SOME CONCEPTUAL AND LEGAL PROBLEMS IN REPARATIONS FOR SLAVERY

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Now that "reparations talk"[1] has gained wide acceptance on college campuses, on the opinion pages of the nations' newspapers, and even on occasion in the halls of Congress, we need to focus on the moral and legal case for reparations and how proposals made might actually work. Reparations may be becoming widely accepted as an ideal, but there is great uncertainty about the form they will take. There are some conceptual problems associated with the implementation of reparations: whether the court system is the best (or even an appropriate) place to look for redress and, at a higher level of generality, whether the dominant liberalism of American law is equipped to deal with such claims. I shall address three such problems with reparations: first, Part I and Part II examine the rhetoric of debt and unjust enrichment in reparations talk and associated conceptual problems with making claims on behalf of victim groups against perpetrator groups; second, Part III explores the constitutionality of reparations for slavery; and third, Part IV investigates the appropriate types of remedies for harms where the people most directly harmed are no longer alive. A final section places the reparations debate into a larger context of the cultural wars over redistribution of property and benefits on the basis of race.

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1. With apologies to Mary Ann Glendon. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

I.
THE ORIGINS OF MODERN SLAVERY REPARATIONS TALK

As the United States struggled with extricating itself from the tragedy of slavery in the years of the Civil War and Reconstruction, some members of Congress proposed transferring land to former slaves. The proposals, if followed, would have resulted in huge redistribution of property.[2] It is testimony to the fluid nature of American political philosophy that such proposals, with such sweeping results, were under consideration. Because reparations talk at the time considered using land confiscated from Confederate loyalists, it was part of the destruction of Southern power—what before the war had been called "The Slave Power Conspiracy." But the proposal of land redistribution was forward-looking as well and began to address how former slaves might be assisted in their transition to freedom. The rhetoric at the time was of economic independence and virtue.[3]

Following Reconstruction, however, there were decades of state-mandated segregation in housing, public accommodations, and education, and state-mandated limits on voting. This legacy, and the sad realization that Reconstruction left former slaves not with economic independence but in many instances in long-term labor contracts with their former owners and subjected to harsh "black codes," is central to the current debate over reparations. Had there been adequate measures taken to allow former slaves to gain economic and educational advancement, it is doubtful that anyone would be talking about reparations now, for there would be no need for them. African Americans would have educational opportunities and wealth equivalent to (or approaching) that of the white population.

The reparations movement has gained substantial strength in both academic and political debate in the last fifteen years. That growth is attributable to several factors. First, and perhaps most

2. *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION (1988) (discussing reconstruction proposals, especially their effect on property ownership).

3. ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 128–49 (1980). Foner emphasizes Thaddeus Stevens' desire to hurt the South, but running alongside the rhetoric of destruction of the Southern aristocracy is the promotion of freed slaves. *See also* Daniel Hamilton, The Limits of Sovereignty: Legislative Property Confiscation in the Union and the Confederacy (2003) (forthcoming dissertation, Harvard University) (on file with author) (discussing the power of the idea of property in the Union and Confederacy).

importantly, has been the decline of support for affirmative action.[4] Those searching for new ways to talk about race see reparations as a way of talking about why some race-based corrective action is necessary. There is a grand optimism in much reparations literature, which suggests that if we can just educate others about the centuries of injustice that African Americans have faced, there will be a change in Americans' attitudes.[5] Indeed, a bill proposed by Representative Conyers of Michigan is premised in part on that idea. Representative Conyers's Reparations Study Bill proposes a committee to study slavery and more recent discrimination, to propose ways to educate Americans about that history, and to make recommendations on reparations.[6] There is a strange relationship, of course, between affirmative action and reparations talk, because many see affirmative action as a form of reparations.[7] So as courts restrict affirmative action and as it loses support in legislatures, reparations offers the hope of a different language for talking about many of the same issues.

A second factor leading to the reinvigoration of talk about reparations for slavery and Jim Crow are the models of reparations that other groups—Native Americans, Holocaust victims, Japanese Americans interned during World War II, South Africans—have obtained. The form of reparations in each case has varied widely. There have been some cases of relatively limited reparations, such as the Civil Liberties Act of 1988, which provided $20,000 to each Japanese American person interned during World War II who sur-

4. *See generally* Norman Redlich, *"Out, Damned Spot; Out, I Say." The Persistence of Race in American Law*, 25 VT. L. REV. 475 (2001); Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1 (2002). Bernie Jones has interpreted critical race theory more generally as a response to the decline of the Civil Rights Movement. *See* Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACKLETTER L.J. 1 (2002).

5. *See, e.g.*, Ronald Roach, *Moving Towards Reparations*, BLACK ISSUES IN HIGHER EDUCATION, November 8, 2001, at 21 ("[T]he demand for reparations is fundamentally not about the money. The money is secondary. The primary reason is for the truth to be told.") (quoting Professor Manning Marable).

6. For the text of the bill, see H.R. 3745, 101st Cong. (1989), http://thomas.loc.gov/cgi-bin/query/C?1Ø1:./temp/~c1Ø109ØviA (last visited Oct. 24, 2002); H.R. 105th Cong. (1997), http://www.directblackaction.com/rep_bills/hr40.htm (last visited Oct. 24, 2002).

For a history of the movement by one of its leaders, see Adjoa A. Aiyetoro, *The Development of the Movement for Reparations for African Descendants*, 3 J. L. SOC'Y 133–44 (2002).

7. Jack Greenburg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 575–80 (2002) (discussing affirmative action as a form of reparations).

vived until 1986. That legislation cost the United States $1.6 billion; however, it provided only a modest payment to each individual and it made no effort to correlate payments with amounts of suffering.[8] It offered a token, lump-sum payment. In other cases, such as Holocaust victims, there have been a variety of compensation programs.[9] The most notable is the Swiss banks' program, which paid money that was held by the banks to victims' family members.[10]

The sad fact is that payments have been small. There is not enough wealth in the world to provide compensation for all the wrongs that have been done, and so payments are for limited tragedies and can be at best little more than symbolic. To paraphrase a character from Harriet Beecher Stowe's novel of slave rebellion and redemption, *Dred: A Tale of the Great Dismal Swamp*: for the great wrongs in society, little can be expected.[11] It is precisely the magnitude of the problem that will make meaningful reparations for slavery unlikely, if not impossible. Nevertheless, advocates of reparations for slavery have drawn from other reparations precedents.[12]

There may be yet a third factor, which is outside of the legal domain but worth noting. It appears that we are in an age of apol-

8. 50 U.S.C. app. § 1989b (1994). In 1992, the funding for the act was increased from $1.25 billion to $1.65 billion. 50 U.S.C. app. § 1989b-3(e) (1994). *See also* COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, COMM. ON INTERNAL AND INSULAR AFFAIRS, 102D CONG., PERSONAL JUSTICE DENIED (Comm. Print 1992) (describing the history of exclusion that was being compensated). A 1948 act also provided limited compensation. *See* Japanese-American Evacuation Claims Act of 1948, Pub. L. No. 80-886, 62 Stat. 1231 (codified as amended at 50 App. U.S.C. §§ 1981-87).

9. Libby Adler & Peer Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich,* 39 HARV. J. ON LEGIS. 1 (2002) (analyzing German law establishing reparations program for victims of the Nazi slave and forced labor programs); Emily J. Henson, Comment, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners—Can Moral Obligations be Translated into Legal Duties?*, 51 DEPAUL L. REV. 1103 (2002).

10. *See, e.g.*, Michael J. Bazlyer, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 14–17 (2002).

