy of the

¹ Helen Kang is a Professor of Law and Director of the Environmental Law and Justice Clinic at Golden Gate University School of Law. The clinic was founded in 1994 to provide legal services to communities of color and low-income neighborhoods heavily burdened by pollution.

1. I use the terms “African American” and “Black” mostly interchangeably as my clients from Bayview–Hunters Point do with me. At times, I also use the same terms employed by data collectors or the authors I cite to, including the term “black.” As to the
invidious racial discrimination includes existing pollution from facilities that support the residents of the rest of the city, radioactive contamination at the Hunters Point Naval Shipyard that attests to our nation’s nuclear past, and lack of amenities such as access to healthy foods and sanitation services, in addition to other inequities in education and policing.

Still, the community has seen marked improvements in some respects: the only two power plants in the city that were located in the Bayview neighborhood are now gone, and the miles of trails along the southeastern shore of San Francisco are accessible to residents. Because of the displacement of the Bayview community’s Black population, in what has been labeled a “Black exodus,” however, most of the past residents who bore the burden of environmental disparities are no longer living in the historically Black neighborhood. The benefits of any positive developments in the community, therefore, do not inure to them. In fact, compounding the historical harms, eco-gentrification of the neighborhood is contributing to intensifying the displacement that began in the 1970s.

Seeking restorative justice for Bayview residents, past and present, thus requires recognizing the connections between de jure segregation, pollution, and displacement. The problems Bayview residents face are systemic problems rooted in its segregation past and the virulent prejudices Black communities still face. These systemic problems need systemic solutions. To remedy the injustices of this past, the traditional distributive and procedural lens typically employed to achieve environmental justice, while still fundamental, lends too narrow a focus. Instead, achieving true justice requires the hard work of achieving restorative justice: what has been wrested from these communities and residents should be restored to make them whole. Both the federal and local governments who were actors in creating the injustice should employ a restorative justice framework to redress the harm done to the displaced Bayview residents.

I. De Jure Segregation in the City of San Francisco and the Displacement of Black Residents from the Bayview–Hunters Point Neighborhood

As the Great Migration was transforming our nation, when six million African Americans escaped the Jim Crow South, cities that served as “receiving stations” took on the task of recreating the echoes of Jim Crow by intentionally creating segregated housing and, eventually,
neighborhoods. In *The Color of Law: A Forgotten History of How Our Government Segregated America*, Richard Rothstein details how during the New Deal era and after, governments at all levels intentionally “created segregation in every metropolitan area of the nation.” That is, “[t]oday’s residential segregation in the North, South, Midwest, and West is not the unintended consequence of individual choices and of otherwise well-meaning law or regulation but of unhidden public policy.”

In Rothstein’s telling, segregation in the San Francisco Bay Area serves as a particularly damning instance of government-sponsored or de jure segregation. In San Francisco, as in other areas of the San Francisco Bay Area such as East Palo Alto, Richmond, and West Oakland, the government created segregated areas where they did not previously exist: unlike in other metropolitan areas, there had been too few African Americans in areas like San Francisco for segregation patterns to cement themselves before the Great Migration of African Americans through the midst of World War II.

Beginning at least in 1942, both the U.S. government through the Navy and the City of San Francisco established segregated housing in the Bayview neighborhood. Once segregated, the demographic pattern hardened in Bayview as white residents moved out. The pattern also in-

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4. Id.

5. Rothstein, supra note 2, 13-14. Still, segregation in San Francisco existed before the Great Migration, even if San Francisco might not have been hyper-segregated. Bianca Taylor, How ‘Urban Renewal’ Decimated the Fillmore District, and Took Jazz with It, KQED (June 25, 2020), https://www.kqed.org/news/11825401/how-urban-renewal-decimated-the-fillmore-district-and-took-jazz-with-it (“San Francisco in the early 1900’s was segregated.”). Hypersegregation means the “separation of the races that was so total and complete that blacks and whites rarely intersected outside of work.” WILKERSON, supra note 2, at 447.

tensified when the city’s urban “renewal” policies displaced some African American residents from another part of the city into Bayview. Since the 1970s, demographics of the area have shifted, draining the neighborhood of longtime Black residents and their children in response to the pressures of gentrification and housing discrimination against low-income residents.

A. The De Jure Segregation of Bayview-Hunters Point

The Bayview and Hunters Point neighborhoods are located in southeast San Francisco, about six miles from downtown as the crow flies. The San Francisco Bay lies along the eastern shore of Hunters Point. The Bayview has historically been home to African Americans who sought a better life, away from the Jim Crow South. Among those pioneering residents were Pullman porters, members of the military, and civilian workers at the Hunters Point Naval Shipyard.\(^7\) Ironically, but reflective of the deeply-embedded racial hierarchies, these residents did not escape the reaches of Jim Crow even in San Francisco. The same underlying prejudices and the entrenched belief in the supremacy of the white race and the “otherness” of Black and other people of color that infected the Jim Crow South were prevalent in the city, as elsewhere.

Since before 1940, when the U.S. Navy assumed control of what was once a commercial drydock to use it as a shipyard for building, repairing, and maintaining naval ships, the shipyard was a presence in the Hunters Point neighborhood. Occupying some 500 acres, the site has a big footprint both physically and historically.\(^8\) During wartime, the shipyard employed as many as 17,000 to 18,500 people.\(^9\) Housing was in short supply as in other parts of the nation,\(^10\) and the City of San Francisco set about to build public housing to accommodate working families.\(^11\) When the San Francisco Housing Authority attempted to create integrated housing for “14,000 workers and their families” at the shipyard in 1942, the Navy objected on the basis that “integration would cause conflicts among workers and interfere with ship repair” much needed in the

\(^7\) ALBERT S. BROUSSARD, BLACK SAN FRANCISCO: THE STRUGGLE FOR RACIAL EQUALITY IN THE WEST, 1900-1954, at 133-34 (1993), and other sources cited in Kang, supra note 6, at 221 n.7 (2019).

\(^8\) Kang, supra note 6, at 224.

\(^9\) Id.

\(^10\) See generally Rothstein, supra note 2, at 17.

\(^11\) “Public housing’s original purpose was to give shelter not to those too poor to afford it but to those who could afford decent housing but couldn’t find it because none was available.” Id.
The housing authority then acquiesced and moved African Americans to “separate sections.” The housing authority advertised vacant units to other white San Francisco residents, even as African American workers remained on the waitlist for available units.

B. Continuation of De Jure Segregation Through Redlining and Other Government Actions

As Rothstein chronicles, de jure segregation entailed government-initiated discriminatory lending and mortgage guarantee policies, which limited the freedom of people of color, particularly Black people, to live where they wished. These policies, supported by cities and their departments, affected not only Black families in the post-Depression era but also their descendants, severely limiting access to adequate education, health care, and the ability to pass on accumulated wealth that might have been gained through building equity in residential property.

Specifically, mortgage insurers or guarantors such as the Federal Housing Administration and U.S. Department of Veteran Affairs denied African American homeownership in most suburbs. In addition, preceding those practices, the Home Owners’ Loan Corporation (“HOLC”) created “Residential Security Maps” that divested African Americans of access to home loans and a chance at building wealth in urban areas where they lived. Created purportedly to assess mortgage risks, the

HOLC mortgages were amortized, meaning that each month’s payment included some principal as well as interest, so when the loan was paid off, the borrower would own the home. Thus for the first time, working- and middle-class home-owners could gradually gain equity while their properties were still mortgaged. If a family with an amortized mortgage sold its home, the equity (including any appreciation) would be the family’s to keep.

12. Id. at 27.
13. Id. at 28.
14. Id.
15. As Rothstein explains,


16. “[T]he Federal Housing Administration and Veterans Administration not only refused to insure mortgages for African Americans in designated white neighborhoods . . . [but] also would not insure mortgages for whites in a neighborhood where African Americans were present.” Rothstein, supra note 2, at 12.
HOLC maps coded areas like Hunters Point where African Americans lived with the color red, which designated areas that HOLC determined to present the highest loan risk, regardless of whether “it was a solid middle-class neighborhood of single-family homes.” The areas with the “safest” mortgage risks were coded green.

Mapping Inequality updates the study of New Deal America, the federal government, housing, and inequality for the twenty-first century. It offers unprecedented online access to the national collection of “security maps” and area descriptions produced between 1935 and 1940 by one of the New Deal’s most important agencies, . . . HOLC (pronounced “holk”). HOLC recruited mortgage lenders, developers, and real estate appraisers in nearly 250 cities to create maps . . . and their accompanying documentation [that] helped set the rules for nearly a century of real estate practice. . . . [M]ore than a half-century of research has shown housing to be for the twentieth century what slavery was to the antebellum period, namely the broad foundation of both American prosperity and racial inequality.

See also University of Richmond, Mapping Inequality, DATA-SMART CITY SOLUTIONS (2017), https://datasmart.ash.harvard.edu/solutions/mapping-inequality.
C. Intensification of Segregation and the Subsequent Displacement of African Americans Out of the City

Several economic and policy developments devastated the African American residents of the city in the post-war decades. In the 1960s and 1970s, changes in the maritime industry in San Francisco and the closure of the Hunters Point Naval Shipyard resulted in crushing job losses for African Americans in Bayview. In those decades and since, the efforts led by the city government first resulted in concentrating the city’s Black residents in Bayview, intensifying segregation, and then, after the 1970s, displacing them from the city. Although come to be known as the “Black exodus,” there was no Moses leading these residents into the land of milk and honey—more accurately, the movement resulted from expulsion, whether intentional or not.  

1. Displacement: Out of the Western Addition

Around the same time the housing authority of the City of San Francisco had intentionally segregated the housing at the Hunters Point shipyard, the authority created segregated housing in the Western Addition—four buildings for white families and one for African Americans. One of the few areas where African Americans and immigrants from both Europe and Asia could live in the city, the Western Addition, including the Fillmore District in its eastern section, became a thriving cultural center for the city’s Black residents, as Black residents began to occupy some of the residences and businesses. In 1947, however, the San Francisco Planning and Housing Association published a report called “Blight and Taxes,” arguing that the city’s “cancerous growth” of areas like the Western Addition were imposing cost burdens on the residents in “better areas” and that “it costs more to keep the slums than to tear them down and rebuild.”

Subsequently, pursuant to the federal 1949 Housing Act, under which many urban areas considered “slums” were demolished for development funding, the City of San Francisco targeted the “low income and not-white” and once-integrated area of the Fillmore, whose residents by then were mostly Black, for the largest redevelopment project on the west coast. Over 4,700 households “were forced out of their homes, often without much warning or adequate compensation,” through eminent domain, and the city evicted 13,000 more people; nearly “2,500 Victorian homes were demolished” once the bulldozers that began their work finished. About 900 businesses were shut down, among them Black-owned banks, small businesses such as retail shops and barbershops, and entertainment businesses, including jazz clubs that featured the famous

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21. Kang, supra note 6, at 257; Taylor, supra note 5.
22. San Francisco Planning and Housing Association, Blight and Taxes 1, 10 (1947).
23. Taylor, supra note 5. See also Erlich, supra note 19, at 33, 38.
artists of the time. The city’s redevelopment agency evicted renters and property owners and gave them “Certificates of Preference vouchers to return upon the properties’ redevelopment, and $25 to $50 for moving expenses.” But affordable replacement housing promised to residents largely failed to materialize at the end of the decades-long redevelopment process and in the aftermath of the physical destruction of the neighborhood. Most Black families were displaced; some of the displaced residents during the lengthy process moved into Bayview; some moved out of the city altogether into Oakland across the bay and farther out to Antioch, Fairfield, Pittsburg, and Vallejo, and still farther out to Stockton.

In the end, the Western Addition’s urban renewal was a failure by any reckoning.

2. Displacement: Out of Bayview-Hunters Point

Bayview is no longer a majority Black neighborhood and has been that way since the beginning of the new century. Asian Americans and Latinos—even separately—far outnumber Black residents. As of 2017,

25. Fulbright, supra note 24. Recounting the history of the “redevelopment,” a former resident of the Western Addition estimates that there were at least 600 Black-owned businesses in the Western Addition. Arnold Townsend, It Was Too Late, in (DIS)LOCATION: BLACK EXODUS 51, 52 (2019), https://antievictionmap.com/dislocation black-exodus.

26. Erlich, supra note 19, at 38.

27. Id. at 40-41 (describing the 1985 addition of condominiums, the razing of public housing, and racial targeting of Blacks in the Western Addition by the police).

28. Id. at 31.


Black residents were ten percent of the neighborhood’s population, as compared to 72 percent in 1970.\textsuperscript{31}

This “Black exodus,” more accurately characterized from the residents’ point of view as an “expulsion,” has largely been attributed to economic factors such as the prohibitive cost of living in San Francisco from the influx of dot com workers. But the realities are far more complex and evade systematic study through a simplistic review of demographics data, as Sarah Erlich’s work, centered on resident interviews, demonstrates:

Many African Americans I interviewed feel systematically excluded and targeted for expulsion from San Francisco. Furthermore, interviewees separately and repeatedly identified calculating and criminalizing instigators of displacement [aside from the city’s policy in the Western Addition:] San Francisco Housing Authority’s demolition of public housing and enforcement of a “One Strike and You’re Out” law for public housing residents; the San Francisco Police Department’s enforcement of gang injunctions in the Western Addition and Bayview Hunters Point; and real estate agencies’ and banks’ issuance of subprime mortgage loans[,] the exorbitant expense to rent or own housing in San Francisco; the level of violent crime and environmental health hazards that pervade the few neighborhoods African Americans find accessible in the housing market; the underinvestment in public education, which undermines the city’s appeal for raising children; and the absence of a visible African American middle class.\textsuperscript{32}

Nevertheless, Bayview faces enormous pressures from gentrification: residents who owned homes are growing old, and the next generation can no longer afford to live in the houses where their grandparents and parents built their lives and community.\textsuperscript{33} Targeting Bayview residents for

\textsuperscript{31.} \textit{American Community Survey 1-year estimates}, \textit{supra} note 31.

\textsuperscript{32.} Erlich, \textit{supra} note 19, at 30. Erlich points out that income as a reason for displacement does not fully bear out; a significant percentage of upper (63 percent) and middle class (33 percent) Black residents moved out of the city between 2000 and 2009. \textit{Id.} Residents viewed the gang injunction, which the San Francisco City Attorney obtained, as a method of eradicating Black families from San Francisco because broad application of the injunction forced youth targets and their families to be expelled from public housing. \textit{Id.} at 43–44.

\textsuperscript{33.} The neighborhood has traditionally enjoyed high homeownership by African Americans who had stable employment. U.S. Census Bureau, \textit{Census Explorer}, http://www.census.gov/censusexplorer/censusexplorer.html (census tracts 231.03, 232,
subprime mortgages also resulted in foreclosures.  

Adding further to the pressures, the City of San Francisco is in the midst of erecting a 750-acre city within a city, redeveloping Candlestick Park stadium and Hunters Point shipyard, which is in the process of being remediated because it is contaminated with hazardous wastes, most famously nuclear waste from the Cold War years.  

Known as the biggest redevelopment in the city’s modern history, with expected investments in the billions of dollars, the redevelopment envisions creating 12,000 housing units alongside five million square feet of commercial and retail space and 350 acres of public space, including cultural centers and parks.  

Once finished, the developments at the shipyard and Candle Stick Park stadium to the south (and other developments in the works to the west) will be dotted with parks and bayside trails: “Think ‘Crissy Fields meet the High Line.”  

Adding to this dramatic change in the neighborhood, one of the two shuttered power plant sites is also slated for development.  

In the words of one community activist whose mother was among those evicted from the Western Addition and found a home in Bayview, the new development is not for “her or for her grandchildren”:  

“It would be positive if they cleaned up... parks and made them really nice and left open space, because it used to be a community of children... Unfortunately, the plan is to tear down and make walkways. To tear down all of the old buildings... Put grass over it. And make a few docks and restaurants where people with boats from as far away as Oakland, Richmond, and San Jose can sail up and pull over... and have lunch or dinner. Nice restaurants and music areas, stroll through the wetlands and that kind of thing. And I'm thinking, ‘Wow. How many folks do you know that live in public...
housing, personally? And how many of them do you know
own boats?”

Those are words of Marie Harrison, who had more searing words
that capture the Bayview residents’ sentiments about the massive redevel-
opment taking over their neighborhood:

“When you sit [in] a room full of poor folks on one side and
homeowners on the other side, who are trying to bring all of
this... ‘greening’ into our areas, and trying to pass it off as
something that’s going to be good and healthy for you, and
you can’t see through that? And I’m saying, ‘Good Lord!
We’re black, we’re not stupid.’”

II. CONNECTING THE DOTS: FROM REDLINING TO INJUSTICE IN
BAYVIEW-HUNTERS POINT

Although researchers have not yet comprehensively layered inter-
secting dimensions of inequalities in historically redlined communities –
i.e., pollution, food insecurity, police violence, urban redevelopment
based on “blight,” provision of public services, among others – they are
on their way of doing so. Notably, the National Community Rein-
vestment Coalition (“NCRC”) recently published a report, “Redlining
and Neighborhood Health,” demonstrating a greater incidence of
COVID-19 risk factors in once redlined neighborhoods; relatedly, other
studies are finding that Black populations in the United States dispropor-

39. Id. Marie Harrison is a longtime advocate and resident of Bayview, whose family
was pushed out of the Western Addition in the 1960s and then moved to Stockton in
2016. Id.; Fulbright, supra note 24. Harrison describes her mother’s struggle to find substi-
tute housing after the Western Addition eviction. Id.

40. Harshaw, supra note 36. The interactive map at Mapping Inequality lends itself to
layering. See, e.g., Brad Plumer & Nadja Popovich, How Decades of Racist Housing Policy
/interactive/2020/08/24/climate/racism-redlining-cities-global-warming.html (historically
redlined neighborhoods have less tree canopy coverage, which makes them hotter in
summers and more dangerous to residents as the climate continues to warm).

41. These inequities are markers of systemic racial discrimination. Such discrimination
“refers to the interlocking of racial disparities across multiple dimensions: residential loca-
tion, education, employment and income, access to financial services and credit, justice,
healthy food, a clean environment and quality of health services.” Jason Richardson,
Bruce C. Mitchell, Jad Edlebi, Helen C.S. Meier & Emily Lynch, The Lasting Impact of
Historic “Redlining” on Neighborhood Health: Higher Prevalence of COVID-19 Risk Factors 6,
NATIONAL COMMUNITY REINVESTMENT COALITION (2020) [hereinafter “NCRC Re-
port”], https://ncrc.org/holc-health/ (citing Barbara Reskin, The Race Discrimination Sys-
tem, 38 ANN. REV. OF SOC. 17 (2012)).
tionately suffer and die from COVID-19. These results are consistent with research concluding that “[r]acial residential segregation is a foundation of structural racism, and contributes to racialized health inequities.” In particular, health researchers note that racialized differences in health outcomes are consistent with research connecting elevated health risks and reduced access to health care in formerly redlined areas, on the one hand, and segregation and socio-economic factors and health outcomes, on the other.

Specific to Bayview, connecting the formerly redlined areas of Bayview with a measure of social vulnerability, NCRC’s report shows that the neighborhood, even with post-1970 demographic changes, is highly vulnerable: D16 and a part of D17, which are part of Bayview in the HOLC map (Figure 1), register Social Vulnerability Indices of 0.779 and 0.928, on a zero-to-one scale, based on the 2018 Center for Disease Control and Prevention’s data. The Social Vulnerability Index, however, does not account for pollution. Bayview also ranks among the highest


43. NCRC Report, supra note 41, at 27; see Nancy Krieger, Gretchen Van Wye, Mary Huynh, Pamela Waterman, Gil Marduro, Wenhui Li & R. Charon Gwynn et al., Structural Racism, Historical Redlining, and Risk of Preterm Birth in New York City, 2013-2017, 110 AM. J. OF PUB. HEALTH 1046, 1050 (July 2020) (“80 years after the HOLC grades were delineated . . ., they remained associated with contemporary risk of preterm births” in New York City).

44. Krieger, supra note 43, at 1050; Parpia, supra note 42, at .

in the State of California on a measure of inequity based on pollution burden and socio-economic factors, called CalEnviroScreen. CalEnviroScreen is a tool that factors in twenty indicators of cumulative pollution exposure and burden and population characteristics for each of California’s 1,800 census tracts and ranks them. Race is not among the twenty factors taken into account but is reported on the CalEnviroScreen mapping tool. All of the areas east of Third Street, the main thoroughfare east of 101 North, which are part of Bayview, score in the 85 to 90th percentile, except the area in the figure below marked in the color aqua, which scores in the 90 to 95th percentile, meaning that the burden is higher than the 85 to 95 percent of the census tracts in California.


47. Id.

48. Id.

49. See SB 535 Disadvantaged Communities, CALIFORNIA OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT (last updated June 2017), https://oehha.ca.gov/calenviroscreen/sb535. The census tracts do not correspond neatly to the neighborhood boundaries of Bayview. Pollution sources in Bayview are numerous: the largest percentage of industrial sites, brownfields, and leaking underground fuel tanks in San Francisco are located there, as are multiple sources of air pollution. The only two power plants in the city existed in the neighborhood until they were shuttered through community efforts. The older of the two wastewater treatment plants in the city handing 80 percent of the city’s sewage—and created odor problems for residents—still operate there, as does a biodiesel plant that handles animal carcasses. Most publicized of all is the Hunters Point shipyard, which is a Superfund site contaminated with radioactive and other hazardous substances, including from the radiation laboratory that operated there, as noted above. Kang, supra note 6, at 223; see also Miriam Solis, Conditions and Consequences of ELULU Improvement: Environmental Justice Lessons from San Francisco, CA, J. OF PLANNING ED. & RES. (2020), https://doi.org/10.1177/0739456X20929407. A long-time advocate, the Bayview Hunters Point Community Advocates also reports that Bayview lacks groceries and pharmacies. The area also floods and experiences sewage overflows.
At the same time that these tools and efforts highlight the connection between the enduring legacy of redlining, they also illustrate the imperfection inherent in hewing to the HOLC maps to census-tract level data that are generally considered more finetuned. For example, the development of the Social Vulnerability Index postdates the peak period of Black residency in Bayview, the 1970s, and thus assessing the 1970s population characteristics against measures of vulnerability is not simple. Nor do tools like CalEnviroScreen allow for historical pollution assessments. For example, in the 1970s, when the Black population in Bayview was at its height, two power plants were in operation, emitting large amounts of pollution. In other words, it is difficult to connect the dots of segregation and redlining to pollution and other disamenities: the measures of inequality are imperfect because the relevant data are limited or difficult to mine, and the displacement of Black residents in redlined communities make it tricky to connect the dots between the conditions and the harms of segregation. With more of these endeavors studying and reporting the inequalities, the intersectionality of womb-to-grave inequalities among

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50. SB 535 Disadvantaged Communities, supra note 49.
51. CEJA CalEnviroScreen Report, supra note 46, at 51.
Black populations across the nation will become even more powerfully graphic.\(^53\) Regardless of whether the inequities can be mapped, however, there is basis for hypothesizing the connection between the redlining practices and 21st century inequities. Like Bayview, following segregation and divestment of resources, redlined areas elsewhere in the country show similar characteristics, which are connected to negative health outcomes: limited “place-based resources for healthy living as features of the built environment, environmental pollution, quality and availability of housing stock, access to transportation, presence of local employers and access to well-paying jobs, presence of and access to well-resourced schools, and access to and quality of health facilities, food stores, bank branches, social services, and parks and recreational facilities.”\(^54\) Needless to say, these are neighborhood characteristics that are harms in themselves, not just causal linkages to health harms.\(^15\)

![Hypothesized Pathways](image)

53. Kang, supra note 6, at 255-56 (discussion of multiple inequalities for Black Americans).
55. In turn, pollution in areas like Bayview affects children’s cognition; air pollution also diminishes academic opportunities when the resulting illnesses like asthma increase the number of days children miss school, which then affects educational outcomes. See James K. Boyce, Klara Zwickl & Michael Ash, Three Measures of Environmental Inequality, INSTITUTE FOR NEW ECONOMIC THINKING, Working Paper No. 12, at 6-7 (Aug. 1, 2015), http://ssrn.com/abstract=2638089.
Likewise, gentrification and displacement also cause harm. Take the residents of the Western Addition who were displaced. They were not simply deprived of their property. According to community leaders, they suffered health harms; this anecdotal evidence is supported by literature on health impacts of displacement. Studies document that “populations displaced by gentrification, as compared to those who remained, typically have shorter life expectancy, higher cancer rates, more birth defects, greater infant mortality, and higher incidences of asthma, diabetes, and cardiovascular disease.” For African Americans in California, “gentrification was associated with poor self-rated health.” Displacement can also profoundly harm mental health. Other impacts include loss of culture (in what some characterize as “cultural homicide”), sense of place, community, and neighborhood resilience.

58. The Rev. Amos Brown described the destruction of the Fillmore-Western Addition District:

There is still [forty years later] frustration, hopelessness and a negative mindset on the part of the African American community because of what redevelopment did . . . . They wiped out our community, weakened our institutional base and never carried out their promise to bring people back.

Fullbright, supra note 24. This displacement led James Baldwin to remark, “redevelopment is “removal of Negroes” and that despite San Francisco’s progressive image, it was no different from Birmingham, Alabama.” Taylor, supra note 5.
59. Tehrani, supra note 15, at 8.
60. Id.
61. Id. at 9.
62. Townsend, supra note 25, at 52 (antieviction mapping mag).
63. Tehrani, supra note 15, at 8-9. “Many say they feel like strangers in their own city.” Other less well-known impacts from the displacement of Black residents from the Western Addition to Bayview relate to “violent turf battles . . . [in] the volatile drug market.” Erlich, supra note 19 at 31. See also Taylor, supra note 5.
III. Looking Outside the Traditional Environmental Toolbox to a Multi-faceted Approach to Achieve Restorative Justice

So far, I have argued that the problems Bayview residents face are those rooted in its segregation past, whose tentacles reach to the present. In the intervening years, the virulent prejudices Black communities have faced as a result of systemic racism further entrenched the mind-boggling destruction of Black people and their culture. In this decade, the cleanup of the shipyard, rather than being celebrated, is resulting in unabated displacement of Bayview’s original Black population. Indeed, Marie Harrison, in describing how the new Bayview is not for her, is describing what happens with “eco-,” “green,” or environmental gentrification— in the words of another, when redevelopment focuses on place instead of on people. The benefits of the complex and colossal environmental cleanup and the creation of highly desirable greenspace will not inure to the people who once lived in Bayview or their children and grandchildren. Instead, as some Bayview residents poignantly describe, the displaced and the soon-to-be displaced have simply served as human filters, carrying with them body burdens of pollution. Compounding the injustice, these residents have historically toiled to have Bayview cleaned up. This environmental injustice, where the displaced cannot benefit from the cleanup even though they bore the brunt of the cumulative pollution in Bayview, cannot be redressed with environmental solutions. This injustice is a result of systemic problems requiring systemic solutions.

A. The Neglected Framework of People-Based Restorative Justice

Academic literature on environmental justice has focused primarily on distributive and procedural injustices, with a few notable exceptions. Environmental advocacy and litigation brought on behalf of environmental justice communities (“EJ communities”), too, have focused on re-

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65. See Kang, supra note 6, at 223-45.

dressing those injustices; in addition, because of the nature of the remedies under environmental laws, litigation has focused on corrective justice—penalties and injunctive relief.\textsuperscript{67} The reasons are somewhat obvious. First, the descriptions of communities that are considered EJ communities rely on the distributive injustice of disproportionality of pollution and environmental benefits such as green space, access to healthy foods, and basic amenities, including safe drinking water and utility and public services. Even President Clinton’s Executive Order No. 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” focuses on the disproportionality of pollution and benefits and public participation.\textsuperscript{68} Second, one of the very reasons that distributive and procedural injustices afflict EJ communities is attributable to the failure of governments, corporations, and the nation’s laws to address disproportionate environmental burdens and barriers to public participation: more than forty years since environmental justice became a rallying cry, communities of color still bear a disproportionate pollution burden, as study after study document. And, EJ communities remain largely uninvited to, or only nominally sit at, the table when they


are the ones most acutely harmed. It is thus natural for distributive and procedural injustices to stand out. Third, and perhaps foremostly, though, within our current political system, distributive and procedural injustices can at least partially be redressed or corrected through the legal system, even though the available remedies may be woefully insufficient, and slippages in the legal system shortchange achievement of justice. For example, communities can at least attempt to fight additional pollution sources and seek to be included in decision-making.

For these and perhaps other reasons, while focusing on distributive, procedural and, at times, corrective justice, academic literature on environmental justice is sparse on restorative justice. This is not to say scholars have ignored restorative justice. At times, it may be subsumed under the concept of social justice.

In this context, it may not be surprising that restorative justice is rarely the focus of any policy at any level of government for redressing environmental harms. Rarely have the harms imposed on EJ communities been redressed to make the community whole, whatever that may be. Yet restorative justice, particularly people-based restorative justice, not just environmental cleanup, is a critical lens to employ if we as a society are to fulfill the moral responsibilities that follow from the injustices done to EJ communities.

In contrast to governmental efforts to redress environmental injustice, grassroots advocates have embraced concepts of people-based restorative justice to redress environmental harms that are intimately connected with injustices resulting from the segregation past and present. Recently, for example, in evaluating a class action settlement resulting from the Flint water crisis in Michigan, advocates made clear that remedies available through employing the traditional lens of justice were inadequate to make Flint whole:

> [P]art of the work of justice is empowering community members to determine for themselves what justice means and when justice has been done. . . . [O]utside assessments of harm have repeatedly failed to capture the scope of our crisis, incorporate community knowledge and concerns and imagine what it will

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69. See, e.g., Kang, supra note 67.


take for the community to thrive as opposed to merely surviving.

... We will still be expecting adequate health care and wraparound services. We will still be expecting the repeal of [Michigan] emergency manager laws that stripped us of democracy and put our water under the control of unelected autocrats. And we will be insisting, as always, that people ask us and our fellow residents before concluding that Flint has been made whole.72

Like these grassroots advocates, labor unions before them began to use the restorative justice frame in the 1980s in advocating for job restoration to their members hurt by large-scale shuttering of fossil-fuel industries.73

Governments who were actors in creating the disparities should employ this people-based restorative justice framework to redress the harm done to the displaced Bayview residents.

B. Opportunities to Incorporate Restorative Justice: A Whole-of-Government Approach

Solutions being proposed in response to the recent call for racial justice that arose during the COVID-19 pandemic, as well as the deepening climate crisis driving the move toward the Green New Deal, offer unparalleled opportunities for making whole displaced communities, including the Bayview community. So does the reparations movement that has been building, even though it has not seen traction in Congress. Remarkably, a recent report from the Lancet Commission on Public Policy and Health in the Trump Era recommended legislative action to “[c]ompensate Native Americans, Native Hawaiians, Puerto Ricans and

73. McCauley, supra note 70, at 4–5.
African Americans for the wealth denied to and confiscated from those groups in the past.”

The Biden-Harris administration, in particular, has adopted a whole-of-government approach to environmental justice, which may be the closest approach to applying the restorative framework to achieve environmental justice (even though the administration has not referred to the framework). That it may be the “closest” also does not mean that it indeed is envisioned to achieve restorative justice. The new administration, however, has recognized that addressing environmental justice is not simply a matter of tinkering at the edges – that deeply-rooted problems require multi-agency collaboration. The Biden-Harris administration, which appears to be responding to the call for racial justice reforms, at least in its early actions, should take the opportunity to solve the problem of racial injustice in communities like Bayview and the problems the federal government actively participated in causing.

Solutions will not be easy. In fact, it may take a new Marshall Plan-like effort, as some Black leaders in San Francisco have in the past called for. Solutions may be too complex because of the deeply-entrenched nature of systemic discrimination and the enormity of the problems it left in its wake. But without envisioning achievement of restorative justice for the people of Bayview (and not just the place of Bayview), the envi-

75. Executive Order on Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Jan. 27, 2021). Interestingly, the Biden-Harris administration announced a people-based restorative justice approach to redressing the harm done to families forcibly separated at the U.S.-Mexican border under the previous administration’s immigration policy, promising to “address the family needs, so we are acting as restoratively as possible.” Press Briefing by Press Secretary Jen Psaki and Secretary of Homeland Security Alejandro Mayorkas, THE WHITE HOUSE (Mar. 1, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/03/01/press-briefing-by-press-secretary-jen-psaki-and-secretary-of-homeland-security-alejandro-mayorkas/.
77. As Reskin has proposed, attacking systemic racism will involve at the very least “identifying and intervening at leverage points, implementing interventions to operate simultaneously across subsystems, isolating subsystems from the larger discrimination system, and directly challenging the processes through which emergent discrimination strengthens within-subsystem disparities.” Reskin, supra note 41. Reskin, however, is concerned in her article with fixing the system and perhaps is addressing social justice. Kuehn, supra note 97, at 10697 (“The demands of social justice are . . . first, that the members of every class have enough resources and enough power to live as befits human beings, and second, that the privileged classes, whoever they are, be accountable to the wider society for the way they use their advantages.”) (citations omitted). In this article, I am concerned with making whole the people the government left behind.
Restorative Justice for Redlined Communities

The environmental justice movement will fail its founding as a transformative movement.

CONCLUSION

The federal and local governments created Bayview as a segregated community. The city then intensified this segregation when it destroyed the Western Addition, eliminating one of the two areas where most of the city’s Black population lived. In recent years, the city’s mega-redevelopment effort is once again displacing the city’s Black population.

Meanwhile, the most notable features that signified the polluted landscape of the Bayview community—the power plants and the stacks that once emitted pollution right at the level of the residences uphill—are gone, primarily as a result of the persistent advocacy of the community. Significant green space is also being created and envisioned. Yet, having been subject to the harms of segregation, African Americans who once lived in Bayview are not there to enjoy the fruits of their labors. Instead, the displaced are likely occupying yet another landscape dotted with pollution sources.

To remedy the injustices of this past, the focus on environmental justice is too narrow a vision, while still fundamental. The solutions require a whole-of-government approach.