11. Stowe's character, a justice of the North Carolina Supreme Court, lamented that the great institutions (churches, courts, and legislatures) in society had aligned themselves with slavery. HARRIET BEECHER STOWE, DRED: A TALE OF THE GREAT DISMAL SWAMP 444 (Robert S. Levine ed., Penguin Books 2001) (1856) ("[F]rom the communities—from the great organizations in society—no help whatever is to be expected.").

12. *See* BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS (1973) (discussing precedents of German and Native American reparations as potential precedents in his analysis of the case for black reparations).

ogy. President Clinton apologized for, was part of apologies for, or discussed apologizing for slavery, the genocide in Rwanda,[13] executions of civilians during the Korean war,[14] the United States' support of Guatemala's military while it committed genocide,[15] medical experiments on African Americans at Tuskegee, radiation experiments, and the deprivation of native Hawaiians' land.[16] That seems to have led to an increased awareness and focus on the present effects of past pain—and given legitimacy to claims that someone (usually the government) should apologize and then pay.[17] This combination of factors has led to the recent explosion of reparations talk.

II.
CONSIDERING CONCEPTUAL PROBLEMS WITH FRAMING REPARATIONS CLAIMS

With that background, which seeks to explain why people are asserting reparations claims now, we can turn to some of the conceptual problems that reparations claims face. This section begins by discussing the critical race scholarship advocating reparations and the ways that scholarship addresses such problems as identifying the appropriate recipients of reparations and payers of them, as well as issues of statute of limitation. Then it looks to several recent lawsuits that have been filed, proposed, and in several cases dis-

13. Philip C. Aka, *The "Dividend of Democracy": Analyzing U.S. Support for Nigerian Democratization*, 22 B.C. THIRD WORLD L. J. 225, 276–77 (2002) (discussing Clinton's high-profile apologies).

14. Martha Mendoza, *No Gun Ri: A Cover-Up Exposed*, 38 STAN. J. INT'L L. 153, 158 (2002).

15. John M. Broder, *Clinton Offers His Apologies to Guatemala*, N.Y. TIMES, Mar. 11, 1999, at A1.

16. *See* Pub. L. 103-150, 107 Stat. 1510 (1993). The 2001 World Conference Against Racism in Durban, South Africa, illustrates the continuing international concern over reparations. It may also signal the emergence of new strategies. *See* Michelle E. Lyons, Note, *World Conference Against Racism: New Avenues for Slavery Reparations?*, 35 VAND. J. TRANSNAT'L L. 1235 (2002); Ryan Michael Spitzer, Note, *The African Holocaust: Should Europe Pay Reparations to Africa for Colonialism and Slavery?*, 35 VAND. J. TRANSNAT'L L. 1313 (2002).

17. *See*, *e.g.*, Joe Hermer, *Gift Encounters: Conceptualizing the Elements of Begging Conduct*, 56 U. MIAMI L. REV. 77, 83 (2001) ("Some commentators, in the wake of the recent conduct of former President Clinton, have suggested that the apology has become a central trope of political discourse in the late twentieth century."); Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289 (2001); Jon M. Van Dyke, *The Fundamental Human Right to Prosecution and Compensation*, 29 DENVER J. INT'L L. & POL'Y 77, 87–88 (2001) (listing Clinton-era apologies).

missed, for further evidence of the promise and limitations of lawsuits.

In many ways the origin of modern slavery reparations talk in the legal academy is Mari Matusda's 1987 article, "Looking to the Bottom: Critical Legal Studies and Reparations," in the *Harvard Civil Rights-Civil Liberties Law Review*.[18] Matsuda, writing as Congress was considering reparations to Japanese Americans, contemplated a much larger agenda: the wholesale redistribution of wealth to descendants of slaves. She used reparations for slavery as an example of an idea born in the minds of people "at the bottom of the well"—that is, from outsiders, non-lawyers, the dispossessed—who are calling for some sort of economic justice.[19] Matsuda then develops an argument that reparations claims should be considered as claims of a group of victims against a group of perpetrators, instead of individual victims against individual perpetrators.

For Matsuda, the claim for slavery reparations is in conflict with traditional legal notions. She diagrams the problem of reparations as:

Plaintiff Class A (victim group members) v. Defendant Class B (perpetrators' descendants and current beneficiaries of past injustice).[20]

Because courts are used to dealing with claims by well-identified victims against well-identified wrongdoers,[21] these will be hard claims to put into a legal framework, though there have been some stunningly thoughtful attempts to do so in recent years.[22] The

18. 22 HARV. C.R.-C.L. L. REV. 323 (1987). Matsuda's article, in turn, is part of a much larger movement that questions the fairness of legal rules and statements about law's neutrality in regard to race. Matsuda's proposal of reparations is, thus, connected to many other scholars. Many of those other scholars seek legal change in place of reparations. *See, e.g.*, Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637 (1999).

19. For a critique of Matsuda's emphasis on the race of and the racialized ideas of those at the bottom, see Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1801–10 (1989). *Cf.* DANIEL FARBER AND SUZANNE SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 15–33 (1997) (critiquing the tenets of critical race scholarship).

20. Matsuda, *supra* note 18, at 375. R

21. *Id.* at 374.

22. Perhaps the article that has advanced the cause the most is Rhonda V. Magee, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863 (1993). For earlier examples, see BITTKER, *supra* note 12; Graham Hughes, *Reparations for Blacks?*, 43 N.Y.U. L. REV. 1063 (1968). Recently Adrienne Davis has provided a suggestive case for reparations based on the Thirteenth Amendment.

claims are hard to fit into a traditional framework for two reasons. First, the victims are making claims against people who are not themselves wrongdoers. Furthermore, that defendant class may not have any current benefit from the harm. In that case, there will be a claim asserted against a discrete group of innocent people. The stronger claim—though not necessarily a successful one—is against the current beneficiaries of past injustice. Reparations claims sometimes fit within the framework of identifiable victims and perpetrators, but they usually do not. Often the perpetrators cannot be identified with specificity or are no longer alive. One thinks of war crimes, where it is frequently impossible to specify a guilty individual although a group that committed the crime may be identified. At other times, the appropriate recipients of restitution are also difficult to identify for much the same reasons; one wonders, for instance, who precisely are the victims of Jim Crow legislation? Certainly we can identify a significant number of people who have been harmed, but the Supreme Court typically requires some showing of close connection between those who were harmed and those receiving a remedy.[23]

Because courts demand that particular plaintiffs identify particular defendants, many victims try to draw connections between past wrongdoers and people in the present. Looking from the victims' perspective, Matsuda calls for group liability: "[A] victim would

See Adrienne D. Davis, *The Case for United States Reparations to African Americans*, HUM. RTS. BRIEF, Winter 2000, at 3, 4–5.