78. See Dorcetta Taylor, The Rise of the Environmental Justice Paradigm, 43 AM. BEH. SCI. 508, 521 (2000) (characterizing the environmental justice movement as a “transformative movement,” seeking “broad or sweeping changes in the social structure and its ideological foundation” and contrasting the movement with reformatory movements that seek to make incremental change).
To address the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to study and consider a national apology and proposal for reparations for the institution of slavery, its subsequent de jure and de facto racial and economic discrimination against African Americans, and the impact of these forces on living African Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 2021

Ms. JACKSON LEE (for herself, Ms. PLASKETT, Mr. RUSH, Mr. ESPAILLAT, Mrs. WATSON COLEMAN, Ms. NORTON, Ms. CASTOR of Florida, Ms. LEE of California, Mr. KHANNA, Mrs. BEATTY, Mr. MCNERNEY, Mr. NORCROSS, Mr. RUPPERSBERGER, Ms. ESHOO, Mr. COOPER, Mr. CONNOLLY, Ms. MENG, Mr. RASKIN, Mr. WELCH, Mrs. TRAHAN, Ms. PRESSLEY, Ms. CLARKE of New York, Mr. JEFFRIES, Mr. SARBANES, Mr. BISHOP of Georgia, Ms. DEGETTE, Mr. KILDEE, Ms. BONAMICI, Mr. GREEN of Texas, Ms. MOORE of Wisconsin, Mrs. DINGELL, Ms. ADAMS, Ms. WILLIAMS of Georgia, Mr. BEYER, Ms. CLARK of Massachusetts, Mr. CROW, Mr. SUCOSZI, Mr. CICILLINE, Mr. NADLER, Mr. MCGOVERN, Ms. DELBENE, Mr. LYNCH, Mr. JONES, Mr. BLUMENAUER, Mr. KEATING, Mr. NEGUZE, Ms. BLUNT ROCHESTER, Mr. EVANS, Ms. SPEIER, Ms. MCCOLLUM, Ms. JAYAPAL, Mr. MEEKS, Ms. STRICKLAND, Ms. SCANLON, Ms. VEJÁLQUIZQUEZ, Mr. DEUTCH, Mr. COHEN, Mr. PAYNE, Mr. MORELLE, Ms. WILSON of Florida, Mrs. DEMINGS, Mr. BERA, Mr. TAKANO, Mr. BRENDA F. BOYLE of Pennsylvania, Ms. SCHAKOWSKY, Mrs. LAWRENCE, Ms. TITUS, Mr. LIEU, Mr. MFUME, Mr. CARSON, Ms. FUDGE, Mr. DAVID SCOTT of Georgia, Ms. BARRAGÁN, Mr. QUIGLEY, Mr. DANNY K. DAVIS of Illinois, Mr. VARGAS, Mr. LARSON of Connecticut, Mr. THOMPSON of Mississippi, Mr. BROWN, Ms. WASSERMAN SCHULTZ, Mr. LOWENTHAL, Mr. KILMER, Mr. NEAL, Mr. PALLONE, Ms. SEWELL, Ms. MATSUI, Mr. LAWSON of Florida, Mr. THOMPSON of California, Mr. YARMUTH, Mr. COSTA, Mr. HORSFORD, Ms. PINGREE, Mr. SOTO, Ms. DEAN, Mrs. HAYES, Mr. CASTEN, Mr. DESAULNIER, Mr. POCAN, Mr. GOMEZ, Mr. VEASEY, Miss RICE of New York, Ms. LOFGREN, Mr. JOHNSON of Georgia, Ms. KAPITUR, Ms. OMAR, Ms. BASS, Mr. PETERS, Ms. GARCIA of Texas, Ms. ESCOBAR, Mr. SWALWELL, Mr. BUTTERFIELD, Ms. KELLY
of Illinois, Mr. Bowman, Ms. Ocasio-Cortez, Ms. Tlaib, Ms. Chu, Mr. Panetta, Mr. Foster, and Ms. Bush) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To address the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to study and consider a national apology and proposal for reparations for the institution of slavery, its subsequent de jure and de facto racial and economic discrimination against African Americans, and the impact of these forces on living African Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Commission to Study and Develop Reparation Proposals for African Americans Act”.

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

(1) approximately 4,000,000 Africans and their descendants were enslaved in the United States and colonies that became the United States from 1619 to 1865;
(2) the institution of slavery was constitutionally and statutorily sanctioned by the Government of the United States from 1789 through 1865;

(3) the slavery that flourished in the United States constituted an immoral and inhumane deprivation of Africans’ life, liberty, African citizenship rights, and cultural heritage, and denied them the fruits of their own labor;

(4) a preponderance of scholarly, legal, community evidentiary documentation and popular culture markers constitute the basis for inquiry into the ongoing effects of the institution of slavery and its legacy of persistent systemic structures of discrimination on living African Americans and society in the United States;

(5) following the abolition of slavery the United States Government, at the Federal, State, and local level, continued to perpetuate, condone and often profit from practices that continued to brutalize and disadvantage African Americans, including sharecropping, convict leasing, Jim Crow, redlining, unequal education, and disproportionate treatment at the hands of the criminal justice system; and

(6) as a result of the historic and continued discrimination, African Americans continue to suffer
debilitating economic, educational, and health hardships including but not limited to having nearly 1,000,000 Black people incarcerated; an unemployment rate more than twice the current White unemployment rate; and an average of less than $\frac{1}{16}$ of the wealth of White families, a disparity which has worsened, not improved over time.

(b) PURPOSE.—The purpose of this Act is to establish a commission to study and develop Reparation proposals for African Americans as a result of—

(1) the institution of slavery, including both the Trans-Atlantic and the domestic “trade” which existed from 1565 in colonial Florida and from 1619 through 1865 within the other colonies that became the United States, and which included the Federal and State governments which constitutionally and statutorily supported the institution of slavery;

(2) the de jure and de facto discrimination against freed slaves and their descendants from the end of the Civil War to the present, including economic, political, educational, and social discrimination;

(3) the lingering negative effects of the institution of slavery and the discrimination described in
paragraphs (1) and (2) on living African Americans
and on society in the United States;

(4) the manner in which textual and digital in-
structional resources and technologies are being used
to deny the inhumanity of slavery and the crime
against humanity of people of African descent in the
United States;

(5) the role of Northern complicity in the
Southern based institution of slavery;

(6) the direct benefits to societal institutions,
public and private, including higher education, cor-
porations, religious and associational;

(7) and thus, recommend appropriate ways to
educate the American public of the Commission’s
findings;

(8) and thus, recommend appropriate remedies
in consideration of the Commission’s findings on the
matters described in paragraphs (1), (2), (3), (4),
(5), and (6); and

(9) submit to the Congress the results of such
examination, together with such recommendations.

SEC. 3. ESTABLISHMENT AND DUTIES.

(a) Establishment.—There is established the Com-
mission to Study and Develop Reparation Proposals for
African Americans (hereinafter in this Act referred to as the “Commission”).

(b) Duties.—The Commission shall perform the following duties:

(1) Identify, compile and synthesize the relevant corpus of evidentiary documentation of the institution of slavery which existed within the United States and the colonies that became the United States from 1619 through 1865. The Commission’s documentation and examination shall include but not be limited to the facts related to—

(A) the capture and procurement of Africans;

(B) the transport of Africans to the United States and the colonies that became the United States for the purpose of enslavement, including their treatment during transport;

(C) the sale and acquisition of Africans as chattel property in interstate and intrastate commerce;

(D) the treatment of African slaves in the colonies and the United States, including the deprivation of their freedom, exploitation of their labor, and destruction of their culture, language, religion, and families; and
(E) the extensive denial of humanity, sexual abuse and the chattellization of persons.

(2) The role which the Federal and State governments of the United States supported the institution of slavery in constitutional and statutory provisions, including the extent to which such governments prevented, opposed, or restricted efforts of formerly enslaved Africans and their descendants to repatriate to their homeland.

(3) The Federal and State laws that discriminated against formerly enslaved Africans and their descendants who were deemed United States citizens from 1868 to the present.

(4) The other forms of discrimination in the public and private sectors against freed African slaves and their descendants who were deemed United States citizens from 1868 to the present, including redlining, educational funding discrepancies, and predatory financial practices.

(5) The lingering negative effects of the institution of slavery and the matters described in paragraphs (1), (2), (3), (4), (5), and (6) on living African Americans and on society in the United States.

(6) Recommend appropriate ways to educate the American public of the Commission’s findings.
(7) Recommend appropriate remedies in consideration of the Commission’s findings on the matters described in paragraphs (1), (2), (3), (4), (5), and (6). In making such recommendations, the Commission shall address among other issues, the following questions:

(A) How such recommendations comport with international standards of remedy for wrongs and injuries caused by the State, that include full reparations and special measures, as understood by various relevant international protocols, laws, and findings.

(B) How the Government of the United States will offer a formal apology on behalf of the people of the United States for the perpetration of gross human rights violations and crimes against humanity on African slaves and their descendants.

(C) How Federal laws and policies that continue to disproportionately and negatively affect African Americans as a group, and those that perpetuate the lingering effects, materially and psycho-social, can be eliminated.

(D) How the injuries resulting from matters described in paragraphs (1), (2), (3), (4),
(5), and (6) can be reversed and provide appropriate policies, programs, projects and recommendations for the purpose of reversing the injuries.

(E) How, in consideration of the Commission’s findings, any form of compensation to the descendants of enslaved African is calculated.

(F) What form of compensation should be awarded, through what instrumentalities and who should be eligible for such compensation.

(G) How, in consideration of the Commission’s findings, any other forms of rehabilitation or restitution to African descendants is warranted and what the form and scope of those measures should take.

(c) REPORT TO CONGRESS.—The Commission shall submit a written report of its findings and recommendations to the Congress not later than the date which is one year after the date of the first meeting of the Commission held pursuant to section 4(e).

SEC. 4. MEMBERSHIP.

(a) NUMBER AND APPOINTMENT.—(1) The Commission shall be composed of 13 members, who shall be appointed, within 90 days after the date of enactment of this Act, as follows:
(A) Three members shall be appointed by the
President.

(B) Three members shall be appointed by the
Speaker of the House of Representatives.

(C) One member shall be appointed by the
President pro tempore of the Senate.

(D) Six members shall be selected from the
major civil society and reparations organizations
that have historically championed the cause of
reparatory justice.

(2) All members of the Commission shall be persons
who are especially qualified to serve on the Commission
by virtue of their education, training, activism or experi-
ence, particularly in the field of African American studies
and reparatory justice.

(b) TERMS.—The term of office for members shall
be for the life of the Commission. A vacancy in the Com-
mission shall not affect the powers of the Commission and
shall be filled in the same manner in which the original
appointment was made.

(c) FIRST MEETING.—The President shall call the
first meeting of the Commission within 120 days after the
date of the enactment of this Act or within 30 days after
the date on which legislation is enacted making appropria-
tions to carry out this Act, whichever date is later.
(d) **QUORUM.**—Seven members of the Commission shall constitute a quorum, but a lesser number may hold hearings.

(e) **CHAIR AND VICE CHAIR.**—The Commission shall elect a Chair and Vice Chair from among its members. The term of office of each shall be for the life of the Commission.

(f) **COMPENSATION.**—(1) Except as provided in paragraph (2), each member of the Commission shall receive compensation at the daily equivalent of the annual rate of basic pay payable for GS–18 of the General Schedule under section 5332 of title 5, United States Code, for each day, including travel time, during which he or she is engaged in the actual performance of duties vested in the Commission.

(2) A member of the Commission who is a full-time officer or employee of the United States or a Member of Congress shall receive no additional pay, allowances, or benefits by reason of his or her service to the Commission.

(3) All members of the Commission shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties to the extent authorized by chapter 57 of title 5, United States Code.
SEC. 5. POWERS OF THE COMMISSION.

(a) HEARINGS AND SESSIONS.—The Commission may, for the purpose of carrying out the provisions of this Act, hold such hearings and sit and act at such times and at such places in the United States, and request the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents, as the Commission considers appropriate. The Commission may invoke the aid of an appropriate United States district court to require, by subpoena or otherwise, such attendance, testimony, or production.

(b) POWERS OF SUBCOMMITTEES AND MEMBERS.—Any subcommittee or member of the Commission may, if authorized by the Commission, take any action which the Commission is authorized to take by this section.

(c) OBTAINING OFFICIAL DATA.—The Commission may acquire directly from the head of any department, agency, or instrumentality of the executive branch of the Government, available information which the Commission considers useful in the discharge of its duties. All departments, agencies, and instrumentalities of the executive branch of the Government shall cooperate with the Commission with respect to such information and shall furnish all information requested by the Commission to the extent permitted by law.
SEC. 6. ADMINISTRATIVE PROVISIONS.

(a) STAFF.—The Commission may, without regard to section 5311(b) of title 5, United States Code, appoint and fix the compensation of such personnel as the Commission considers appropriate.

(b) APPLICABILITY OF CERTAIN CIVIL SERVICE LAWS.—The staff of the Commission may be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that the compensation of any employee of the Commission may not exceed a rate equal to the annual rate of basic pay payable for GS–18 of the General Schedule under section 5332 of title 5, United States Code.

(c) EXPERTS AND CONSULTANTS.—The Commission may procure the services of experts and consultants in accordance with the provisions of section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the highest rate payable under section 5332 of such title.

(d) ADMINISTRATIVE SUPPORT SERVICES.—The Commission may enter into agreements with the Administrator of General Services for procurement of financial and administrative services necessary for the discharge of
the duties of the Commission. Payment for such services shall be made by reimbursement from funds of the Commission in such amounts as may be agreed upon by the Chairman of the Commission and the Administrator.

(e) CONTRACTS.—The Commission may—

(1) procure supplies, services, and property by contract in accordance with applicable laws and regulations and to the extent or in such amounts as are provided in appropriations Acts; and

(2) enter into contracts with departments, agencies, and instrumentalities of the Federal Government, State agencies, and private firms, institutions, and agencies, for the conduct of research or surveys, the preparation of reports, and other activities necessary for the discharge of the duties of the Commission, to the extent or in such amounts as are provided in appropriations Acts.

SEC. 7. TERMINATION.

The Commission shall terminate 90 days after the date on which the Commission submits its report to the Congress under section 3(c).

SEC. 8. AUTHORIZATION OF APPROPRIATIONS.

To carry out the provisions of this Act, there are authorized to be appropriated $12,000,000.
12-1-1998

Racial Reparations: Japanese American Redress and African American Claims

Eric K. Yamamoto

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RACIAL REPARATIONS:
JAPANESE AMERICAN REDRESS AND
AFRICAN AMERICAN CLAIMS

ERIC K. YAMAMOTO*

I. INTRODUCTION

In 1991 the United States Office of Redress Administration presented the first $20,000 reparations check to the oldest Hawai‘i survivor of the Japanese American internment camps. I attended the stately ceremony. The mood, while serious, was decidedly upbeat. Tears of relief mixed with sighs of joy. Freed at last.

Amidst the celebration I reflected on the Japanese American redress process and wondered about its impacts over time. The process had been arduous, with twists and turns. Many Japanese Americans contributed,¹ and their communities overwhelmingly considered reparations a great victory, as did I.

Other racial groups lent support, often in the form of political endorsements. Support also came as ringing oratory—for instance, the moving speech on the floor of the House of Representatives by African American Congressperson Ron Dellums.² Yet some of the support seemed begrudging. One African American scholar observed,

[t]he apology [to Japanese Americans] was so appropriate and the payment so justified . . . that the source of my ambivalent reaction was at first difficult to identify. After some introspection, I guiltily discovered that my sentiments were related to a very dark, brooding feeling that I had fought long

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and hard to conquer—inferiority. A feeling that took first root in the soil of "Why them and not me."³

This confession led me to ask about what political role Japanese Americans might play in future struggles for racial justice in America. That question then led to my essay in 1992 about the social meanings of Japanese American redress.⁴ The essay started with the recognition that Japanese American beneficiaries of reparations benefited personally, sometimes profoundly. The trauma of racial incarceration, without charges or trial, and the lingering self-doubt over two generations left scars on the soul. The government’s apology and bestowal of symbolic reparations fostered long overdue healing for many. As I observed then, redress was:

cathartic for internees. A measure of dignity was restored. Former internees could finally talk about the internment. Feelings long repressed, surfaced. One woman, now in her sixties, stated that she always felt the internment was wrong, but that, after being told by the military, the President and the Supreme Court that it was a necessity, she had come seriously to doubt herself. Redress and reparations and the recent successful court challenges, she said, had now freed her soul.⁵

But, I wondered, what were the long-term societal effects of reparations—the social legacy of Japanese American redress beyond personal benefits? Would societal attitudes toward Asian Americans and other racial minorities change? Would institutions, especially those that curtailed civil liberties in the name of national security, be restruc-

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⁵Yamamoto, Social Meanings of Redress, supra note 4, at 227.
tured? Would Japanese American reparations serve as a catalyst for redress for others?

I identified and critiqued two emerging and seemingly contradictory views of reparations for Japanese Americans and then offered a third. The first view was that redress demonstrates that America does the right thing, that the Constitution works (if belatedly) and that the United States is far along on its march to racial justice for all. I criticized that view as unrealistically bright.

The criticism is not that reparations are insignificant for recipients; the criticism is that they can lead to an "adjustment of individual attitudes" towards the historical injustice of the internment without giving current "consideration to the fundamental realities of power." The "danger lies in the possibility of enabling people to 'feel good' about each other" for the moment, "while leaving undisturbed the attendant social realities" creating the underlying conflict.6

The second view was that "reparations legislation has the potential of becoming a civil rights law that at best delivers far less than it promises and that at worst creates illusions of progress, functioning as a hegemonic device to preserve the status quo."7 I criticized that view as overly dark.

As part of this critique, and drawing upon critical race theory insights, I offered a third view.

[R]eparations legislation and court rulings in cases such as [the] Korematsu [coram nobis case] do not . . . inevitably lead to a restructuring of governmental institutions, a changing of societal attitudes or a transformation of social relationships, and the dangers of illusory progress and co-optation are real. At the same time, reparations claims, and the rights discourse they engender in attempts to harness the power of the state, can and should be appreciated as intensely powerful and calculated political acts that challenge racial assumptions underlying past and present social arrangements. They bear potential for contributing to institutional and attitudinal restructuring . . . .8

6 Id. at 231–32 (citations omitted) (quoting Edmonds, Beyond Prejudice Reduction, MCS Conciliation Q., Spring 1991, at 15).
7 Id. at 229.
8 Id. at 233. The Korematsu coram nobis litigation in 1983–84 reopened the United States Supreme Court's decision in the original Korematsu case in 1944 which upheld the constitution-
In light of this third view, I posited that the social meaning of Japanese American redress was yet to be determined. I suggested that the key to the legacy of redress was how Japanese Americans acted when faced with continuing racial subordination of African Americans, Native Americans, Native Hawaiians, Latinas/os and Asian Americans. Would we draw upon the lessons of the reparations movement and work to end all forms of societal oppression, or would we close up shop because we got ours?