23. The connection does not need to be perfect, as the Supreme Court has explained in affirmative action cases and busing cases. *See, e.g.,* United States v. Paradise, 480 U.S. 149, 167 (1987) (permitting race-conscious hiring, given extreme evidence of discrimination against African-Americans in the past by the employer, even though beneficiaries may not have been the same people previously excluded); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15–16 (1971) (providing for race-conscious remedy for school desegregation). The Supreme Court has recently re-emphasized that there may be race-conscious government action, if there is a history of discrimination in the location (and perhaps by the government entity taking action). *See* Richmond v. J.A. Croson, 488 U.S. 469, 505–09 (1989). Of course, the program must be "narrowly tailored" to the discrimination—that is, it must seek to rectify specific discrimination and have a logical stopping point. There are a number of specific instances of racial crimes which could be used to justify action, such as the riots used to terrorize and destroy African American communities throughout the south and southwest, and lynchings. *See, e.g.,* Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 851–52 (2002) (discussing intergenerational effects of racial violence of the Jim Crow era and its implications for reparations); Alberto B. Lopez, *Focusing the Reparations Debate Beyond 1865*, 69 TENN. L. REV. 653, 665–675 (2002) (discussing reparations for various specific racial incidents).

note that as the experience of discrimination against the group is real, the connections must exist. The hierarchical relationship that places white people over people of color was promoted by the specific wrongs of the past."[24] It seems that few deny that there are connections between past wrongdoing and present harm (though recognition of that fact may be more prevalent among victims than descendants of perpetrators), but the problem becomes putting that connection into some framework that law recognizes. Formulating a legal claim requires linking past perpetrators with people who currently exist. It also involves linking past victims with people who are making a claim in the present—or what one might call present victims of past discrimination. Matsuda links those people by arguing that victimization itself is racial: "Each specific act of oppression against a minority group reinforces, entrenches, and promotes the assumption that non-whites are different and appropriately treated as different."[25] Therefore, Matsuda treats racial identity as a substitute for victim identity.[26] She is able to expand the concept of victim and perpetrator identity by reliance upon groups' own conception of themselves as victims and as discrete units.[27] She also uses other, more tangible factors to link victims together as groups, such as low economic status and lack of property.[28] There is much that can be said for such an approach—and indeed, courts have adopted such arguments in desegregation cases. Courts are much more reluctant to adopt such an approach for perpetrator identity, however.[29]

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24. Matsuda, *supra* note 18, at 376. R

25. *Id.*

26. *Id.* at 380 ("Victims and perpetrators belong to groups that, as a matter of history, are logically treated in the collective sense of reparations rather than the individual sense of the typical legal claim.").

27. *See, e.g., id.* at 376 ("Victims necessarily think of themselves as a group, because they are treated and survive as a group."); *id.* at 379 ("In short, the experience of the Hawaiians and Japanese-Americans as members of a victim group is raw, close and real.").

28. Matsuda uses the example of Native Hawaiians to make this point:

> Indigenous Hawaiians . . . are on the bottom of every demographic indicator of social survival: they have lower birth weights, higher infant mortality, and, if they survive, higher rates of disease, illiteracy, imprisonment, alcoholism, suicide and homelessness. Hawaiians realize their forgotten status in their own land. Poor and rich, Democrat and Republican, commoner and royalty—native Hawaiians largely agree that they have been robbed.

Id. at 377.

29. *See, e.g.,* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (finding that comparisons between percentages of minority students and minority faculty were insufficient when remedies "work against innocent people").

Closely related to the difficulty of identification of victims and wrongdoers is the requirement that there be a close connection between past wrong and present claim.[30] In some instances, courts are willing to relax the usually strict connection between past wrong and present claim. In environmental law, for instance, a present owner of property may be liable for reclamation costs, without regard to fault.[31] However, even in those instances, there is a connection between the past wrong and the individual asked to pay—that person is the successor to the property's title. When subsequent purchasers can demonstrate they took extraordinary steps to investigate the property before purchasing it, they can claim status as an "innocent owner" and escape reclamation costs. Moreover, the Supreme Court has recently called into question the imposition of liability on successors in *Eastern Enterprises v. Apfel*.[32] Matsuda offers an alternative test for gauging the relationship between past wrong and present claim. She proposes that victim status for a racial group continue as long as "a victim class . . . continues to suffer a stigmatized position enhanced or promoted by the wrongful act in question."[33] The statute of limitations is extended for as long as there is a group that is suffering harm as a group—potentially for generations. There are, then, several distinct problems between connecting past and present. There are problems in connecting the past wrongdoers with their successors (who would be the present defendants); problems in connecting past victims with their successors (who would be the present plaintiffs); and connections between past wrongs and present claims.

Finally, there are questions about how to compute damages.[34] Difficulty of figuring remedies—who is entitled to reparations, the form they will take (such as individual payments)—pales by comparison, however, with the other issues Matsuda identifies, including identifying proper defendants and overcoming typical legal barriers such as standing, statutes of limitations, and location of a substantive claim. Moreover, the United States Supreme Court has frequently pointed out that difficulty in determining an appropriate remedy should not bar relief completely.[35] Some of the issues of

30. Matsuda, *supra* note 18, at 374. R

31. Andrew R. Klein, *Hazardous Waste Cleanup and Intermediate Landowners: Reexamining the Liability-Based Approach*, 21 HARV. ENVTL. L. REV. 337 (1997) (discussing liability of subsequent owners for predecessors' torts).

32. 524 U.S. 498 (1998).

33. Matsuda, *supra* note 18, at 385. R

34. *Id.* at 374, 385–88.

35. *See, e.g.*, Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562–63 (1931).

remedies, however, like who will receive compensation, overlap with substantive questions about whether plaintiffs are victims of a legally recognizable claim.

Matsuda's article established the basic position of many reparations proponents; subsequent articles have added to her analysis. Vincene Verdun's 1993 article in the *Tulane Law Review*, for instance, focused exclusively on reparations for slavery.[36] Like Matsuda, she identified key differences in attitudes towards reparations and issues of group identity and tracing present harm to past discrimination. However, Verdun aimed at establishing the case for reparations for slavery on political rather than legal grounds. She divided the world into holders of the dominant (anti-reparations) and the African American consciousnesses, and used Matsuda's discussion of the legal system's usual requirement that there be an identified victim and an identified wrongdoer as representative of the dominant (anti-reparations) view.[37]

Verdun critiqued this "dominant" perspective as providing far too little liability, for it prevents courts from imposing remedies on those who are the beneficiaries of past discrimination.[38] Affirmative action decisions—tracking that dominant perspective but not following it completely—have required that there be a close tailoring of race-conscious remedies to past discrimination in a specific location.[39] Verdun's focus on the African American consciousness—which is part of a much larger debate over the persistence of African values—emphasizes what she identifies as values of "collectivism and communalism."[40] Those values lead to the conclusion that the community should help repair the damage imposed on African Americans by slavery and decades of Jim Crow without regard to problems of specificity of victim and perpetrator.[41] Verdun does not distinguish between harm caused by the government and that

36. Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TULANE L. REV. 597 (1993).

37. *Id.* at 619–20.

38. *Id.* at 621–22.

39. The implications of affirmative action and desegregation decisions are discussed more fully below, when we contemplate the constitutionality of reparations. *See infra* Part III (on constitutionality of reparations).

40. Verdun, *supra* note 36, at 628. Verdun's work aims less at courts and more at legislatures than Matsuda's. It is also part of a much larger debate over the nature of African American culture. It, therefore, touches on issues of Afrocentrism, along with citations to suspect scholarship on the biological determinants of personality differences between African Americans and European Americans. *See id.* at 668 nn.90–91.