Six years have passed. During that time, the United States, indeed the world, has gone apology crazy. Japanese American redress has stimulated a spate of race apologies. Some apologies appear to reflect heartfelt recognition of historical and current injustice and are backed by reparations. Other apologies appear empty, as strategic maneuvers to release pent-up social pressure.9

Amidst this phenomenon African Americans have renewed their call for reparations for the legally sanctioned harms of slavery and Jim Crow oppression. These renewed claims have gained momentum, perhaps more so than at any time since Reconstruction—when Congress and the President sought to confiscate Southern land and provide freed slaves with forty acres and a mule.10 The Florida legislature recently approved reparations for survivors and descendants of the 1923 Rosewood massacre.11 The African American victims of the Tuskegee syphilis experiment received reparations and a presidential apology in 1997.12 One reparations lawsuit was filed on the West Coast and a reparations class action is contemplated on the East Coast.13 Representative John Conyers' resolution calling for a Congressional Reparations Study

ality of the internment. Korematsu v. U.S., 584 F. Supp. 1406 (N.D.Cal. 1984). Based on recently discovered World War II documents showing the absence of military necessity for the internment and the Justice Department's wilful misrepresentations to the Court, the federal district court found a manifest injustice and set aside Fred Korematsu's conviction for refusing to abide by the military's exclusion orders. See id. at 1417.


10 See Salim Muwakkil, Does America Owe Blacks Reparations?, In These Times, June 30, 1997 (describing mounting community activism in support of reparations). See also Verdun, supra note 3, at 600 (describing five African American reparations movements since the Civil War).

11 In 1995, each of the nine African American survivors of the mayhem as a result of a white woman's false rape charge was awarded $150,000 in reparations; the descendants of Rosewood residents received between $375 and $22,535 for loss of property. See Lori Robinson, Righting a Wrong Among Black Americans: The Debate is Escalating over Whether an Apology for Slavery is Enough, Seattle Post-Intelligencer, June 29, 1997, available in 1997 WL 3200157.


13 See infra note 116 (describing the 1995 California case, Cato v. United States, 70 F.3d 1103, 1110 (9th Cir. 1995)).
Commission, reintroduced every year since 1989, has garnered endorsements from an impressive array of political organizations.¹⁴

And in every African American reparations publication, in every legal argument, in almost every discussion, the topic of Japanese American redress surfaces.¹⁵ Sometimes as legal precedent. Sometimes as moral compass. Sometimes as political guide. In similar fashion, Native Hawaiian reparations claims against the United States for the illegal overthrow of the sovereign Hawaiian nation in 1893, and against the State of Hawai‘i for mismanagement of Hawaiian trust lands,¹⁶ also cite reparations for Japanese Americans.

In light of recent reparations history and contemporary claims, the diverging views of Japanese American redress and the February 1999 closure of the Office of Redress Administration,¹⁷ the time is ripe


¹⁵ See Derrick A. Bell, Jr., Race, Racism, and American Law 51 (2d ed. 1980); Verdun, supra note 3.

¹⁶ Current Hawaiian claims for reparations are divided into both court and legislative claims against both the federal and state governments. Examples of court claims against the state government include: Office of Hawaiian Affairs v. State of Hawaii, Civ. No. 94-0203-01, appeal docketed, No. 20281 (1998) (the Office of Hawaiian Affairs, created by the Hawai‘i Constitution to represent Native Hawaiians, has asserted claims to back payment of one-fifth of ceded land trust revenues, over $1 billion; the case is on appeal to the Supreme Court of Hawai‘i); Ka‘ai‘ai v. Drake, Civ. No. 92-3742-10 (1st Cir. 1992) (after successful lobbying, the 1995 legislature committed $30 million a year for 20 years, $600 million total, to the Homelands Trust); Kealoha v. Hee, Civ. No. 94-0118-01 (1st Cir. 1994) (plaintiffs sought to enjoin negotiations, settlement, and the execution of release by trustees of Office of Hawaiian Affairs “concerning claims against the United States for the overthrow of the Hawaiian government in 1893, and the redress of breaches of the ceded lands trust committed by the United States and the State of Hawai‘i”).

Examples of legislative reparations proposals include: The Aborigional Lands of Hawaiian Ancestry, Inc. Association (“ALOHA”) (during the 1970s ALOHA called attention to the United States involvement in the overthrow of the Hawaiian government; their efforts resulted in the introduction of a series of reparations bills into Congress, bringing attention to Native Hawaiian claims on a federal and state level); The Native Hawaiian Autonomy Act, H.B. 98-0270-1, 19th Leg., 1st Spec. Sess. (Haw. 1997) (the bill proposed the creation of Native Hawaiian Trust Corporation to assume the assets, liabilities and responsibilities currently held by the state as trustees for Native Hawaiians; in the face of stiff Hawaiian political opposition, the legislation died); The Native Hawaiian Plebiscite, 1996 Haw. Sess. Laws 140 (to acknowledge and recognize the unique status the Native Hawaiian people bear to the State of Hawaii and to the United States and to hold an election allowing Native Hawaiians to decide whether to set up a constitutional convention establishing an indigenous sovereign government); Senator Daniel Akaka’s commitment to introducing legislation in Congress. See Pete Pichaske, Honolulu Star Bulletin, July 14, 1998 (describing Akaka’s proposed advisory committee of tribal leaders and indigenous peoples to address Native Hawaiian self-determination rights). See generally Native Hawaiian Rights Handbook (Melody Kapilialoha MacKenzie ed., 1991).

to revisit the legacy of Japanese American redress. As part of that inquiry, it is also time to assess what Japanese American redress means to racial reparations movements for others.

In this essay I examine aspects of Japanese American reparations history and the current reparations debates and offer the beginnings of a conceptual framework for inquiring into, critiquing and guiding ongoing reparations efforts in the United States. The framework I offer operates from a specific vantage point: groups seeking reparations. The framework, however, does not address “how to get reparations” so much as “how to think about the reparations process with all its potential and risk.” Its utility lies in helping groups frame concepts, craft language and determine strategy in deciding whether to embark on a reparations journey and what to anticipate along the way.18

More specifically, Section II of this essay surveys the terrain of recent race apologies and reparations and asks about the extent of Japanese American support for other groups currently seeking redress for historical injustice. Section III asks what lessons, bright and dark, might be drawn from the political and legal processes of Japanese American redress. It begins with the assumption that reparations usually have salutary impact upon recipients and that in certain situations reparations can be transformative for groups struggling against oppression. The section then focuses on the underside of that assumption, a darker side often only minimally explored during legislative lobbying, court suits, community demonstrations and media presentations—a darker side often overlooked amid the hot rhetoric justifying reparations.

That underside is comprised of the risks of reparations efforts—the hidden dangers of entrenched victim status, image distortion, mainstream backlash, interminority friction and status quo enhancement. Drawing from experiences of Japanese American redress and the current African American and Native Hawaiian reparations move-

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18 In discussing Japanese American redress and African American and, to a lesser extent, indigenous Hawaiian reparations claims, I am not passing judgment about the comparative value or priority of racial group reparations claims. Nor is my decision in this essay to not address in depth reparations claims of other groups (such as various Native American tribes; see infra note 22) meant to diminish the importance of those claims. In saying this, I am not suggesting that all group reparations claims are the same. Groups have experienced oppression differently, and every serious discussion of reparations should acknowledge the uniqueness and moral strength of African American claims (due to slavery and Jim Crow apartheid) and indigenous peoples’ claims (due to physical and cultural genocide). See generally Eric K. Yamamoto, Rethinking Alliances: Agency, Responsibility and Interracial Justice, 3 ASIAN PAC. AM. L.J. 33 (1995) [hereinafter Rethinking Alliances] (describing how groups are “differentially racialized,” giving rise to differing group identities, living conditions and claims).
ments, and for the sake of simplicity, I cast this underside, the risks, in three ways. The first is the distorted legal framing of reparations claims; the second, the dilemma of reparations process; and the third, the ideology of reparations.

Section IV assesses pending African American reparations claims in light of these concerns. Finally, in the context of future claims, Section V offers an expanded view of reparations not as compensation, but as "repair"—the restoration of broken relationships through justice.

II. JAPANESE AMERICAN AND OTHER REDRESS MOVEMENTS

Movements to redress historical racial injustice mark the global landscape. These movements are part of the Japanese American redress legacy.19 Internationally, the Canadian government recently apologized to and promised substantial reparations for Canada's indigenous peoples for destruction of their culture and way of life; the British offered reparations to New Zealand's Maori for British-initiated 19th century bloody race wars; French President, Jacques Chirac, recognized French complicity in the deportation of 76,000 Jews to death camps; the Catholic Church apologized for its assimilationist policy in Australia that contributed to the Aborigines' spiritual and cultural destruction. Still unresolved are the claims of the Korean "comfort women" forced into prostitution by the Japanese government.20

Nationally, President Clinton apologized to indigenous Hawaiians for the illegal U.S.-aided overthrow of the sovereign nation and the near decimation of Hawaiian life that followed; the Methodist Church apologized to Native Americans in Wyoming for the 1865 post-treaty slaughter at the hands of the U.S. cavalry led by a Methodist minister; the Florida legislature awarded reparations to survivors of mayhem at Rosewood; and the federal government offered reparations to the African American victims of the Tuskegee syphilis experiment and agreed to apologize to and provide limited reparations for Japanese Latin Americans kidnapped from Latin American countries and placed in U.S. internment camps as hostages during WWII.21 Claims that are

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19 The following are brief descriptions of recent national and international apologies and reparations catalogued in greater detail in Yamamoto, Race Apologies, supra note 9, at 68 app.
still pending include: Native Hawaiian claims for land and money reparations from the U.S. and the State of Hawai‘i, Native American reparations claims for treaty violations by the U.S. and African American slavery-based reparations claims.

The political movements supporting these reparations claims have been bolstered by the reality of Japanese American redress. Yet the larger questions asked six years ago remain. First, in what ways have Japanese Americans, as an exercise of group agency, engaged in these recent and ongoing reparations efforts of others? Have the Japanese Americans—community and legal organizations, media, politicians, educators—lent organizational help and political and legal muscle to the movements of others? Or, have they sat back and said, “you’re on your own?” Second, to what extent have Japanese Americans engaged with other Asian American groups and other communities of color.


23 See infra notes 104–13 and accompanying text.

24 One example of organizational help is the Hawai‘i Chapter of the Japanese American Citizens League’s endorsement of the Hawaiian sovereignty movement and its educational sessions on Hawaiian history and the various forms of indigenous sovereignty. Interview with Alan Murakami, President of the Hawai‘i Chapter of the Japanese American Citizens League, in Honolulu, Hawai‘i (Mar. 29, 1997). Of course, one important factor of engagement is the extent to which other groups have asked Japanese Americans to participate.

25 See Sachi Seko, Remembering Walter Weglyn, PACIFIC CITIZEN, June 19–July 2, 1998, at 7 (“For most of us, interest in redress faded soon after President Reagan signed the 1988 Civil Liberties Act, a common attitude being, ‘I’ve got mine.’”).

26 More recent Asian American immigrant groups, including Vietnamese, Laotians, Hmong,
on racial justice issues beyond reparations, such as anti-immigrant legislation, the ending of affirmative action, the curtailment of welfare, job discrimination, English-only proposals and hate violence.\textsuperscript{27}

Of course, Japanese American activists have supported others in their political struggles and have worked hard to forge multiracial alliances.\textsuperscript{28} Some reparations beneficiaries have pooled reparations money to aid others struggling socially and economically.\textsuperscript{29}

Nevertheless, the question persists: Why do some activists in current reparations movements perceive that, as a whole, Japanese Americans benefitting from redress have offered relatively little financial aid and political and spiritual support to others in their justice struggles?\textsuperscript{30} Is this perception completely false? Or partially true? If it is false, why does the perception exist? If true in some part, what are the explanations, and what is the Japanese American response?

These questions engender complicated inquiries that encompass, but also extend well beyond, present-day Japanese American political activities. They entail detailed inquiry into past and present intergroup conflicts and cooperation.
relations. In brief, this inquiry may require digging into whether other groups opposed the Japanese American internment at the time and later supported Japanese American redress. For example, preliminary research reveals an apparent lack of opposition by the National Association for the Advancement of Colored People ("NAACP") to the internment at the time. Although black journalists voiced dissent, neither the NAACP nor any other African American organization submitted an amicus brief when the Korematsu internment cases were before the Supreme Court. Did this apparent historical lack of public opposition to the violation of the civil liberties of Japanese Americans, when the NAACP was beginning to forge its civil rights strategy, create an African American interest in later assisting in Japanese Americans' struggles for redress? Consider the strong support for Japanese American redress in the 1980s by black congressional leaders.

The inquiry into intergroup relations may also require digging into and beyond the pervasive effects of white supremacy, into the extent to which Japanese Americans (and Asian Americans) have been complicit in the subordination of African American communities over the last fifty years. In present-day America, depending on the circumstances, racial groups can be simultaneously disempowered and empowered, oppressed and complicit in oppression, liberating and subordinating. Do Asian Americans, themselves subject to continuing discrimination and negative stereotyping, have an obligation to aid in the healing of African American communities culturally, spiritually and economically?

These questions about Japanese American engagement with the justice struggles of other racial groups, which I raise rather than seek to answer in this essay, speak to a larger issue: Is Japanese American reparations solely about redress for Japanese Americans? Or is it also about racial justice for all?

31 See Randall L. Kennedy, Racial Critiques of Legal Academia, 102 HARV. L. REV. 1745, 1780 (1989) ("Significantly, neither the NAACP nor any other predominantly black organization submitted an amicus curiae brief to the Supreme Court in Korematsu v. United States or the other cases challenging the government's internment policy."). Id. See Korematsu v. United States, 323 U.S. 214 (1944). See also RICHARD DELGADO, THE COMING RACE WAR? AND OTHER APOCALPYTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE 171 n.25 (1996). To place this apparent inaction in context, the Japanese American Citizens League initially decided not to oppose the internment (although it later submitted an amicus brief when the Hirabayashi case was argued in 1943). In addition, the national office of the American Civil Liberties Union refused to publicly oppose the internment. See PETER IRONS, JUSTICE AT WAR 105–18 (1983).

32 See supra note 2.

33 See generally Yamamoto, Rethinking Alliances, supra note 18.

34 See ANGELO N. ANCHETA, RACE RIGHTS AND THE ASIAN AMERICAN EXPERIENCE 7–10 (1998)
As I did six years ago, I suggest that the response to these questions, and the mature legacy of Japanese American redress, is yet in the making.

III. THE POTENTIAL UNDERSIDE OF REPARATIONS PROCESS

With this in mind, I turn to reparations process: What larger lessons might communities of color in the United States draw from Japanese American redress? Most addressing this question talk about how the government rectified a serious violation of constitutional liberties and how a diverse racial community banded together to achieve reparations legislation. These are important salutary lessons. Indeed, I start with the premise that reparations can be beneficial and at times transformative for recipients.

This essay, however, takes a different tack. It focuses on the underside of reparations process—a darker side requiring careful strategic attention by those seeking reparations and requiring forthright acknowledgement by those who have achieved them. To simplify, I identify three aspects of this underside: the distorted legal framing of reparations claims, the dilemma of reparations process and the ideology of reparations. My thesis is not that this underside diminishes the significance of achieving reparations or forecloses future redress efforts. Rather, I suggest that the risks caution careful strategic framing of debate and action and anticipatory grappling with a reparations movement's both bright and darker potential.

A. Legal Framing of Reparations Claims

The first aspect of the underside of reparations process is the distorted legal framing of reparations claims. Reparations that repair are costly. Meaningful reparations entail change. Change means the loss of some social advantages by those more powerful. For these reasons, those charged with repairing the harms always resist.

Opponents employ legalisms in two ways to aid their resistance. First, they cite the sufficiency of existing laws. Since existing civil rights

("the United States Commission on Civil Rights concluded that anti-Asian activity in the form of violence, harassment, intimidation, and vandalism has been reported across the nation.") Id. at 7.


36 See infra Section V (describing the reframing of reparations from compensation to "repair"—that is, the repairing of tears in the structural and psychological fabric of a society resulting from the social and economic subordination of some of its members).
laws already afford individuals equal opportunity, the argument goes, there is no need for additional reparations legislation to rectify social inequalities.\textsuperscript{37} Second, those resisting reparations raise objections shaped by narrow legal concerns. They argue the criminal law defense of lack of bad intent on the part of wrongdoers; they assert the procedural bar of lack of standing by claimants (the difficulty of identifying specific perpetrators and victims); they cite the lack of legal causation (specific acts causing specific injuries); and they cite the impossibility of accurately calculating damages (or compensation).\textsuperscript{38}

These concerns seem compelling to lawyers and judges because they resonate with the common law paradigm of a lawsuit—where an individual wrongfully harmed by the specific actions of another in the recent past is entitled to recover damages to compensate for actual personal losses. The typical situation is the pedestrian hit by a speeding car. As Mari Matsuda observes, however, that paradigm works poorly where, over time, members of a group act to preserve that group’s system of dominance and privilege by denigrating other groups and excluding other groups’ members from housing, businesses, jobs and political and social opportunities; that is, situations of systemic racial oppression.\textsuperscript{39}

Yet, despite the misfit, the common law paradigm for reparations persists. African Americans seeking reparations for slavery have tended to frame their arguments according to traditional remedies law—that reparations are a form of both payment for individual losses (just compensation) and divestiture of ill-gotten gain (preventing unjust enrichment).\textsuperscript{40} This resort to traditional legal remedies makes some sense at first glance. Compensation and unjust enrichment are well-recognized remedial principles, and they generally appear to fit the circumstances of African American slavery-based claims.