41. *Id.* at 628.

caused by private discrimination. She concludes with a sweeping statement about society's liability for racism.[42]

Verdun advocates reparations for both an economic and an emotional injury: the failure to pay for slaves' labor and "the presumption of inferiority, devaluation of self-esteem, and other emotional injuries, pain, and suffering, that resulted from the institution of slavery."[43] Verdun proposes two ways of measuring the economic injury to individuals, which appear in keeping with the African American perspective, although she maintains they are consistent with the dominant perspective: establish who would have gone to college if the opportunity had been available and then compensate them; or "distribute the compensation for all students who would have entered professions, calculated by comparative ratios with a white control group, to all African Americans who were undereducated."[44] Verdun does not propose a way of determining who is due compensation for emotional injuries or a way to gauge the amount of that compensation. Group identity serves, in Verdun's article as in much reparations scholarship, as a proxy for evidence of discrimination. The work is provocative and suggestive of

42. *See id.* at 638 ("Because society perpetuated and benefited from the institution of slavery, all of society must pay. Society, unlike individuals, does not have a natural life. The society that committed the wrong is still thriving. In a sense, reparationists would analogize society to a trustee who holds the corpus of the trust—the benefit society derived from slave labor during slavery and since emancipation—and would view African Americans as the beneficiaries of the trust who are entitled to trace the assets of the trust in whatever form they can be found.").

43. *Id.* at 631–32.

44. *Id.* at 643. Verdun argues that every loss to an individual also represents a loss to the larger African American community. *Id.* at 644 ("It is easy to see that if injuries to all individuals who could be identified under the dominant perspective were evaluated from the African-American consciousness, every African American would be an injured party as the result of the collective harms caused by discrimination against such individuals."). She does not offer a formula for measuring what those harms might be. And, while few would deny that the community is harmed by harm to its constituent members, it is very difficult to measure that harm. And such a remedy would run up against the Supreme Court's complaint in *Richmond v. J.A. Croson*, 488 U.S. 469, 499 (1989), that "It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination. . . . Defining these sorts of injuries as 'identified discrimination' would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor."

Occasionally, however, courts ask how much a class of employment discrimination victims would have earned, then distribute the award to all members of the class. *See* United States v. City of Miami, 195 F.3d 1292 (11th Cir. 1999). That is potentially different than Verdun's formula, since Verdun measures the people who would have entered the profession by the percentage in the white population; *City of Miami* looked to the class of people who were likely candidates. *Id.* at 1300.

issues that require consideration and considerable further formulation.

Just a few months after Verdun's article, Rhonda Magee published "The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse," in the *Virginia Law Review*, which aimed at clarifying both the case for reparations, based on the historical evidence of government-sponsored mistreatment of African Americans in slavery and the era of Jim Crow, and placing it in a context of contemporary American law.[45] Although Magee did not necessarily envision filing a lawsuit, she used law as a framework for evaluating reparations. Like Matsuda and Verdun, Magee explored the differing conceptions of fairness of those in the mainstream and of outsiders. Magee also focused on the differences among outsiders. Some, like Marcus Garvey and his descendants, advocate a nationalist perspective, which urges separatism of African Americans and European Americans. Others urge integrationism. Magee portrays reparations as a third way, which is part of achieving a multicultural balance that Magee calls "cultural equity."[46] Magee has gone far towards envisioning what a world of cultural equity might look like and the role of reparations as part of that world. She calls for a renewed focus on education, and nurturing awareness of African American contributions to American economic and cultural development. Affirmative action and reparations are both part of that program, for the wealth redistribution they effect would increase African American participation in politics and lead, she predicts, towards economic and social equality.[47] Magee provides an important justification for reparations, which presents it as more than a replacement for affirmative action—she sees reparations as a key component of a program that integrates African Americans more fully into American politics. Provision of reparations, she concludes, "simultaneously acknowledges official responsibility, promotes economic and cultural self-sufficiency, and relinquishes to African-Americans a measure of control over the implementation of the remedy."[48] Magee is searching for what she calls a "utopian ideal"[49] that dismantles what she identifies as a pervasive ethic of white supremacy.[50] Magee attacks, as do many critical race schol-

45. Magee, *supra* note 22. R
46. *Id.* at 874–75.
47. *Id.* at 876.
48. *Id.* at 914.
49. *Id.* at 910.
50. Magee states:

ars, the idea of colorblindness. She argues that courts' adherence to colorblind principles hinders remedies that "eliminat[e] internalized racism" and, one presumes, redistribute wealth along racial lines.[51] Magee aims not so much at suggesting new uses of old doctrine, as articulating a system-wide critique of this liberalism in American law.

What is emerging, then, in legal academic scholarship on reparations are several key themes: first, that reparations claims through the courts are going to be difficult, and second, that there are multiple perspectives for evaluating reparations claims. Some—usually denoted the "dominant" or classic liberal positions—require some elements of tracing who caused harm and who is harmed. Pro-reparation positions more readily see harm to entire groups and want to repair that economic and psychological harm. They seek a whole new system, which radically redistributes property and therefore economic and political power.

There are other ways to approach the question of reparations through the courts. Boris Bittker's 1973 book *The Case for Black Reparations*, offered a detailed exploration of the ways that contemporary civil rights law might be used as a framework for apportioning blame to the United States government for slavery and the subsequent decades of state-sponsored discrimination. What distinguishes Bittker from Matsuda and many other more contemporary reparations advocates is that he sought to apply well-known legal principles to the case of black reparations. Where Matsuda and other critical race theorists seek to re-spin legal ideas, Bittker embraced them. He made a compelling case for holding the federal and state governments legally liable (assuming that one could sus-

> The central point is that "the system" of American law and politics merely consists of the aggregate actions of racially hyperconscious individual participants. As long as whites continue to predominate in positions of power over Blacks within the system, they bring their subconscious beliefs in white supremacy to bear on the processes at hand. This done by tens of thousands of individuals every minute of every day creates a system by which racism continues to operate in institutions—so-called institutionalized racism, or rather, institutionalized white supremacy. Institutionalized white supremacy is driven by the internalized white-over-Black world views of millions of individual participants acting daily in their individual offices and ranges of responsibility. There simply is no public-private distinction when it comes to the white supremacist world view. One believes it, more or less.

Id. at 910.

51. Magee, *supra* note 22, at 899. *See also* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991); Kimberlé Williams Crenshaw, *Colorblindess, History, and the Law*, *in* THE HOUSE THAT RACE BUILT: BLACK AMERICANS, U.S. TERRAIN 280–87 (Wahneema Lubiano ed., 1997).

pend the statute of limitations). He concluded that the barriers to recovery for slavery were probably insuperable, but that for more recent racial crimes—such as the maintenance of unequal schools—the law ought to provide a remedy. Rhonda Magee perceptively points out that Bittker's abandonment of claims for slavery has the virtue of pragmatism, but "eliminates the most compelling basis for claims and damages."[52] Bittker left many critical legal issues un-addressed, such as standing and statutes of limitation, as well as critical issues like sovereign immunity.[53]

Bittker suggested that the legal framework was a way of showing moral culpability and others have followed Bittker's lead, trying to construct their utopian plans with precision that is more usually seen only once a plan is firmly in place. For utopia, like truth, "resides in the details."[54] For instance, Anne Alstott and Bruce Ackerman recently published *The Stakeholder Society*, a meticulous book that is reminiscent of Bittker's attempt to provide a detailed case for reform.[55] Bittker then placed the issue of reparations into a larger context, comparing it to other social programs, so that the comparative advantages of reparations might be judged against other ways of spending the federal government's limited resources. When Derrick Bell reviewed *The Case for Black Reparations* he concluded pessimistically (but not perhaps incorrectly) that "[l]egal analysis cannot give life to a process that must evolve from the perceptions of those responsible for the perpetuation of racism in this country."[56] Professor Bell may be correct in concluding that the impetus for reform must come from outside the judiciary—and as the reparations advocates predicted, courts have not been receptive to reparations claims. Despite the problems with the courts as a forum for seeking reparations, nevertheless, courts can present the opening wedge for presentation of reparations claims.