In practical legal application, however, those traditional principles erect inordinately high barriers. For instance, as Vincene Verdun observes, by casting reparations as a “claim for compensation based on


\textsuperscript{39}See Matsuda, \textit{Looking to the Bottom}, supra note 38, at 376.

\textsuperscript{40}See Verdun, \textit{supra} note 3, at 621.
slavery, present-day African Americans are required to prove "that all African Americans were injured by slavery and that all white Americans caused the injury or benefitted from the spoils of slave labor." The courts legally, and mainstream America politically, have been unwilling to accept this group victim/group perpetrator proposition. They continue to look instead for individual wrongdoers who inflict harm on identifiable individuals, resulting in quantifiable damages. This search, framed by the common law paradigm, undermines historical group-based claims for the wrongs of slavery and Jim Crow segregation.

Without a marked shift away from the individual rights/remedies paradigm, reparations claims face formidable obstacles—unless the circumstances, particulars and timing of the claims allow for recasting those claims in traditional legal garb. For example, the Japanese American redress movement stalled in the late 1970s in part because former internee claims lacked a traditional legal basis. Despite hindsight recognition of historical injustice, government decisionmakers opposed to reparations cited the Supreme Court's 1944 constitutional validation of the internment in Korematsu. The government argued there was no legal claim and that, therefore, compensation could not be awarded. Indeed, the Hohri class action case, filed in the early 1980s on behalf of internees seeking monetary compensation for internment losses, also ran aground on the shoals of legal procedure—the statute of limitations.

The redress movement regained its political momentum in the mid-1980s in part from the judiciary's rulings in the Korematsu and Hirabayashi coram nobis cases. Those cases reopened the original

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41 Id. at 630.
42 See infra Section IV for a detailed discussion.
43 Korematsu v. United States, 323 U.S. 214 (1944). See also James Kilpatrick, quoted by Senator Thurmond in the Civil Liberties Act debates:

As the Supreme Court noted in the case of Korematsu v. United States, most of the internees were loyal Americans. But some were not. More than 5,000 of them refused to swear allegiance to the United States and to renounce allegiance to the emperor. Several thousand evacuees requested repatriation to Japan. It is all very well to say today that these citizens should have received fair hearings, but in the spring of 1942 we were involved in a desperate war for national survival. Due process had to yield to the exigencies of the day.

44 See Korematsu v. United States, 323 U.S. 214 (1944).
47 See Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987).
World War II internment decisions by the Supreme Court on the basis of declassified government documents. The federal courts found that during the war the Justice and War Departments had destroyed and suppressed key evidence and lied to the Supreme Court about the military necessity for the internment. These “factual findings” in specific cases, coupled with a congressional commission’s similar conclusions, provided the missing traditional legal cornerstone to the foundation for Japanese American reparations claims.

Ultimately, Japanese Americans succeeded on their reparations claims not because they transcended the individual rights paradigm, but because they were able to fit their claims tightly within it. Consider these facets of the internees’ claim: (1) their challenge addressed a specific executive order and ensuing military orders; (2) the challenge was based on then-existing constitutional norms (due process and equal protection); (3) both a congressional commission and the courts identified specific facts amounting to violations of those norms; (4) the claimants were easily identifiable as individuals (those who had been interned and were still living); (5) the government agents were identifiable (specific military and Justice and War Department Officials); (6) these agents’ wrongful acts resulted directly in the imprisonment of innocent people, causing them injury; (7) the damages, although uncertain, covered a fixed time and were limited to survivors; and (8) payment meant finality. In the end, the traditional legal rights/remedies paradigm bolstered rather than hindered the internees’ reparations claims.

For similar reasons, reparations awarded to African Americans emerged from narrow legal claims of families and survivors of the 1923 Rosewood Massacre. In 1995, the State of Florida paid each of the nine survivors $150,000 and each of the 145 descendants of residents between $375 and $22,535. Framed in terms of property damage, the Rosewood claims fit within the traditional individual rights paradigm. The government perpetrators and victims were identifiable, direct causation was established, damages were certain and limited, and payment meant finality.

By contrast, and as developed further in Section IV, African American groups seeking broad redress for slavery and Jim Crow segregation

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50 See Robinson, L., supra note 11.
have encountered considerable difficulty in casting their reparations claims in terms of individual rights and remedies. Legally framed claims for lost wages, liberty and property meet the slew of standard legal objections identified earlier. Opponents of African American reparations point to: (1) the statute of limitations ("this all happened over one hundred years ago"); (2) the absence of directly harmed individuals ("all ex-slaves have been dead for at least a generation"); (3) the absence of individual perpetrators ("white Americans living today have not injured African Americans and should not be required to pay for the sins of their slave master forbearers"); (4) the lack of direct causation ("slavery did not cause the present ills of African American communities"); (5) the indeterminacy of compensation amounts ("it is impossible to determine who should get what and how much").

The strength of these legal objections impelled Boris Bittker in his highly publicized book, *The Case for Black Reparations*, to purposely omit slavery as the basis for African American reparations. His argument, which fashioned reparations as a civil rights claim under a Reconstruction era statute (known as Section 1983), conceded insurmountable legal obstacles to reparations for the harms of slavery. Rather than challenging the appropriateness of framing black reparations claims as narrow legal civil rights claims, Bittker abandoned slavery as the principal justification for reparations. He instead stressed compensation for present-day societal discrimination. This argument identified harmed individuals — living blacks experiencing discrimination. It identified perpetrators — Americans who operated government and private institutions that supported discrimination in housing, education and jobs. It linked present harm to contemporary acts whose historical roots lay in legalized Jim Crow segregation. And the argument cast damages in terms of lost wages, property and economic opportunities. Bittker framed his argument in this limited fashion to characterize black reparations claims as recognized by law.

Even this narrow legal framing, however, foundered in at least two significant respects. First, the framing was still not narrow enough. Issues such as governmental immunity and proof of racist intent of government actors appeared to block current damage claims. Second, and more significant, this framing reflected "a tactical loss [by]

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51 Verdun, *supra* note 3, at 607.
53 See id.
excluding the slavery period: setting this voluntary limitation on coverage sacrifices much of the emotional component that provides the moral leverage for black reparations demands.”

Opponents of Native Hawaiian reparations cite similar legal objections. They contend that “[i]f there were now a legal right to reparations the Hawaiians could have sued the U.S. government and won years ago . . . . [T]here is now no legal remedy for the alleged moral wrong.” These opponents thus deem reparations claims unavailing because they perceive no legal wrong.

Legal arguments against African American and Native Hawaiian reparations often appear compelling when reparations claims are cast narrowly within the traditional individual rights and remedies paradigm. Indeed, for this reason, reparations critics continue to frame reparations claims primarily in narrow legal terms. This does not mean that African American and Native Hawaiian claims lack merit as justice claims. It means that the narrow legal framing of those sweeping reparations claims, based largely on a vast array of historical events, carries heavy baggage.

That baggage does not counsel abandonment of legal claims and court battles. Rather, it counsels a dual strategy. One strategic path focuses on bite-sized legal claims, with limited numbers of claimants, well-defined in time and place. This would resemble situations like Rosewood and Tuskegee and, to some extent, the internment, which were framed in terms of individual rights and remedies. The second, and simultaneous, strategic path recognizes the distortions of narrow legal framing. It therefore reconceptualizes law and litigation broadly as key components of larger political strategies. This alternative path means treating law and court process—regardless of formal legal outcome—as generators of “cultural performances” and as vehicles for providing outsiders an institutional public forum. The strategy also entails communicating counter-narratives to dominant stories about the racial order and attracting media attention to help organize racial

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55 Id. at 158.
57 By contrast, many Native Hawaiians seek redress for the U.S.-aided illegal overthrow of the Hawaiian Nation in 1893, which resulted in a loss of sovereignty and land. Because the Provisional Government, which replaced the Queen, actively sought and eventually secured a treaty annexing Hawai‘i to the United States, proponents seeking redress contend that the United States and the State of Hawai‘i perpetrated the harm upon all Native Hawaiians. See generally NATIVE HAWAIIAN RIGHTS HANDBOOK, supra note 16.
communities politically in support of more sweeping reparations claims. 58

As described in the concluding section, when law and court process are recast in this fashion and when reparations claims are reframed within the law-based paradigm and beyond it in terms of moral, ethical and political dimensions of "repair," reparations can address both the improvement of present-day living conditions of a historically oppressed group and the healing of breaches in the larger social polity. Under these circumstances, reparations claims can appear not only justifiable but essential to the racial health of both communities of color and the nation. This alternative framework for reparations has yet to gain a foundational hold in the rhetoric and strategy of reparations movements. Narrow legal framing of reparations claims continues to dominate, allowing opponents to hide their underlying social and political objections.

What are the opponent's objections? Money. Critics are wondering where reparations resources will come from, and if reparations sufficient to "do justice" will disrupt the economy. Power. They are calculating how reparations can be shaped and conveyed in ways that will advance the interests of mainstream America. Privilege. Critics question whether reparations will alter the existing racial order. 59

These objections by dominant interests suggest a need for concern about reparations' likely impacts. Will the benefits to recipients have lasting, or only temporary, effect? Will the reparations process reopen or exacerbate old wounds, inflaming rather than healing? Will there be social and political backlash against reparations beneficiaries and political leaders, not only by disgruntled dominant group members but also by marginalized groups who have not received reparations?

Collectively, these questions raise serious concerns worthy of careful consideration in every situation where reparations claims are contemplated. In most instances, no clear answers will be forthcoming. Although there is no simple way to cut through the morass of questions and concerns, I suggest merging them into two additional conceptual categories to facilitate practical exploration by those engaged in reparations movements. Those categories are the dilemma of reparations and the ideology of reparations.

58 See generally Eric K. Yamamoto, Moses Haia & Donna Kalama, Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue, 16 U. Haw. L. Rev. 1 (1994) [hereinafter Cultural Performance] (describing courts in handling indigenous peoples' claims as potential sites and generators of "cultural performances"); DELGADO, supra note 31 (describing this approach generally as "legal instrumentalism").

59 See generally Matsuda, Looking to the Bottom, supra note 38.
B. Dilemma of Reparations

The dilemma of reparations is the second aspect of the darker side of reparations.60 Reparations, if thoughtfully conceived, offered and administered, can be transformative. They can help change material conditions of group life and send political messages about societal commitment to principles of equality. When reparations stimulate change, however, they also generate resistance. Proponents suffer backlash. Thus, when reparations claims are treated seriously, they tend to recreate victimhood by inflaming old wounds and triggering regressive reactions.61 This is the dilemma of reparations.

Seeing these dual possibilities in all redress movements, Joe Singer describes the potential for further victimization in two contemporary situations. He recounts Jews’ highly publicized demands in 1997 that Swiss banks account for and restore Jewish money and gold held by the banks for Nazis during World War II.62 Bank acknowledgment and restitution treats Jews as worthy human beings with rights, including the right to own property. Restitution counters the anti-Semitic myth of Jews misappropriating the property of others. Jewish “victimhood is acknowledged, but Jews are not treated as mere victims, but as agents calling the Swiss banks to account . . . .”63

One problem, however, is that Jewish demands for monetary restitution resurrect for some the harsh historical stereotypes of Jews “as money-grubbing, as having both accumulated secret bank accounts in the past and as caring now about nothing more than money . . . .”64 Another, and broader, problem is that additional Jewish reparations claims may spark resentment among other groups whose reparations claims have gone unmet (such as Hungarian gypsies who were exterminated by Nazis in Auschwitz and elsewhere).65

Singer also describes reparations demands for African Americans.66 Some understand those demands as a call for redress of past injustice; others understand the demands as a “refusal to grow up.”67

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61 See id. at 3–4.
63 Singer, supra note 60, at 3.
64 Id. at 3. See also Johanna Mcgeary et al., Echoes of the Holocaust: The Effort to Recover Jewish Assets Deposited in Swiss Banks Before and During the War has Grown into a Bitter Crusade that Dredges Up the Horrors of the Past, TIME, Feb. 24, 1997, at 36.
65 See, e.g., Alex Bundy, Gypsies Demand Compensation for Suffering During Holocaust, HONOLULU ADVERTISER, Aug. 4, 1997, at A10.
66 See Singer, supra note 60, at 4.
67 Id.
The result, evident in the volatile affirmative action debates, is that "calls to repair the current effects of past injustice are met with derisory denials that continuing injustice exists and that the problems of African Americans are now purely of their own making." As Singer observes about mixed healing potential in both situations, the "very thing that restoration is intended to combat may be the result of the demand for restoration."

There are other examples of the reparations dilemma. In 1970 James Forman interrupted Sunday services at the Riverside church in New York to demand 500 million dollars from America's churches and synagogues for the oppression of blacks. He demanded the "beginning of the reparations due us as people who have been exploited and degraded, brutalized, killed and persecuted." The backlash against Forman and his "Black Manifesto" was swift and strong. Many were appalled at the idea. Others, who agreed in concept, criticized Forman's tactics. Among this latter group were African American churches that acknowledged continuing racism against blacks and pledged money for church programs to uplift blacks, while stipulating that none of the money could go to Forman or his supporters. Forman, who issued the challenge to repair the degradation, felt exploited and persecuted.

The dilemma of reparations process, the dual realities, also played out in the United Church of Christ, Hawai'i Conference redress process. The Hawai'i Conference of the United Church of Christ proposed and eventually approved a plan to apologize to Native Hawaiians for its predecessor's participation in the overthrow of the Hawaiian Nation in 1893 and to offer monetary reparations. The arduous process took several years.

Serious discussion of reparations within the Hawai'i Conference raised a host of serious fears. Amid fractious debate at the 1993 Conference's annual meeting, some delegates called for a halt to the process to stop the bleeding. Both missionary descendants and Hawaiian church members expressed fears about tearing apart the Con-
ference by reopening (and not healing) one hundred year-old wounds. Others hinted at possibilities for renewed betrayal—where the Conference would regain Hawaiian churches’ trust, revisit the pain and then, due to internal backlash, disappoint once again. Still others worried about reinforcing negative stereotypes of Hawaiians still unable to lift themselves up.

In addition to illuminating the angst of the reparations process—a fear of replicating the very injuries reparations are designed to heal—the dilemma of reparations also partially explains the disappointed expectations of some Hawaiian community leaders. Those leaders criticized Conference redress priorities that directed reparations primarily to Hawaiian Churches and not community organizations. The leaders asked, in effect, why them and not us, why so much for the churches and so little for the rest. 76

The dilemma also played out—but in a different way—after Japanese American redress. Since past governmental sin had been absolved, Asian Americans were once again permissible targets for the government and mainstream America. 77 The President and Congress criticized Japanese competition in the auto industry and extensive Japanese real estate purchases in the United States. 78 Asian immigrants became a target of popular initiatives like California’s Proposition 187 and federal welfare reforms. They were blamed for America’s depressed economy, inadequate public education and other social ills. 79 The recent congressional investigation into campaign finance tarred with the taint of “yellow peril” not only Asian nationals and immigrants, but also all American citizens of Asian ancestry. 80 Some believe that although the redress process educated many about the historical injustice, reparations, combined with a feeling that “now the system works,” also let the government off the hook so that it no longer needed to vigorously oppose racism against Asian Americans.

The transformative potential of reparations is therefore linked, ironically, to dissatisfaction and risk. Reparations for some does not necessarily presage reparations for deserving others. Reparations for one group may stretch the resources or political capital of the giver, precluding immediate reparations (or enough reparations) for oth-

76 See id.
77 See Yamamoto, Social Meanings of Redress, supra note 4, at 236.
78 See id.
79 See id.
ers. The very dynamic of reparations process, even where salutary for recipients, can generate backlash and disappointment.

C. Ideology of Reparations

The third aspect of the underside of reparations process is the ideology of reparations. Reparations ideology is illuminated by Derrick Bell’s interest-convergence thesis. Bell’s thesis suggests that dominant groups only recognize “rights” of minorities when the recognition of those rights benefits the dominant group’s larger interests. That is, a government will rarely simply do the right thing; rather, it is likely to confer reparations only at a time and in a manner that furthers the interests of those in political power.

Rhonda Magee employs the interest-convergence thesis to explain why African Americans have not received reparations for slavery. She observes that, “[s]elf-interested whites who must make the ultimate decision on whether or not to transfer property (land or currency) to African-Americans have no incentive to make such self-defeating decisions.” Magee discusses how after the Civil War and during Reconstruction, Congress decided to seize land from the wealthiest Southerners and distribute forty acres to each adult former slave. Support for the redistribution came from those who believed “the establishment of an African-American economic base was critical to the dissolution of the economic legacy of slavery.” After two years of lobbying, Congress created the Freedman’s Bureau to distribute “captured and abandoned land.” In January 1865, possessory title to

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81 In July 1998, just before President Clinton’s visit to China, the U.S. agreed to apologize and bestow limited monetary reparations ($5,000) to Japanese Latin Americans (“JLAs”) kidnapped from Latin American countries by the U.S. and placed in U.S. internment camps during World War II. Previously, the government had refused to award reparations to the JLAs under the Civil Liberties Act of 1988 on grounds that they were not U.S. citizens and had been in the U.S. illegally. The settlement of the JLAs’ class action lawsuit and the government’s apology and limited reparations brought mixed reactions. Some hailed the settlement as a “major victory for JLAs.” John Tateishi, A Major Victory for JLAs, PACIFIC CITIZEN, June 19:July 2, 1998, at 3. Others called it a “bittersweet victory.” Aoyagi, supra note 21. Many would argue that JLAs in fact endured much more suffering than what [U.S. Japanese Americans] went through,” said the attorney for the JLAs, Robin Toma. “That’s why I think many people feel that it’s a bitter pill to swallow to take so much less than what the [U.S. Japanese Americans] received.” Id.