Past examples show that courts are often unhelpful as vehicles for reparations and that the conceptual problems scholars have identified are indeed roadblocks. Before the Civil Liberties Act of 1988 provided reparations for internment, Japanese Americans filed a lawsuit against the federal government for internment. The

52. Magee, *supra* note 22, at 901.

53. *See, e.g.,* Magee, *supra* note 22, at 902 (noting problems in Bittker's legal analysis).

54. Mark Tushnet, *The Utopian Technician*, 93 YALE L.J. 208, 210 (1983).

55. BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (1999) (proposing a sytem, based on idea of free and equal citizenship, which approximates equal opportunity by providing $80,000 grants to all citizens).

56. Derrick A. Bell, Jr., *Dissection of a Dream*, 9 HARV. C.R.–C.L. L. REV. 156, 165 (1974) (reviewing BITTKER, *supra* note 12). R

District Court of the District of Columbia dismissed the suit on statute of limitations grounds and then the court of appeals reversed.[57] The case for tolling the statute of limitations turned on the doctrine of fraudulent concealment, which tolls the running when the defendant has fraudulently concealed the facts that constitute the basis of the action *and* the plaintiff could not have discovered those facts through reasonable investigation. The United States Supreme Court held that the claims for taking of property had to be heard in the United States Court of Appeals for the Federal Circuit,[58] and on remand, the Federal Circuit agreed with the district court's conclusion that the statute of limitations had already run. In short, it believed that the plaintiffs could have discovered the facts that led to their suit, even though the Justice Department had hidden evidence that the internment was unnecessary.[59] The problems with use of the courts are illustrated by Judge Robert Bork's dissent from a denial of rehearing in the District of Columbia Circuit Court: "justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law."[60] Even after Congress passed the Civil Liberties Act of 1988, which provided $20,000 compensation to Japanese Americans interned during World War II, traditional legal principles barred some victims of wartime discrimination from recovering.[61]

In rare instances, the courts are a viable means to suit. As is to be expected, given the above analysis, that happens mostly in instances where there are identifiable victims and identifiable perpetrators, and the complaint is filed within the statute of limitations. In the spring of 2002, for instance, a Bosnian war criminal who had resided in the United States was held liable for torturing four Muslim prisoners.[62] Perhaps the best-known case of reparations

57. *See* Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986).

58. United States v. Hohri, 482 U.S. 64, 75–76 (1987).

59. Hohri v. United States, 847 F.2d 779, 783 (Fed. Cir. 1988).

60. Hohri v. United States, 793 F.2d 304, 313 (D.C. Cir. 1986).

61. *See* Kaneko v. United States, 122 F.3d 1048 (Fed. Cir. 1997) (denying recovery because of lack of federal government action to the surviving spouse of a Japanese immigrant who lost his railroad job before the internments began); Jacobs v. Barr, 959 F.2d 313 (D.C. Cir. 1992) (denying compensation to German American interned during World War II).

62. Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (D. Ga. 2002). Another successful suit was brought on behalf of torture victims in El Salvador. *See* David Gonzalez, *Torture Victims in El Salvador are Awarded $54 Million*, N.Y. TIMES, July 24, 2002, at A8. In those rare instances there are identified (though regrettably largely judgment-proof) individuals, but still no way of reaching the system of which they were a part. For instance, in the El Salvador case, the two men held liable were leaders of the El Salvador National Guard and Ministry of Defense; yet,

through the courts involves victims of the Nazi Holocaust. They have been able to overcome initial statute of limitations defenses, and are able to fit their claims into traditional modes of individual victims versus defendant corporations.[63] Moreover, there are quite specific claims for identifiable property or specific torts.[64] When the claims are for slavery, however, the courts are remarkably unreceptive. In recent years the United States courts have reviewed several slavery reparations claims. Each time they have dismissed the claims. A series of claims were filed in northern California in 1994;[65] the opinion of the United States Court of Appeals for the Ninth Circuit in one of them, *Cato v. United States*,[66] is the leading judicial statement on reparations for slavery. It is a remarkable opinion in many respects—in part because it takes seriously reparations claims, in part because it is so dismissive of them.[67] Cato sought $100 million 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.[68]

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the judgment was against them personally, rather than against the government. *Id.*

63. *See* Sean Somerville, *Suing for Reparations*, BALT. SUN, Jan. 17, 1999, at D1 (discussing effect of evidence hidden by defendants' fraud on tolling statute of limitations). The Swiss Bank litigation was settled before there was a hearing on the statute of limitations issue. *See Swiss Banks Reach Accord*, N.Y. TIMES, Aug. 16, 1998, § 4, at 2. It testifies to the importance of negotiation—and a moral consensus—on claims for reparations. It also testifies to the importance of a credible claim in court.

64. *See* Somerville, *supra* note 63 (listing funds and valuables held by banks).

65. Powell v. United States, No. C 94-01877 CW, 1994 U.S. Dist. LEXIS 8628 (N.D. Cal. June 20, 1994); Jackson v. United States, No. C 94-01494 CW, 1994 U.S. Dist. LEXIS 7872 (N.D. Cal. June 7, 1994); Lewis v. United States, No. C 94-01380 CW, 1994 U.S. Dist. LEXIS 7868 (N.D. Cal. June 7, 1994). *See also* Bell v. United States, No. 3:01-CU-0338-D, 2001 U.S. Dist. LEXIS 14812 (N.D. Tex. July 9, 2001) (dismissing suit for reparations for slavery and observing that "[w]ithout a concrete, personal injury that is not abstract and that is fairly traceable to the government conduct that [plaintiff] challenges as unconstitutional, [Bell] lacks standing") (quoting Cato v. United States, 70 F.3d 1103, 1109 (9th Cir. 1995)).

66. 70 F.3d 1103 (9th Cir. 1995).

67. The cold and business-like nature of the legal language is captured in the sentence: "As Cato's complaint neither identifies any constitutional or statutory right that was violated, nor asserts any basis for federal subject matter jurisdiction or waiver of sovereign immunity, it was properly dismissed." 70 F.3d at 1106.

68. *Id.*

The court considered ways to fit those claims into a claim against the federal government—or, perhaps more accurately, reasons why no suit could be sustained for the federal government's role in slavery.

First, it addressed the federal government's sovereign immunity. The court concluded that the Federal Tort Claims Act waived immunity only for actions occurring after 1945. The court refused to recognize claims based directly on the Thirteenth Amendment. It also followed Supreme Court precedent that refused to recognize a right to sue the federal government for constitutional violations; individual officers of the government might be liable for constitutional violations, but not the federal government itself.[69]

The court also addressed the statute of limitations. Cato argued that constitutional claims should never be subject to the statute of limitations, using an analogy to Native American claims. The court distinguished those claims, where the statute of limitations is tolled for decades, even centuries, because the tribes have both a treaty relationship and a relationship as trust beneficiaries with the federal government.[70] Cato also argued that continuing discrimination re-tolled the statute of limitations; the court merely concluded that continuing discrimination did not provide an independent statutory basis for suit.[71]

Other recent claims for reparations for slavery in other contexts have fared poorly in the federal courts. In May 2001, the Seventh Circuit, for instance, rejected a claim of a person enslaved in a Nazi concentration camp.[72] World War II veterans who had been enslaved as prisoners of war and forced to work for Japanese corporations lost in the Northern District of California in 2000, because the 1951 treaty with Japan waived those claims.[73] More recently, the claims of foreign nationals suing in federal court have also been dismissed, based on the statute of limitations.[74] In October 2001, the District Court of the District of Columbia dismissed a complaint brought by "comfort women"—more accurately described as sexual

69. *Id.* at 1110.

70. *Id.* at 1108 (citing Oneida Indian Nation of N.Y. v. New York, 691 F.2d 1070, 1083–84 (2d Cir. 1982)).

71. *Id.* at 1108–09.

72. Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1146 (7th Cir. 2001).

73. *In re* World War II Era Japanese Forced Labor Litigation, 114 F. Supp. 2d 939, 944 (N.D. Cal. 2000). *See also* Sean D. Murphy, *World War II Era Claims Against Japanese Companies*, 95 AM. J. INT'L L. 139 (2001).

74. *In re* World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001).

slaves—who were forced to labor for the Japanese military during World War II. That complaint, too, was dismissed because of sovereign immunity, which had not been waived under the Foreign Service Immunities Act.[75]

Cato and the other slavery cases make real Professor Matsuda's concerns about the inability of judicial doctrine to address reparations claims. Even though Cato wanted reparations for a series of acts—many of which were only tangentially related to the federal government—the court considered only the federal government as a defendant. It could not even consider the possibility that there might be other defendants—or other modes of approaching the problem. It acknowledged and dismissed Cato's desire for broad relief. In its one-paragraph treatment of her request for an apology, for instance, the court cited its earlier discussion of Cato's lack of standing to seek relief premised on the stigmatizing injury of discrimination in general.[76]

Even given the inherent problems concerning lawsuits for reparations, some lawsuits may have a chance of success. It appears as though Charles Ogletree's reparations group will file a suit against colleges that received money made from slavery, and there is the possibility that such a suit might succeed. One might be able to identify a proper plaintiff as the class of people descended from slaves who worked on a particular plantation owned by a donor.[77] Using an unjust enrichment theory, such plaintiffs might successfully show that the plantation owner took profits that in justice actually belonged to the plaintiffs.[78] While a suit against the individual plantation owner would be barred because his estate has been distributed and closed, a suit against a school that received a contribution from the donor might not be so surely foreclosed. The school would take the gift subject to all the claims against the donor, such

75. Hwang v. Japan, 172 F. Supp. 2d 52, 55 n.1 (D.D.C. 2001).

76. *Cato*, 70 F.3d at 1109–10 ("In any case, she does not trace the presence of discrimination and its harm to the United States rather than to other persons or institutions. Accordingly, Cato lacks standing to bring a suit setting forth the claims she suggests.").

77. *See generally* Willie E. Gary, et al., *Making the Case for Racial Reparations*, HARPER'S MAGAZINE, Nov. 2000, at 37 (discussing issues in reparations). The problems with identification of the class are enormous, though not greater than what courts face in some real property disputes. *See, e.g.,* Brown v. Indep. Baptist Church of Woburn, 91 N.E.2d 922 (Mass. 1950) (declaring a defeasible fee created in 1849 to be void due to the remote nature of the named legatees and requiring distribution of reversion to intestate heirs).

78. That avoids the problem that slavery was legal at the time, which plagues tort suits.

as unjust enrichment.[79] Although the statute of limitations still presents a problem, a particularly generous court (perhaps one in the West Indies) might be willing to apply a tolling doctrine. Or one might try a more daring theory and claim that the property was stolen from the slaves, and then given to a school. Since a thief cannot pass title,[80] it is possible that the title to the property has never passed. Moreover, there is a possibility that the claim is not barred by the statute of limitations because the statute does not begin to run on the theft of personal property until a request for return of the property is made.[81] It has been suggested that one possible target of such litigation is the money Isaac Royall used to endow Harvard University, which had its source in his plantation in Antigua.[82]

The lawsuit filed recently in federal court in Brooklyn against corporations that were in existence (or have taken over companies that were in existence) during the era of slavery and that profited from slavery presents yet other questions.[83] The suit is styled as a

79. *See* David N. Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples Against Multinational Corporations*, 76 N.Y.U. L. REV. 626, 653–55 (2001) (discussing bona fide purchaser's defense to unjust enrichment).

80. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 157 (4th ed. 1998); O'Keeffe v. Snyder, 416 A.2d 862, 867 (N.J. 1980) ("a mere possessor cannot transfer good title").

81. Or at least some courts hold. *See* Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429 (N.Y. 1991) (stating that "a cause of action for replevin against a good-faith purchaser of a stolen chattel accrues when the true owner makes a demand for return of the chattel and the person in possession . . . refuses to return it."). Though I equate here money and personal property, perhaps a court would not resist such a small analytical step.

82. *See, e.g.*, Christopher Greaves, *Reparations Advocate Argues for Redressing America's 'Debt' to Blacks*, CORNELL CHRONICLE, Feb. 15, 2002, at 6 (discussing Isaac Royall's endowment at Harvard Law School), http://www.news.cornell.edu/Chronicle/01/2.15.01/Robinson_cover.html (last visted Jan. 17, 2003); Laura Israel, *Anthropology Class Studies Slavery in Medford: Former Medford Slave Leaves Legacy of Freedom and Equality*, TUFTS DAILY HERALD, May 19, 2002, http://www.tuftsdaily.com/archives/Spring2002/F05193e.html (last visited Oct. 17, 2002) (discussing Royall's twenty-eight slaves); Charles J. Ogletree, Jr., *Litigating the Legacy of Slavery*, N.Y. TIMES, March 31, 2002, § 4, at 9 (mentioning endowments funded with money made from slavery at Harvard Law School and Brown and Yale Universities).

83. Pls.' Compl. at 6–7, Farmer-Paellmann v. FleetBoston Finan. Corp., (E.D.N.Y. 2002), *available at* http://news.findlaw.com/cnn/docs/slavery/fpllmnflt032602cmp.pdf. For additional commentary, see generally Anthony J. Sebok, *The Brooklyn Slavery Class Action: More than Just a Political Gambit*, *at* http://writ.news.findlaw.com/sebok/20020409.html (last visited Oct. 17, 2002). *See also* Anthony J. Sebok, *Should Claims Based on African-American Slavery be Litigated in the Courts? And if So, How?*, *at* http://writ.news.findlaw.com/sebok/20001204.html (last visited Oct. 17, 2002).

class action, on behalf of people descended from slaves, against CSX, Aetna, and FleetBoston, which are all successors to companies that were in existence and allegedly profited from the institution of slavery. One wonders whether the lawsuit might be more viable if the class were people descended from the people who worked for (or were bought and sold or whose lives were insured by) the defendant companies. Because the companies continue to exist, there is at least the possibility that they are subject to suit. The two major problems are again locating a substantive basis and overcoming the statute of limitations. As to substantive basis, the most commonly cited bases are unjust enrichment and tort. Because judges at that time recognized that violence lay at the heart of slavery—and accepted that violence—it may be difficult to successfully sue in tort.[84] Perhaps that is a case where the change in law could have been anticipated and, in the spirit of enterprise liability, a court might choose to impose retroactive liability on a corporation, though that is going to be a significantly uphill struggle.[85] Unjust enrichment provides an alternative substantive claim. It is less likely to be barred by a claim that slavery was legal at the time, though even with unjust enrichment it is possible that a court would not find the bases for

84. One might consider North Carolina Supreme Court Justice Thomas Ruffin's decision in *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829), which overturned the criminal conviction of a white man for abusing a slave in his custody. Ruffin wrote that in slavery,

> [t]he end is the profit of the master, his security and the public safety. . . . The power of the master must be absolute, to render the submission of the slave perfect. . . . This discipline belongs to the state of slavery. They cannot be disunited, without abrogating at once the rights of the master, and absolving the slave from subjection.