83 See Yamamoto, Social Meanings of Redress, supra note 4, at 230.

84 Magee, supra note 37, at 908.

85 See id. at 886-88.

86 Id. at 887.

87 Id. at 888.
485,000 acres was awarded to 40,000 former slaves who immediately began to settle and work the land. Later that same year, however, in the face of rising Southern states' opposition to Reconstruction, President Andrew Johnson rescinded the land reparations program, ordered the black settlers to leave the occupied land and returned the land to former Southern slave owners. Land reparations threatened the nation's newfound peace. Therefore, the President scrapped the program, assuring peace among the states, but at incalculable long-term cost to former slaves.

The Alaska Native Claims Settlement Act of 1971 can also be viewed through the lens of interest-convergence. The United States agreed to pay one billion dollars and to return forty-four million acres of land to Native Alaskans as reparations for the wrongful seizure of lands. However, the primary impetus for reparations was the need to clear land title for development of the Alaska oil pipeline. The United States deemed the pipeline essential not only to its economic health but also to national security. The Middle Eastern oil cartel controlled oil supplies to the United States and was threatening to strangle the American economy.

Broadly conceived, the interest-convergence thesis underscores reparations ideology in these instances. While no one ideology controls all situations, underlying systems of beliefs and values which serve particular interests tend to shape whether, when and how reparations will be awarded. At least two related strands of reparations ideology are significant to our discussion. One involves the tension between race and class; the other, the characterization of group “worthiness.”

A race/class tension is manifested ideologically in the reparations debate when opponents of reparations play the “class card” to defeat racial reparations. How is this argument structured? These critics argue that racial group reparations are overinclusive. Middle class blacks, for example, will benefit to some extent even though they are not economically disadvantaged. The critics conclude, therefore, that

88 See id. at 888–89.
89 See id. at 889.
90 See id. at 888–89.
93 These ideas are developed and critiqued by Robert Westley in another article in this symposium issue. See generally, Robert Westley, Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?, in this issue, at 429.
racial reparations make bad policy. Many of these critics of race-based reparations, however, do not actually support economically tailored reparations for historically oppressed groups. Instead, they use class concerns to mask hostility for reparations of any kind.

Similarly, opponents of racial reparations employ class to argue underinclusiveness—that other economically disadvantaged groups will be left out of a race-based reparations program. Here again, the failure of these critics to support more expansive reparations for those other groups belies their ideological use of class rhetoric.94

The second ideological strand is the characterization of group worthiness. In an earlier article in this symposium, Chris Iijima traced the Congressional debates preceding Japanese American redress. Politicians, lobbyists and media largely shaped crucial reparations arguments around the cooperativeness of the internees, the heroism of the 442nd Regimental Combat Team and the "good citizenship" of Japanese Americans during and after the internment.95 Mike Masaoka's words, for example, were uplifted in the debates. Masaoka, the Executive Secretary and spokesperson of the Japanese American Citizens League during the war, had urged acquiescence to the government's internment orders as an act of patriotism.

I am proud that I am an American citizen of Japanese ancestry, for my very background makes me appreciate more fully the wonderful advantages of this Nation. I believe in her institutions, ideals and traditions; I glory in her heritage . . . .

Although some individuals may discriminate against me I shall never become bitter or lose faith, for I know such persons are not representative of the majority of the American people . . . .

Because I believe in America, and I trust she believes in me, and because I have received innumerable benefits from her I pledge myself to do honor to her at all times and in all places, to support her Constitution, to obey her laws, to respect her Flag, to defend her against all enemies, foreign or domestic, to actively assume my duties and obligations as a citizen, cheerfully and without any reservations whatsoever,

94 Those who make class-based arguments to limit the scope of racial reparations to those with financial need, and who are serious about supporting reparations in this fashion, raise arguments deserving careful consideration.

95 See generally Chris Iijima, Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation, in this issue, at 385.
on the hope that I may become a better American in a greater America.96

With this and other testimonials as a backdrop, Congress, at least in part, appeared to award redress for "deserving superpatriots." It thereby refined the image of a model minority—those who are loyal to and willing to sacrifice for the United States.97 Congressman Robert Matsui, a key player in Japanese American redress, reinforced this point at a recent gathering of redress activists:

There could be no question about our patriotism after people like Rudy [Tokigawa of the 442nd Regimental Combat Team], who was locked up in camp, went to war for the U.S. I don't think redress would have passed without the 442nd, without those who gave up their lives and gave themselves for the war effort while their families were interned.98

The superpatriot/model minority vision was bolstered by Congressmen Shumway (Japanese Americans are "some of the most respectable, hard working, loyal Americans that we have in this country"), Brown (Japanese Americans are some of Colorado's "finest citizens . . . some of our most honest, hardworking, and productive human beings"), and Lehman (the bill for reparations will show "the respect we all have for the contributions that Japanese Americans have made to our society").99

Most interesting, according to Iijima's research, the Congressional reparations debates avoided reference to Japanese American draft resisters—those who refused to fight while their families were wrongfully imprisoned.100 The debates also failed to address the riots and work and hunger strikes during which interned Japanese Americans voiced discontent with internment conditions.101 Throughout the internment, considerable disagreement existed within Japanese American communities over cooperation with and support for the government—disagreements later ignored by the narrow framing of redress discourse around Japanese American patriotism and sacrifice.102

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96 Id. at 399–400 n.42 (quoting 134 Cong. Rec. H6308–09 (daily ed. Aug. 4, 1988)).
97 See id. at 395.
99 Iijima, supra note 95, at 393 n.25.
100 See id. at 398.
101 See id. at 402–03.
102 See id. at 401–02.
Framing reparations worthiness in terms of the superpatriot/model minority served several interests. Certainly, and pragmatically, it aided Japanese American internees—they received long-overdue reparations. That framing also appears to have served the government's practical and policy interests. Practically, it enabled the government to award reparations to a relatively small number of “highly deserving” Japanese Americans without opening the floodgates to reparations for other racial groups. In terms of policy, it enabled the United States unblushingly to tout democracy and human rights in its hard push against Communism in the Soviet Union and Central Europe.

I supported Japanese American redress. Reparations were a well-deserved and appropriate response to a horrendous violation of constitutional liberties and to human suffering. Yet, difficult questions about ideology bear asking. In the broadest sense, were reparations a monetary buy-off of protest, an assuaging of white American guilt without changes in mainstream attitudes and the restructuring of institutions? Were reparations a transactional exchange along the lines of: “we’ll admit you into the club for now if you don’t challenge our exclusion of others?” In my view, Japanese American redress will not likely be seen by the mainstream and by other communities of color as a buy-off, or an exclusive transactional exchange. But that danger exists unless Japanese Americans now and tomorrow press for racial, immigrant, gender, class and sexual orientation justice in the United States.

The “danger lies in the possibility of enabling people to ‘feel good’ about each other” for the moment, “while leaving undisturbed the attendant social realities” creating the underlying conflict. . . . [R]edress and reparations could in the long term “unwittingly be seduced into becoming one more means of social control that attempts to neutralize the need to strive for justice.”

Inquiry into reparations ideology reveals this potential hidden danger of reparations; that leaving undisturbed the social structural sources of racial grievance may neutralize “the need to strive for justice.”

IV. AFRICAN AMERICAN REPARATIONS CLAIMS

As developed more fully in the concluding section, I support reparations for African Americans for a variety of reasons, including the need to heal the continuing wounds of many African American communities and to help repair the larger racial breach in the American polity. Others, including Robert Westley in this symposium, have made compelling arguments for reparations based on the economic and psychological harms of slavery, of Jim Crow violence and legalized segregation and of continuing institutional discrimination.\textsuperscript{104} With this in mind, and drawing upon emergent lessons of Japanese American redress, this section grapples with strategic obstacles to current African American reparations claims.

A. Legal Framing

Most claims for African American reparations are framed by civil rights law. The claims articulated by the National Coalition of Blacks for Reparations in America (N'COBRA) are one example. Although N'COBRA has several spokespersons at any given time, its main positions can be fairly characterized. N'COBRA cloaks its claims for African American reparations in legal cloth. It grounds those claims primarily in the Thirteenth and Fourteenth Amendments and civil rights statutes and, secondarily, in international law guarantees of equality and self-determination.\textsuperscript{105} N'COBRA's strategy is to seek legislative or judicial recognition of an existing legal entitlement to reparations.\textsuperscript{106}

1. Thirteenth Amendment

N'COBRA maintains there is no need to seek a Congressional amendment to the Thirteenth Amendment to authorize reparations. All that is necessary is enabling legislation to "put the already existing

\textsuperscript{104} See generally RICHARD F. AMERICA, PAYING THE SOCIAL DEBT: WHAT WHITE AMERICA OWES BLACK AMERICA (1993); BELL, RACE, RACISM AND AMERICAN LAW, supra note 15; BITTKER, supra note 52; BLACK MANIFESTO: RELIGION, RACISM, AND REPARATIONS (Robert S. Lecky & Elliot Wright eds., 1969); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS (6th ed. 1988); Magee, supra note 37; Thomas F. Pettigrew, New Patterns of Racism: The Different Worlds of 1984 and 1964, 37 Rutgers L. Rev. 673 (1985); Verdun, supra note 3; Westley, supra note 93.

\textsuperscript{105} See Nketchi Taifa, Reparations and Self-Determination, in REPARATIONS YES!: THE LEGAL AND POLITICAL REASONS WHY NEW AFRIKANS—BLACK PEOPLE IN NORTH AMERICA—SHOULD BE PAID NOW FOR THE ENSLAVEMENT OF OUR ANCESTORS 1, 9–10 (Chokwe Lumumba ed., 1989) [hereinafter Taifa, Reparations and Self-Determination, in REPARATIONS YES!].

\textsuperscript{106} See id. at 10.
13th Amendment into effect. ¹⁰⁷ For this reason, in 1987 N’COBRA members drafted procedural legislation recognizing an existing African American entitlement to reparations and creating the process for “New Afrikan” sovereignty.¹⁰⁸ Because the United States “has never accorded ultimate political justice” to slaves and the descendants of slaves, the draft legislation required that the federal government hold a plebiscite for African Americans.¹⁰⁹ Among other things, blacks could vote to create a New Afrikan nation within the United States¹¹⁰ that would be supported by U.S. reparations payments of three billion dollars annually.¹¹¹

The proposed implementing legislation faced immediate political and legal obstacles. Politically, its unveiling revealed strong disagreement among the American populace about black reparations. The legislation also severely underestimated the logistical and financial difficulties of a nationwide plebiscite involving African slave descendants. Finally, the proposal overestimated African American desire to consider seriously some form of independent black government.¹¹²

Equally important, N’COBRA’s narrow legal framing of an African American entitlement to reparations under the Thirteenth Amendment was easily undermined. As interpreted by the courts, the Thirteenth Amendment forbids slavery. It does not, however, embody an entitlement to reparations.¹¹³ Congress now could elect to confer reparations under the Amendment if it characterized past and current living conditions for many African Americans as “badges of slavery.” Procedural legislation to implement a pre-existing entitlement appears unavailing.

¹⁰⁷ Id.
¹⁰⁸ Entitled an “Act to Stimulate Economic Growth in the United States and Compensate, in part, for the Grievous Wrongs of Slavery and the Unjust Enrichment Which Accrued to the United States Therefrom,” the proposed legislation was submitted to Congress by Professor Imari Abubakari Obadele and Attorney Chokwe Lumumba. See REPARATIONS YES! 67–76 (Chokwe Lumumba ed., 1989).
¹⁰⁹ Id. at 67.
¹¹⁰ Id. at 71–74. N’COBRA’s approach requires all African Americans (“Afrikans”) to decide whether to accept the U.S. government’s offer of citizenship. Afrikans must decide either to (1) accept U.S. citizenship; (2) return to a country in Africa; (3) emigrate to a country outside Africa; or (4) create a New Afrikan nation-state in America. See id. at 73–74.
¹¹¹ See id. at 70, 72–73.
¹¹³ See, e.g., Cato v. United States, 70 F.3d 1103, 1110 (9th Cir. 1995); Hohri v. United States, 586 F. Supp. 769, 782, aff’d, 847 F.2d 779 (D.C. Cir. 1988).
2. Civil Rights and Torts Claims Act

In the summer of 1997, N'COBRA announced a contemplated class action reparations lawsuit on behalf of all descendants of formerly enslaved Africans in America against the federal and state governments. A litigation committee comprised of lawyers, scholars, social scientists and community activists is researching possible legal claims and assessing political strategies. Traditional civil rights and tort claims, along with novel claims such as claims under the Fair Housing Act, are under consideration.114

The problems of a civil rights/tort claims litigation approach to reparations are revealed in the Ninth Circuit's ruling in Cato v. United States.115 Cato consolidated two pro se lawsuits. Jewel, Joyce, Howard and Edward Cato and Leerma Patterson, Charles Patterson, and Bobbie Trice Johnson filed "nearly identical complaints . . . against the United States for damages due to the enslavement of African Americans and subsequent discrimination against them, for an acknowledgment of discrimination, and for an apology."116 Specifically, the complaint sought compensation of:

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114 See Interview with Adrienne Davis, Professor of Law, Litigation Committee member, in Miami, Fla. (May 9, 1998).
115 70 F.3d 1103. See generally Eugene Gressman, The Unhappy History of Civil Rights Legislation, 50 MICH. L. REV. 1323 (1952). Himiya v. United States is relevant to Cato. See No. 94 C 4065, 1994 WL 376850 (N.D. Ill., July 15, 1994). Himiya sued the United States for "aiding, abetting and condoning the institution of slavery" and alleged that the "institution of slavery caused African Americans to lose their language, religion, culture and history." Id. at *1. Himiya sought "twenty million dollars in punitive damages, 150 acres of tax-exempt land of his choice, free health care coverage for the remainder of his life, costs necessary to trace his personal genealogy, and costs necessary to legally change his name." Id. The district court dismissed Himiya's claims, finding them barred by the doctrine of sovereign immunity. In addition, the court dismissed his claim under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (negligence or wrongful act of an employee of government), because he did not "and cannot allege any wrongful act or omission of any employee of the government while acting within the scope of his office." Id. As in Cato, the court concluded with a hint of regret:

Although it is extremely regrettable that this country's history, as well as the history of many other countries, includes a significant history of slavery, the plaintiff does not have proper standing under the law to recover damages for this reprehensible time period. Instead, the citizens of the United States, acting through their congressional representatives, have determined that the remedy has been provided by the 13th, 14th and 15th Amendments to the United States Constitution, as well as our federal civil rights statutes.

Id. at *2.
116 Cato, 70 F.3d at 1105. Cato is a consolidation of two nearly identical complaints filed in forma pauperis. The district court dismissed the complaints in both cases, with prejudice, as groundless prior to service pursuant to 28 U.S.C. § 1915(d), but left open the opportunity to refile the action as a paid complaint. Id. at 1105 n.2.
$100,000,000 for forced, ancestral indoctrination into a foreign society; kidnapping of ancestors from Africa; forced labor; breakup of families; removal of traditional values; deprivations of freedom; and imposition of oppression, intimidation, miseducation and lack of information about various aspects of their indigenous character.117

The complaint also requested that the "court order an acknowledgment of the injustice of slavery in the United States and in the [thirteen] American colonies between 1619 and 1865, as well as of the existence of discrimination against freed slaves and their descendants from the end of the Civil War to the present."118 Finally, and related to the acknowledgment, the complaint asked for a formal apology from the United States.119

Plaintiffs' initial complaint thus described, in general terms, the horrors of slavery and current black/white disparities in employment, education and housing. The district court dismissed the complaint for failure to state a legal claim. On appeal, the plaintiffs' attorneys endeavored to recast the reparations claims in narrow civil rights and tort law terms. Even that constricted framing, however, fell short. Threshold procedural obstacles, including standing, subject matter jurisdiction, and the statute of limitations, blocked plaintiffs' reparations claims at every turn.

In affirming dismissal of the complaint, the Ninth Circuit Court of Appeals first noted that the district court described the suit as "patterned after the reparations authorized by Congress for individuals of Japanese ancestry who were forced into internment camps during WWII."120 The court then expressed empathy for the suffering slavery inflicted upon African Americans. It nevertheless agreed with the following statement of the district court, finding that there was no legally cognizable claim:

Discrimination and bigotry of any type is intolerable, and the enslavement of Africans by this Country is inexcusable. This Court, however, is unable to identify any legally cognizable basis upon which plaintiff's claims may proceed against the United States. While plaintiff may be justified in seeking

117 Id. at 1106.
118 Id.
119 See id.
120 Id.
redress for past and present injustices, it is not within the jurisdiction of this Court to grant the requested relief.121

The Ninth Circuit therefore concurred with the district court’s conclusion that “the legislature, rather than the judiciary, is the appropriate forum for plaintiff’s grievances.”122

More specifically, the court held that it lacked subject matter jurisdiction over Federal Torts Claims Act claims because the Act only applies to claims against the United States accruing after January 1, 1945 and to claims brought within two years of accrual.123 The court concluded that the Act did not provide a waiver of the United States’ sovereign immunity from slavery-related damage claims accruing in the 1800s.124 The court also implied that even if the Act did operate as a waiver of governmental immunity, the statute of limitations would have undermined African American damage claims based on the harms of slavery and legalized segregation.125

Moreover, the court rejected the possibility of amending the plaintiffs’ complaint in order to assert a civil rights statutory claim and a Thirteenth Amendment reparations claim.126 The court adopted the district court’s reasoning that section 1981 (a) of the 1866 Civil Rights Act127 (pertaining to contractual relationships) does not waive the federal government’s immunity from slavery-based claims.128 The court also recognized that the Thirteenth Amendment does not authorize individual damage claims against the government.129 In addition, the

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121 Cato, 70 F.3d at 1105.
122 Id.
123 See id. at 1107.
124 Id.
125 See id. at 1108.
126 See id. at 1109. The Supreme Court has ruled that the Enabling Clause of the Thirteenth Amendment clothed “Congress with the power to pass all laws necessary and proper for abolishing all badges and incidents of SLAVERY in the United States.” Cato at 1109 n.7 (quoting Jones v. Mayer Co., 392 U.S. 409, 439 (1968)).
127 The statute reads:
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
128 See Cato, 70 F.3d at 1106.
129 See id. at 1110. Citing Hohri, 586 F. Supp. at 782, the court concluded that the Thirteenth Amendment itself does not provide grounds to sue for damages (i.e., it does not in and of itself waive sovereign immunity), nor is it self-enforcing as to anything beyond the actual act of slavery. In particular, the court held that the Amendment does not provide a right to damages on grounds
court observed that even a claim solely for non-monetary relief (apology and acknowledgement) would not cure the complaint’s deficiencies because (1) such a claim would be based on a “generalized, class-based grievance” and would not implicate the conduct of any specific official or program that caused a discrete injury, and (2) the individual plaintiffs would lack “standing to litigate claims based on the stigmatizing injury to all African Americans caused by racial discrimination.”