Id. at 266. Ruffin keenly understood the nature of slavery. It is perverse to argue that because slavery was legal that there should be no punishment; however, it is worthy of consideration whether a court would impose retroactive liability on corporations that profited from slavery. Moreover, it is important to distinguish the particular kind of profit. Corporations, like railroads, that benefited from slave labor are more morally tainted than are insurance companies that wrote policies on slaves. In the latter case, the insurance companies profited by selling insurance; the beneficiaries were the people who profited when the policy was paid. Of course, the availability of insurance made the institution of slavery more viable, but the insurance company's involvement was indirect. In contrast, railroads were built with unpaid labor.

85. Here, as with so many issues in reparations, one could conduct an intriguing thought-experiment about the bases for tort liability. One might begin that thought-experiment by considering the desirability and need to discourage similar behavior in the future, the fairness of imposing retroactive liability, the connections between corporations' past decisions and present shareholders, and the virtues of spreading liability for profits from slavery across the enterprises of railroads, insurance companies, and investment banks.

unjust enrichment are met in instances where a corporation profited from the trade in slaves or from insuring them.[86] The claim will be strongest where the fruits of a slave's labor are retained. Moreover, the statute of limitations continues to pose a significant problem.

Lawsuits are a very difficult way of obtaining meaningful reparations. Individual lawsuits are simply not well-suited to deal with claims by a group against descendants of a group of beneficiaries.[87] It may be that someday we will have articles, like the ones that are written about Holocaust litigation, that celebrate the role of the federal courts in restoring justice to descendants of slaves for generations of stolen labor and physical abuse, but that is unlikely.[88] If there are going to be reparations, they will most likely not come from the courts, because of problems with locating a substantive basis for most suits, locating appropriate plaintiffs and defendants, and because of the statute of limitations.

There is a possibility, of course, that a creative federal court might create a new cause of action or impose retroactive liability on corporations that profited from slave labor, much as they imposed enterprise liability in products liability cases. The calculus in those cases frequently turned on the need to spread risk across an entire industry, a desire to deter commercial actors from behaving irresponsibly, and the foreseeability that liability would ultimately be imposed.[89] If a twenty-first century plaintiff could trace ancestry to people who provided labor for a corporation that currently exists, there is some reasonable possibility that a court might impose liability. That leads to the question whether a legislature—instead of a court—might be able to impose liability in those cases by statute.

86. The typical elements of an unjust enrichment claim include that the person seeking compensation furnished services which were accepted by the person charged; that the person seeking compensation expected compensation; the person charged had reasonable notice that compensation would be expected; and that retention of the benefit would constitute unjust enrichment. *See generally* ELAINE SHOBEN ET AL., REMEDIES: CASES AND PROBLEMS 806 (2002). It seems questionable whether slaveowners had notice that they would be expected to pay for the services they took from the slaves. In the case of corporations that profited from insuring slaves, I think the connection between slavery and unjust enrichment is even more attenuated.

87. There are other problems associated with making a claim against descendants of a group of beneficiaries, such as tracing the benefits.

88. *See, e.g.*, Michael J. Bazyler, *Litigating the Holocaust*, 33 U. RICH. L. REV. 601 (1999).

89. *See, e.g.*, Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CAL. L. REV. 2403, 2406–07 (2000) (discussing factors governing enterprise liability).

California has already subjected insurance companies to the requirement that they search their files for evidence of insurance policies written on slaves' lives.[90] And very recently, the Chicago City Council has expanded on California's statute and required all businesses that do business with the city to disclose their connections to slavery.[91] One wonders if the next step will be legislation authorizing suits against insurance companies that wrote such policies.[92]

Matsuda's suggestion that the classic liberal conception of individual victim of individual perpetrator should be refigured in cases of racial victimization identifies the dominant theme of the American legal system as one of liberalism—a claim made against individuals by individuals (or a group with a sufficiently common nexus that they can be made class action plaintiffs).[93] Matsuda suggests

90. *See* CAL. INS. CODE § 13812 (Supp. 2000). In addition, the California Commissioner of Insurance is instructed to make names of slaveholders or slaves in such records available to the public, and the descendants of the people whose lives were insured are entitled to full disclosure. *Id.* at §§ 13811, 13813.

91. Oliver Burkeman, *Chicago Compels Contractors to Come Clean on Slave Profits*, THE GUARDIAN, October 4, 2002, http://www.guardian.co.uk/international/story/0,3604,804155,00.html (last visited Oct. 17, 2002) (discussing City Council's Slavery Era Disclosure Ordinance, which requires "companies doing business with it to disclose whether they ever profited from the slave trade").

92. The legislation poses problems of retroactivity. It is subject to close scrutiny, though it is not necessarily unconstitutional. *See, e.g.,* Debra Lyn Bassett, *In the Wake of* Schooner Peggy: *Deconstructing Legislative Retroactivity Analysis*, 69 U. CIN. L. REV. 453 (2001) (discussing confusion in recent retroactive legislation decisions); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693–97 (1960) (discussing ability of Congress to impose retroactive legislation); James L. Huffman, *Retroactivity, the Rule of Law, and the Constitution*, 51 ALA. L. REV. 1095 (2000) (discussing different treatments in recent Supreme Court cases). Adopting the analysis of *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), it seems likely that the legislation would be constitutional. Obviously, such legislation "attaches new legal consequences to [an employment relationship] completed before its enactment." *Id.* at 532 (quoting Landgraf v. USI Film Prod., 511 U.S. 244, 270 (1994)). Nevertheless, *Eastern Enterprises* emphasized three factors: "[t]he economic impact of the [statute], its interference with reasonable investment-backed expectations, and the character of the governmental action." *Id.* at 523–24. The Court focused on proportionality–how distant were the acts for which liability was imposed and what is the magnitude of the liability. *Id.* at 534. Applying those factors to a reparations statute that provides a cause of action against railroad companies, for instance, seems likely to be constitutional. There is a substantial governmental interest, the liability is small in comparison with the railroad's overall assets (thus limiting its economic impact), as is its interference with reasonable investment-backed expectations.

93. *See* Matsuda, *supra* note 18, at 374. Critical race scholarship frequently explores the limitations of law's liberalism. *See, e.g.,* Blake D. Morant, *Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. RACE & L. 1 (1998) (criticizing the traditional theory of contract law's failure to deal with racial or gender bias); Jef- R

that perhaps there are other ways of conceptualizing the way the world should be organized. She re-spins the classic case of individual plaintiff vs. individual defendant to be a case of a group of victims vs. a group of beneficiaries. That categorization has caught on; her article is one of the most heavily cited articles in recent years.

However, there are some problems with such a formulation. The group of perpetrators against which Matsuda advances her claim no longer exists. The people who perpetrated the crimes of slavery are gone and their estates are (mostly) distributed. A few corporations survive and some of the money made from slavery is traceable to currently existing bank accounts. However, there are significant problems in imposing the liability of past generations of private actors on the current generation. One might be willing to say that we allow the benefits of past generations to descend to the present—in the form of inheritance—and we should, therefore, impose the debts of the past on the present generation. But many Americans are descended from people who arrived after slavery ended; some even after Jim Crow ended. And their connection to slavery and Jim Crow is surely substantially limited. That is not to say that the federal and state governments are free from liability, of course.[94] I am merely suggesting that the proper understanding

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frey J. Pyle, Note, *Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787, 808-19 (1999) (critiquing attack on liberalism and lamenting that critical race theory fails to replace liberalism with a better model). At other times, literature shows that some people reject law and legal categories altogether and create their own vision of reality. *See, e.g.,* Arthur G. LeFrancois, *Our Chosen Frequency: Norms, Race, and Transcendence in Ralph Ellison's* Cadillac Flambé, 26 OKLA. CITY U. L. REV. 1021 (2001) (discussing Ellison short story in which jazz musician rejects legal norms and burns his Cadillac on the front lawn of a race-baiting politician); *cf.* Toby Egan, *Critical Race Theory's Individual Flaw*, 67 UMKC L. REV. 661 (1999) (emphasizing need for law's recognition of individual over group identity).