Boris Bittker’s thoughtful pro-reparations arguments also cast reparations claims narrowly as Section 1983 civil rights claims. In light of a bevy of technical legal problems, however, Bittker limited the claims to those arising from post-slavery discrimination against African Americans. Bittker turned his focus away from the slavery era—a period for which no living person is directly responsible—because civil rights slavery reparations claims against state and local officials create insurmountable legal hurdles that “stultify[y] the discussion.” He argued that post-Civil War wrongs against blacks were sufficient to support present-day reparations claims.

Derrick Bell criticized Bittker for succumbing to narrow civil rights legalisms. First, by framing reparations as civil rights claims, African Americans still faced the legal obstacle of U.S. sovereign immunity. Second, by purposefully excluding claims for the entire period of slavery “there is a tactical loss[,] . . . setting this voluntary limitation on coverage sacrifices much of the emotional component that provides the moral leverage for black reparations demands.” The narrow legal
framing robbed the reparations claims of the heart of African American suffering—the continuing effects of slavery. For Bell, Bittker’s “exploratory surgery” of African American reparations “predictably exposes some serious legal and political difficulties while giving little attention to the pressures, moral and political, that, when applied by those whose faith in a cause exceeded their belief in the law, have spawned other legally [legislatively] acceptable reparations programs in this country and elsewhere.”

Legal obstacles, such as the statute of limitations, justiciability and causation, precluded Cato’s actual claims and undermined N’COBRA’s draft legislation as well as Bittker’s post-slavery civil rights arguments. The traditional common law paradigm of a legal claim, an individual wrongfully harmed by the specific actions of another in the recent past to recover demonstrable personal losses, did more than subvert legal claims for African American reparations. The traditional paradigm’s limitations also deprived the claims of their historical force and obscured their significance for a racially divided America.

3. International Human Rights Law

International human rights law is also a potential, albeit problematic, source of legal claims. In 1998, the Inter-American Commission of Human Rights determined that the United States violated international law through one of its court’s racially discriminatory treatment of William Andrews, an African American man convicted of murder in 1974 and executed in 1992. The Commission’s decision centered on a Utah court’s conviction and death penalty sentencing of Andrews despite ample evidence of a jury member’s overt racial bias. The
The Commission's 1998 report on the case recommended that "[t]he United States . . . provide adequate compensation to Mr. William Andrews' next of kin for . . . violations" of Andrews' right to life and equality under law, his rights to an impartial hearing and his right to protection from cruel, infamous, or unusual punishment, pursuant to Articles I, II and XXVI of the American Declaration of the Rights and Duties of Man.\footnote{See id. at 49.}

International human rights law is significant because of its articulation of global norms of governmental behavior. It is problematic because of the difficulty, if not impossibility, of enforcement of those norms in state and federal courts in the United States. The United States is a member of the Organization of American States, which operates the Commission, and is bound by the American Declaration of the Rights and Duties of Man. Despite the Commission's findings in \textit{Andrews},\footnote{The Commission found that the United States violated Andrews' right to life, right to equality at law, rights to an impartial hearing and not to receive cruel, infamous, or unusual punishment pursuant to Articles I, II and XXVI, respectively, of the American Declaration of Rights and Duties of Man. \textit{Id}.} the U.S. refused to comply with the Commission's recommendations, maintaining that "Mr. Andrews received an impartial trial free of racial bias. . . . [The U.S.] cannot agree with the Commission's findings, or carry out its recommendations."\footnote{\textit{Id}. at 50.} Without significant political intervention, the U.S.'s refusal to formally recognize the international law decision ended the case. Neither the state nor federal courts have jurisdiction to enforce the Commission's decision.

My aim in identifying the obstacles to reparations claims raised by narrow legal framing is not to discourage the assertion of legal claims for reparations or the identification of legal bases for reparations. These tasks are necessary because reparations are bestowed through some formal instrument, and law (whether legislation, court proclamation, executive order or international protocol) provides a recognizable vehicle. The tasks are also important because law and legal process, independent of formal outcome, can serve as generators of "cultural performances." They can provide an institutional public forum for calling powerful government and private actors to account. They can offer opportunity to develop and communicate counter-nar-

\footnote{Id. at 5.}
ratives to prevailing stories about minority communities. And they can help focus community education and political organizing efforts.142

My point is that claims of legal entitlement are integral to a reparations movement; they should not, however, be the primary emphasis of a reparations strategy. Legal claims and arguments need to be carefully framed and employed in light of their limitations in order to further the movement's larger political goals. Thus, although the international commission's decision in Andrews may be unenforceable in the U.S., if aptly framed and publicized, it may serve the reparations movement's larger political goal of recasting domestic civil rights claims as international human rights claims.143 The concluding section of this article sets forth an alternative look at strategic framing.

B. Dilemma of Reparations

Earlier I introduced the dilemma of reparations as part of the darker side of the transformative potential of reparations. When reparations are taken seriously they tend to recreate victimhood by inflaming old wounds and triggering regressive reaction. In a recent study, Jewish recipients of German reparations for Holocaust horrors attest

142 See generally Yamamoto, Cultural Performance, supra note 58. This political/cultural approach to law and legal process also serves as a foundation for environmental justice theory. See generally Luke Cole, Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law, 19 Ecology L.Q. 619 (1992).

143 Haunani-Kay Trask asserts that the United States has deprived Native Hawaiians of their nation and land and denied the Hawaiians' right to self-determination as a people, including control over aboriginal lands and natural resources. HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI‘I (1993). These deprivations, she asserts, are violations of Articles 15, 17, 20, and 21 of the Universal Declaration of Human Rights, Article 1 of the International Covenant on Civil and Political Rights, Article 1 of the International Covenant on Economic, Social and Cultural Rights, and Article 20 of the American Convention on Human Rights. Id. at 34–36.

One example of the use of international law in domestic litigation is Kealoha v. Hee, Civil No. 94-0118-01 (1st Cir. Haw., amended complaint filed Feb. 2, 1994). The plaintiffs sought to enjoin negotiations, settlement, and the execution of release by trustees of the Office of Hawaiian Affairs "concerning claims against the United States for the overthrow of the Hawaiian government in 1893, and the redress of breaches of the ceded lands trust committed by the United States and the State of Hawaii." Id. at 2. One of the claims asserted was that "it would violate the right to self-determination under international law (to do otherwise)." Count V of the Amended Complaint specifically addressed the alleged "Violation of International Law." It located Native Hawaiians' rights of self-determination in, among other things: the International Covenant of Civil Political Rights, Articles I, II, and XXVII, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (ratified by United States on Sept. 8, 1992); the Draft Declaration on the Rights of Indigenous People, dated August 21, 1993, prepared by the Working Group on Indigenous Populations and submitted to the United Nations Sub-Commission on Human Rights; the Universal Declaration of Human Rights; and general principles of international law. See Amended Complaint, at 20–26.

Some African American reparations claims asserted under international law are based on
to these problems.\textsuperscript{144} In the current movement for African American reparations, the potential victimization and backlash are apparent.

N’COBRA adopted a confrontational approach at its inception in 1987.\textsuperscript{145} With its support for a New Afrikan nationalism, N’COBRA recalls a kind of 1960s black nationalism\textsuperscript{146} then feared by many in the American mainstream. Some find N’COBRA’s approach now bracing, a wake-up call. Others twist lingering fears of black nationalism into a particular kind of backlash; for example, the “‘[t]alk of healing and reparations to African-Americans has provided the [Klu Klux] Klan with a recruitment tool in a time of decline.’”\textsuperscript{147}

Democratic Representatives John Conyers of Michigan and Tony Hall of Ohio have taken a kinder and gentler political and moral approach to African American reparations. Each year since 1989 Conyers has introduced legislation proposing an African American reparations study commission patterned after the study commission that uncovered facts essential to Japanese American reparations.\textsuperscript{148} The proposed commission, however, has received little congressional or presidential support.\textsuperscript{149} In June 1997, Hall introduced a highly controversial resolution calling for a simple United States apology to African Americans for slavery.\textsuperscript{150}

The N’COBRA and Conyers calls for African American reparations and the Hall apology resolution generated three types of negative reaction. First, much of the swift public opposition to Hall’s proposed resolution was steeped in hate and denial.\textsuperscript{151} The calls reopened old slavery and are “presented in the context of the United States’ having denied [African Americans] the exercise of [their] right to self-determination.” Imari Abubakari Obadele, \textit{Reparations, Yes!: A Suggestion Toward the Framework of a Reparations Demand and a Set of Legal Underpinnings}, in \textit{Reparations Yes!}, supra note 108, at 51.

\textsuperscript{144} See generally \textsc{Christian Pross}, \textit{Paying for the Past: The Struggle over Reparations for Surviving Victims of the Nazi Terror} (1998) (describing ways in which Jewish survivors of Nazi atrocities felt re-victimized by the reparations process).

\textsuperscript{145} See H. Khalif Khalifah, \textit{Reparations: A War Issue}, \textsc{Encobra: N’COBRA Newsletter}, Summer 1995, at 22 (“[r]eparations should always be presented as a militant, strong, uncompromising issue”).

\textsuperscript{146} See \textsc{Diego Bunuel}, \textit{Black Power Day Provides Motivation; Rally Focuses on Efforts to Bring About Changes}, \textsc{Sun Sentinel}, (Fl. Lauderdale, FL), July 26, 1998, at 3B, available in 1998 WL 12824356.


\textsuperscript{148} See \textsc{Sonya Ross}, \textit{Clinton Considers Apology for Slavery}, \textsc{Greensboro News & Rec.}, June 17, 1997, at 1, available in 1997 WL 4588826.

\textsuperscript{149} See id.


\textsuperscript{151} The backlash to Hall included hundreds of letters and phone messages, most condemning his resolution, often with harsh racial language.
wounds. Second, for some, the calls for an apology and reparations reinscribed victim status.

I don’t believe that we are so scarred by our history that we are incapable of finding creative ways to advance. Indeed, it is our endless preoccupation with governmental redress that partly robs us of the energy to find solutions to our problems. It enslaves us. As long as we sit around waiting on others to do for us what we should be doing for ourselves, nothing will ever get done.152

In addition, for some, the calls for reparations also painted blacks as pandering and overreaching. “Why should average tax-paying Asian Americans or Hispanic Americans or even European Americans (whose forebears [sic] owned no slaves) be asked to pay reparations to all black Americans, including the most wealthy?”153

Some

One man wrote that the government should apologize to him for stripping his great-grandfather of his 435 slaves. Some said African Americans should be thankful that slave traders rescued their ancestors from Africa. Others argued that their ancestors are immigrants who had no connection to slavery or that, beginning with the 350,000 Union soldiers who perished in the Civil War, the nation has done more than enough to atone for slavery.

Michael A. Fletcher, For Americans, Nothing is Simple About Making Apology for Slavery; Congressman’s Suggestion Draws Fire from All Sides, Wash. Post, Aug. 5, 1997, available in 1997 WL 12879800. Political scientist Andrew Hacker observed that Hall’s proposed apology for slavery: raises all sorts of emotions[.]. Many white people don’t want to hear any more obligations that have not been fulfilled. People say, “[w]e have done everything we have to do. We have affirmative action. We supported civil rights. Don’t call us anymore.” I sense a lot of that feeling out there.

Id.

152 Robinson, F., supra note 112. According to Edgar Hunt, a N’COBRA member, “Native Americans, the Eskimos and Japanese got reparations for what the American government did to them, why can’t we?”

Barbara Cooper, a Tennessee state representative, expressed similar sentiments regarding the issue of reparations: “There have been reparations for other groups to help keep them afloat. We (blacks) are just as much a part of this country as anyone else, so there is no reason that blacks should not receive reparations, also.” Chandra M. Haystett, Clinton Panel on Black Reparations Sought, Comm. Appeal (Memphis, Tenn.), June 28, 1997, at 1, available in 1997 WL 11999623.


[T]he reparationists make their strongest case when they argue that the 30 percent of black Americans who remain mired in poverty may be suffering the residual effects of slavery 120 years later. Fair enough. But helping these 9 million or so black Americans—whom Harvard social scientist William Julius Wilson termed the “truly disadvantaged”—is best accomplished not by cutting $400,000 reparation checks to these poor black families (which, no doubt, would be squandered like lottery checks), but by completely dismantling the $230-billion-a-year government—
blacks reacted by saying that reparations claims unnecessarily mis-
cast blacks as continuing targets of government mistreatment when
blacks in the past have benefitted from Urban Renewal, Model
Cities, Community Block Grants, Urban Development Action
Grants, Enterprise Zones, Empowerment Zones and affirmative ac-
tion.154

The third type of negative reaction came from the other direction.
It addressed the perceived inadequacy155 of Conyers' study commission
approach—that this approach did not go far enough because it initially
asked only for a study, and that even if individual monetary payments
resulted, those payments would be mere tokens. "[R]eparations [need
to] come in a lump sum that would be funneled into the educational
system, social programs or loans for first time home buyers."156

Joe Singer asked, "[w]ill reparation[s] right a wrong" or "will it
create further victimization of the oppressed group" thus exacerbating
the wound?157 Some will answer affirmatively to the first question, some
affirmatively to the second, and some will say yes to both. The dilemma
of reparations, revealed here, argues not for retreat by reparations
proponents in light of ambiguous support and likely backlash, but for
tactical anticipation.

C. Ideology of Reparations

I introduced Derrick Bell's broadly conceived interest-conver-
geneces thesis in Section III C of this article. According to Bell, African
Americans will only receive reparations for slavery when reparations
serve white Americans' larger political or economic interests. Bell
believes that ordinarily "[s]elf-interested whites who must make the
ultimate decision on whether or not to transfer property (land or
controlled welfare plantation, on which far too many poor black families are reliant.
In its place should be an empowerment system, which encourages and rewards
legitimate child birth, family cohesion, education, work and entrepreneurship.
These are the keys to upward mobility in America, as the thriving, successful black
middle and upper-middle classes have proven.

Id.154 See Robinson, E., supra note 112.

155 Tony Hall's proposed apology also received some negative reaction stemming from its
perceived inadequacy. See Fletcher, supra note 151.

156 Rother, supra note 150, at 4. In response to the Hall apology resolution, Reverend Jesse
Jackson commented: "[i]t is like you drive over somebody with a car, leave the body mangled,
then you decide to come back later to apologize with no commitment to help them get on their
feet. There is something empty in that. It is just more race entertainment." Fletcher, supra note
151.

157 Singer, supra note 60, at 3.
currency) to African-Americans have no incentive to make such self-defeating decisions." The interest-convergence thesis does not mean that African Americans must subordinate their interests to those of white Americans. Rather, it means that blacks must devise a reparations strategy that primarily serves African American interests while furthering, or appearing to further in some important way, mainstream interests. Those interests, as traditionally described, include the United States’ international and domestic reputation on human rights issues, peace in American cities and bolstering the American economy.

From this vantage point, until mainstream America perceives self-interest in N’COBRA’s position or the Conyers/Hall legislation, the political movements for reparations will have little resonance. As one commentator observes:

[w]e could organize ’til the cows came home and make a unified, resounding demand for reparations, and I just don’t think that in this climate it would be taken seriously. . . . This is not a black question. This is a white question. The question ought to be: “What will bring whites to apologize for the sin and the crime of slavery and to make the just recompense for it?”

Tellingly, Representative Conyers did not expect to find support for an apology to African Americans in the current Republican-majority Congress.

In America’s volatile racial climate, supporters of African American reparations have yet to frame a compelling interest-convergence.

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158 Magee, supra note 37, at 908.
159 See Yamamoto, Social Meanings of Redress, supra note 4, at 231; Bell, Interest-Convergence Dilemma, supra note 82, at 524; Mary Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61, 113–14 (1988).
160 The Reverend Jesse Jackson has attempted to lay an interest-convergence foundation for African American reparations. In one instance, he commented that an apology by President Clinton to African Americans would not be enough, and that the United States would also have to pay reparations. Reverend Jackson then praised an effort by President Clinton, who is preparing for a trade mission to southern Africa. He noted that the United States is seeking better trade relations with southern Africa, an effort he considered unprecedented. “The U.S. has interests in southern Africa, and southern Africa has an interest in shoring up its trade relations with America. So this is not a gift but an investment in Africa,” Mr. Jackson said, comparing the effort to the Marshall Plan for Europe after World War II. Harold McNeil, Baptist Gathering Hears Jackson Call for Return to Activism, Buff. News, Aug. 7, 1997, at 2, available in 1997 WL 6453116.
161 Robinson, L., supra note 11.
162 See id.
Proponents of a confrontational black nationalism in the 1960s coalesced with anti-war and social justice activists and spurred mainstream accommodation in the form of affirmative action and government entitlements. N’COBRA’s black nationalism takes the position that the reparations movement is a “war” and should always be presented as “militant, strong, [and] uncompromising.” This aggressive approach to reparations in post-civil rights era America, however, has played out quietly for the most part. N’COBRA has not attracted the kind of kinetic community and media attention once garnered by James Forman, Malcolm X and the Black Panthers. The 1960s black nationalism in the streets and schools created a sense of urgency in mainstream America; its 1990s version is comparatively unobtrusive.

Nor has the Conyers study commission approach appealed to the now politically conservative American mainstream. This approach adopts the blueprint for Japanese American redress. In 1988, based on a congressional commission’s recommendations and in light of the court rulings in the coram nobis cases, the United States paid $20,000 to each Japanese American internee survivor, totaling over $1.6 billion dollars. The payments, although substantial, were a small blip on the radar of the American economy. By contrast, similar reparations for African Americans would impact the economy: 20 million descendants of Africans enslaved in the United States between 1619 and 1865, multiplied by $20,000, would total 400 billion dollars in reparations. Opponents of African American redress are likely to cite these figures in playing the class card. Tapping into public concerns about expenditure of taxpayer dollars, they will argue both the overinclusiveness and underinclusiveness of racial reparations; overinclusive in that some not economically disadvantaged will benefit, underinclusive because other needy groups will be left out.

Also, in contrast with Japanese American redress, African American interests in reparations are not as easily squared with mainstream America’s current interests. First, when Japanese Americans received reparations the United States was fighting to win the Cold War and needed to be perceived as liberators. Although the United States recently has sought to expand its political influence into China, the Middle East and central Europe, an American interest internation-
ally in African American “liberation” through reparations has not been clearly articulated. There also has been no development of a cogent vision of far-reaching domestic benefits for the American polity.

Second, politicians from both parties, lobbyists and media shaped the debate on reparations for Japanese Americans so that Congress ultimately bestowed reparations upon a “worthy” racial minority—the “superpatriotic” even in the wake of oppression, the “model minority” that pulled itself up by the bootstraps. Chris Iijima characterized this reparations narrative as a celebration of “blind obedience” to injustice. This narrative, he suggests, sent a pointed ideological message to those subject to racial and other forms of aggression in America—be “patriotic,” do not complain, succeed on your own and you may be rewarded later. Or, conversely, if your group’s “character” marks it as “unworthy,” do not come to Congress seeking reparations.

Thus, although the moral justification for Japanese American redress applies many times over to African American claims, the economics and rhetorical strategies of 1980s Japanese American redress do not translate readily into African American reparations in a conservative political environment. How African American reparations proponents handle superpatriot/model minority narrative and its linkage to the social justification for reparations may be key, particularly in light of the Republican Party’s casting of African Americans in recent years as undeserving of “special” government benefits. Will the rise in overt white racism, the abolition of affirmative action, glass ceiling discrimination influence on China’s potential for manufacturing high value weapons such as submarines and nuclear weapons); Marianne Means, Scandal Backfire: Don’t Conclude Clinton is in China’s Pocket, DAYTON DAILY NEWS, Mar. 22, 1997, at 15A, available in 1997 WL 3931950 (noting that with President Clinton’s visit to China “[p]owerful economic interests are at stake . . ., represented by companies with vast political influence whose overseas trade translates into jobs for thousands of voters’); Edith M. Lederer, Group Says U.S. Shows Poor Leadership, ASSOCIATED PRESS, Apr. 23, 1998, available in 1998 WL 6654746 (describing U.S. attempts to gain political influence in the Middle East and other world trouble spots by acting as peace maker and displaying leadership); Jaime Suchlicki, Foreword, J. OF INTERAMERICAN STUDIES & WORLD AFF., Mar. 22, 1997, at 1, available in 1997 WL 10714609 (criticizing U.S. preoccupation with China, Central Europe, and the Middle East in attempts to obtain economic and political influence).

106 See generally Iijima, supra note 95.
107 See id.
108 See id.
nation, the high black male incarceration rate and the cutbacks in social programs and public assistance generate enough black anger and mainstream anxiety to create a national interest in black reparations? Will the "resegregation of America"—President Clinton's words—detract from America's capacity to police global democracy and thereby create impetus for black reparations? Will Japanese American redress beneficiaries disavow the singular superpatriot/model minority narrative of reparations worthiness and publicly support African American justice claims? The ideology of reparations poses these questions to Japanese Americans, African Americans, other groups seeking redress and the American polity as a whole.

In sum, at the turn of the millennium, how might the African American reparations movement navigate its way through obstacles generated by the narrow legal framing of reparations claims, the reparations dilemma and the ideology of reparations? How might it translate the moral power of its claims into politically viable action? There is, of course, no single, encompassing answer. No magic words.

What I offer in the concluding section are not specific arguments for African American reparations. Rather, I offer an altered conception of reparations to assist in the formulation of those arguments as part of a larger political strategy of "repair."

V. REPARATIONS AS REPAIR

Notwithstanding legal and political objections and the dilemma and ideology of reparations, reparations have been offered and accepted in recent years. The socio-psychological benefits of apologies and reparations are often significant for recipients. As previously mentioned, one woman said the Japanese American redress process had "freed her soul." Other beneficiaries responded with a collective sigh of relief. Ben Takeshita, for instance, expressed the sentiments of

\[170 \text{See Yamamoto, Race Apologies, supra note 9, at 47–48.}
\[171 \text{According to clinical psychologist Susan Heitler, } [\text{a}] \text{ an apology is a much more complex and powerful phenomenon than most people realize[.]} \text{ Fletcher, supra note 151. Additionally, psychologist Susan T. Fisk observes, }
\[\text{An apology for slavery would say it may not have been me, but it was my people or my government that did this and we now see that it was really a crime and sin. It is potentially healing. It shares responsibility for ending racism and it acknowledges that slavery has some relevance to today.}
\[\text{Id. See also Sharon Cohen, Americans to be Compensated for Horrors of Holocaust: Survivors Say Reparations Won't End Nightmares, SAN DIEGO UNION-TRIB., Apr. 6, 1997, available in 1997 WL 3126022 (for concentration camp survivor, "[r]eceiving reparations... would be a psychological boost").}
\[172 \text{Yamamoto, Social Meanings of Redress, supra note 4, at 227.}
when he said that although monetary payments "could not begin to compensate . . . for his . . . lost freedom, property, livelihood, or the stigma of disloyalty," the reparations demonstrated the sincerity of the government's apology.\textsuperscript{173}

In light of both the dangers and the transformative potential of reparations, I offer two insights into specific reparations efforts, insights drawn from Japanese American redress that bear on the shape of African American reparations claims and strategy. One is normative: reparations by government or groups should be aimed at a restructuring of the institutions and relationships that gave rise to the underlying justice grievance. Otherwise, as a philosophical and practical matter, reparations cannot be effective in addressing root problems of misuse of power, particularly in the maintenance of oppressive systemic structures, or integrated symbolically into a group's (or government's) moral foundation for responding to intergroup conflicts or for urging others to restructure oppressive relationships. This means that monetary reparations are important, but not simply as individual compensation. Money is important to facilitate the process of personal and community "repair" discussed below.

A second insight is descriptive: restructuring those institutions and changing societal attitudes will not flow naturally and inevitably from reparations itself. Dominant interests, whether governmental or private, will cast reparations in ways that tend to perpetuate existing power structures and relationships. Indeed, traditionally framed, American interests in racial reparations, including international credibility and domestic peace, tend to reinforce the social status quo.

Those seeking reparations need to draw on the moral force of their claims (and not frame it legally out of existence) while simultaneously radically recasting reparations in a way that both materially benefits those harmed and generally furthers some larger interests of mainstream America. Moreover, those benefiting from reparations in the past need to draw upon the material benefits of reparations and the political insights and commitments derived from their particular reparations process and join with others to push for bureaucratic, legal and attitudinal restructuring—to push for material change. And their efforts must extend beyond their own reparations to securing reparations for others.

These insights point toward a reframing of the prevailing reparations paradigm—a new framing embracing the notion of reparations

as "repair." Indeed, reparation, in singular, means repair. It encompasses both acts of repairing damage to the material conditions of racial group life—distributing money to those in need and transferring land ownership to those dispossessed, building schools, churches, community centers and medical clinics, creating tax incentives and loan programs for businesses owned by inner city residents—and acts of restoring injured human psyches—enabling those harmed to live with, but not in, history. Reparations, as collective actions, foster the mending of tears in the social fabric, the repairing of breaches in the polity.

For example, slavery, Jim Crow apartheid and mainstream resistance to integration inflicted horrendous harms upon African American individuals and their communities, harms now exacerbated by the increasing resegregation of America.\(^\text{174}\) Reparations directly improving the material conditions of life for African Americans and their communities are especially appropriate. In addition, the racial harm to African Americans also wounded the American polity. It grated on America's sense of morality (do we really believe in freedom, equality and justice?), destabilized the American psyche (are we really oppressors?), generated personal discomfort and fear in daily interactions (will there be retribution?), and continues to do so. As Harlon Dalton observes, "perpetuating racial hierarchy in a society that professes to be egalitarian is destructive of the spirit as well as of the body politic."\(^\text{175}\) Reparations for African Americans, conceived as repair, can help mend this larger tear in the social fabric for the benefit of both blacks and mainstream America.

So viewed, reparations are potentially transformative. Reparations can avoid "the traps of individualism, neutrality and indeterminacy that plague many mainstream concepts of rights or legal principles."\(^\text{176}\) Reparations are grounded in group, rather than individual, rights and responsibilities and provide tangible benefits to those wronged by those in power. As Mari Matsuda observes, properly cast, reparations target substantive barriers to liberty and equality.\(^\text{177}\) In addition, coupled with acknowledgment and apology, reparations are potentially transformative because of what they symbolize for both bestower and


\(^\text{176}\) Matsuda, Looking to the Bottom, supra note 38, at 393-94.

\(^\text{177}\) See id. at 391. See also Magee, supra note 37, at 913 ("[r]eparations would be powerful symbols of white group responsibility for the continued degradation of African-American life and
beneficiary: reparations "condemn exploitation and adopt a vision of a more just world."\(^{178}\)

For these reasons, some argue that reparations—in the sense of repair rather than compensation—are essential to mending racial breaches in the American polity. Manning Marable contends that the post-Civil War Reconstruction eventually failed because the federal government refused to support broad land grant reparations to African Americans.\(^{179}\) Without large-scale land redistribution (forty acres and a mule), the emancipation, the Fourteenth Amendment and civil rights statutes failed to uplift blacks socially and economically. Marable observes that because economic power was held by whites, equality in political and social relations was an illusion.\(^{180}\)

As Marable implies, without change in the material conditions of racial group life, reparations are fraught with regressive potential. Without attitudinal and social structural transformation of a sort meaningful to recipients, reparations may be illusory, more damaging than healing. No repair. Cheap grace.

Native Hawaiians voice these concerns in their drive for reparations. Hawaiians are seeking reparations from the United States and the State of Hawai‘i in the form of money, homelands and Hawaiian self-governance.\(^{181}\) Repairing cultural wounds, restoring a land base and altering governance structures are perceived by increasing numbers of Hawaiians as essential to functioning relationships among in-

culture"). Failure to engender such a transformation, Carl Rowan warns, may contribute to a race war:

\[\text{T}he\text{ reason there is a danger of this black underclass engaging in a race war is that they have no meaningful stake in the America that most whites and privileged minorities know. People with a real stake in something of value are loath to piss on it, let alone destroy it. But the mass of blacks can't get close enough to the American dream just to piss on it.}\]

\(^{178}\) Matsuda, \textit{Looking to the Bottom}, supra note 38, at 394.


\(^{180}\) See id. at 6.

\(^{181}\) A few legal claims for Hawaiian reparations have achieved some success. These claims were resolvable in part because they were based on specific provisions in Hawai‘i’s Constitution that recognize the state’s trust relationship with Hawaiians. See Ka‘ai’ai, Civil No. 92-3742-10 (1st Cir. Haw., Oct. 1992) (after successful lobbying by the core group, the 1995 legislature committed $30 million a year for 20 years, $600 million total, to the Homelands Trust); Office of Hawaiian Affairs v. State of Hawai‘i, Civ. No. 94-0205-01, \textit{appeal docketed}, No. 20281 (1998). See also Haw. Const. art. 16, § 7; Haw. Const. art. 12, § 4; Haw. Const. art. 12, § 7.
digienous Hawaiians, the federal and state governments and their non-Hawaiian citizens. Thus, while monetary compensation may be an appropriate form of reparations in some instances, it is not, alone, deemed sufficiently reparatory by most Hawaiians. For some, monetary payment alone would not bring material change; it would likely generate only illusions of progress and "throwing money at old wounds would do little to heal them." 182

Symbolic compensation without accompanying efforts to repair damaged conditions of racial group life is likely to be labeled "insincere." For instance, despite modest monetary restitution, the Japanese government's refusal to acknowledge responsibility for World War II crimes or take active measures to rehabilitate surviving victims has generated charges of insincerity and foot-dragging. For many, the Japanese government's refusal to express regret undermines the possibility of forgiveness and prospects for healing. 183 By contrast, Germany's efforts to heal the wounds of Jewish Holocaust survivors extend beyond monetary reparations. The German government has also undertaken disclosure of war archives, passed legislation barring race hatred, overhauled Holocaust educational materials and commemorated war victims. 184

Reparations, as repair, therefore aim for more than a temporary monetary salve for those hurting. Reparations are a vehicle, along with an apology, for groups in conflict to rebuild their relationships through attitudinal changes and institutional restructuring. 185 In terms of changed attitudes, making apologies a part of a group’s public history—as the Southern Baptists did through their formal apology to African Americans 186—is one means of reparation. Committing to end derogatory stereotyping of racial "others" is another. In terms of dismantling disabling social structures or supporting empowering ones, reparations might mean, as in South Africa, the government's new

182 Magee, supra note 37, at 879 (citing subcommittee members' comment on Conyers' reparations study bill, Commission to Study Reparations Proposals for African Americans Act, H.R. 1684, 102 Cong., (1991)).
184 See id. at 538 (citing "Forgive Us": East Germany Faces the Truth, Apologizes for the Holocaust—A Profound First Act, NEWSDAY, Apr. 15, 1990, at 3).
struggling but active Reconstruction and Development Programme aimed at redistributing land, changing education, health and housing policies and establishing public and private affirmative action programs.\textsuperscript{187}

This repair paradigm of reparations redirects attention away from individual rights (recognized by law) and legal remedies (monetary compensation). It focuses instead on (1) historical wrongs committed by one group, (2) which harmed, and continue to harm, both the material living conditions and psychological outlook of another group, (3) which, in turn, has damaged present-day relations between the groups, and (4) which ultimately has damaged the larger community, resulting in divisiveness, distrust, social disease—a breach in the polity.\textsuperscript{188} Within this framework, reparations by the polity and for the polity are justified on moral and political grounds—healing social wounds by bringing back into the community those wrongly excluded.\textsuperscript{189}

How Japanese Americans respond to African American reparations claims in the new millennium, and whether Japanese Americans

\textsuperscript{187} See generally John W. DeGruchy, The Dialectic of Reconciliation: Church and the Transition to Democracy in South Africa, in THE RECONCILIATION OF PEOPLES: CHALLENGE TO THE CHURCHES 16 (Gregory Baum & Harold Wells eds., 1997).

\textsuperscript{188} See generally Yamamoto, Race Apologies, supra note 9. Mari Matsuda has proposed a legal group-based, victim-conscious reparations model that generally embraces these ideas. The model expands the narrow definition of a legal relationship to include victim groups, perpetrator descendants and current beneficiaries. See Matsuda, Looking to the Bottom, supra note 38, at 375. Group damage brought about by past wrongs provides a horizontal connection within victim groups. See id. at 377. Group members think of themselves as a group because they are treated as a group. For them, group experiences with racism and discrimination are "raw, close and real." Id. at 379. A horizontal connection likewise exists within the perpetrator group because dominant groups have benefitted and continue to benefit from past wrongs, even if members of this group deny any personal involvement. See id.

The expanded paradigm also departs from the classical legal notions of time-bar and proximate cause. See Matsuda, Looking to the Bottom, supra note 38, at 381. Reparation itself is necessary because a nation takes such a long period of time to recognize historical wrongs against a victim group. Reparations claims are instead based upon ongoing stigma, discrimination and harm. See id. at 381–82. A victim perspective offers an alternative time-bar. Under the expanded paradigm, "[t]he outer limit should be the ability to identify a victim class that continues to suffer a stigmatized position enhanced or promoted by the wrongful act in question." Id. at 385. And where the continuing effects of the wrongs are acute, the passage of time should not be a waiver of the wrong. See LAWRENCE & MATSUDA, supra note 38, at 240.

Matsuda suggests that victim group members should also participate in the identification of those entitled to relief and the nature and disbursement of the reparation awards. See Matsuda, Looking to the Bottom, supra note 38, at 387. Consultation of victims respects their self-determination and personhood. See id. Under this expanded group-based legal paradigm, groups, both victims and perpetrators, are thus treated collectively rather than individually. See id. at 380.

participate in the repair of other groups’ wounds and the mending of tears in society’s fabric, may well determine the legacy of Japanese American redress.