94. The argument I am advancing here is distinct from the more popular—and I think incorrect—assumption that just because someone's ancestors arrived after slavery ended that there is no liability. Those ancestors arrived into a society in which it was easier for a white person to advance than a black person; and while many immigrants, especially those from southern and eastern Europe and Asia, faced discrimination, it was of a less virulent nature than African Americans faced. Moreover, one who immigrates to the United States takes it with all the liabilities—as well as the opportunities—that the country offers. I would draw an analogy to shareholders' liability for a corporation's actions. Investors are liable (up to the value of their investment) for a corporation's torts, even though the torts may have occurred before the investors' purchased their shares.

My point is that in talking about reparations for slavery and Jim Crow, one must be careful in talking about claims of victims against perpetrators, when many of the people against whom claims are being asserted are not perpetrators.

may not be class of victims against class of perpetrators. It may be more correct to think of reparations in terms of a class of victims against the government's obligation to assist victims. Phrased in that way, reparations for slavery and Jim Crow fit comfortably alongside dozens of social programs, such as the Homestead Act, the New Deal, the GI Bill, and President Johnson's Great Society. In each of those cases, the government used its power to assist those who needed help. In each of those cases, there was the realization that with the proper cultivation, individuals' talents would benefit everyone, especially those being aided.[95]

Still, reparations advocates frequently speak in terms of a debt analogy. Joe Feagin's recent, comprehensive book *Racist America* establishes the basis for reparations as unjust enrichment.[96] He focuses on the benefits that African Americans conferred on the American economy and society[97]—and then argues for reparations from the benefited group (whites) to the harmed group (African Americans).[98] Randall Robinson frames his book *The Debt*, the leading statement on reparations, around the idea that African Americans are owed a debt by America for generations of uncompensated labor:[99]

> Through keloids of suffering, through coarse veils of damaged self-belief, lost direction, misplaced compass, shit-faced resignation, racial transmutation, black people worked long, hard, killing days, years, centuries—and they were never *paid*. The value of their labor went into others' pockets—plantation own-

95. For further development of this theme, see Alfred L. Brophy, *The World of Reparations: Slavery Reparations in Historical Perspective*, 3 J. L. Soc'y 105 (2002).

96. *See* Joe R. Feagin, Racist America: Roots, Current Realities, and Future Reparations 262 (2001).

97. Feagin states that:

> Africans and African Americans created much wealth and capital that to a significant degree spurred not only the economic development of the South but also the industrial revolution in the United States and Europe. . . . The current prosperity, relatively long life expectancies, and relatively high living standards of whites as a group in the United States, as well as in the West generally, are ultimately rooted in the agony, exploitation, and impoverishment of those who were colonized and enslaved, as well as in the oppression and misery of their descendants.

See id.

98. *Id.* at 263.

99. *See, e.g.*, Randall Robinson, The Debt: What America Owes to Blacks 207 (2000); *see also* Richard F. America, Paying the Social Debt: What White America Owes Black America (1993) (assessing the amount of money saved by systematic undercompensation of African Americans); The Wealth of Races: The Present Value of Benefits from Past Injustices (Richard F. America ed., 1990).

ers, northern entrepreneurs, state treasuries, the United States government.[100]

However, some opponents of reparations, like David Horowitz, argue that slavery is—on balance—a benefit to African Americans.[101] There are some conceptual problems with the talk of debt as a measure of reparations for slavery, which need serious attention. Horowitz points out some of them.[102] The debt talk derives from unjust enrichment doctrine, which quite reasonably requires that people (or corporations) must disgorge money that in equity belongs to someone else. It requires little abstraction to conclude that money that was unjustly earned from slave labor ought in fairness to be paid to the slaves whose labor was stolen through violence. During the era of slavery, courts routinely recognized that property rights in labor lay at the center of the institution. And, while judges did not recognize that slaves had an ownership interest in their labor, they recognized that when an owner's interest was interfered with, that owner had a claim. In one remarkable Alabama opinion, for instance, an owner who rented his slave to another asserted an unjust enrichment claim against the renter when that person used the slave for services beyond the contract![103] Thus, it makes conceptual sense to talk in terms of unjust enrichment, if we can show that enrichment has been retained.[104]

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100. ROBINSON, *supra* note 99, at 207. **R**

101. *See* DAVID HOROWITZ, UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY (2002).

102. *See also* GEORGE SCHEDLER, RACIST SYMBOLS & REPARATIONS: PHILOSOPHICAL REFLECTIONS ON THE VESTIGES OF THE AMERICAN CIVIL WAR 103–07 (1998) (discussing reparations theory and its limitations, such as off-set of benefits). Schedler proposes an alternative measure, not based on unjust enrichment, but on lost opportunity:

> I measure the loss by what the individuals could have had but for enslavement . . . . The damage done by slavery is not the work performed under it, but the freedom of which individuals were deprived. I measure the value of that by what they would have been able to do, not by the value of what they did as slaves.

Id. at 108.

103. Moseley v. Wilkinson, 24 Ala. 411 (1854); *see also* Fail and Miles v. McArthur, 31 Ala. 26 (1857).

104. It also makes sense that traceable descendants of those people are entitled to assert the unjust enrichment claim for their ancestors. There are some legal—if not moral—problems of course, since slavery was legal at the time. Those are made more complex even by statutes of limitations and the transfer of the property to others. Even if the transfers are gratuitous, there are limitations on opening estates. Finally, there are extraordinary problems with tracing money and demonstrating with any kind of certainty the origins of that money.

Yet even if one can overcome the significant problems of tracing and statutes of limitations, there are significant problems of computing the debt and of figuring whether the enrichment has already been disgorged. Remember here, when we are talking about a debt, we are dealing with quasi-contract principles. It is a question of how much benefit has been conferred—and is still retained—by the people who are disgorging the benefits. On the benefit side is the labor conferred by the slaves—and the economic explosion that labor made possible.[105] Much of that debt may have been paid by the Civil War—by Northern expenditures and by destruction of Southern wealth. Horowitz sees that as a straight cancellation of the debt. I think the issue is substantially more complex than that. It is not clear that the Northern costs of the war should be considered as a payment on the debt; moreover, the war fueled further economic development in the North. What does one do with those benefits from the war? Do they increase the debt owed to slaves, because without slavery there would have been no war and hence no stimulus to the economy? Perhaps. But then what do we make of the costs of the war to the North? Do they count against the debt? And what does one make of the arguments that there have been forms of reparations, such as the Great Society, New Deal, and more recently affirmative action? Has compensation equal to that taken already been paid?[106] Finally, and even though this is a distasteful (even revolting) argument, if we are talking about unjust enrichment—as opposed to a moral obligation to repair damage—one wonders whether when one offsets the benefits, African Americans are better off because of the institution of slavery.[107]

We may need an analogy beyond that of debt; at the least, there has to be more precision in the discussion. Unjust enrich-

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Along these lines, one might want to consider the story of Joseph's sale into slavery in Genesis. Joseph was able to save his family from famine, including his brothers who sold him, because he rose from slavery to power in Egypt. *Genesis* 43–45.

105. Some might add that there was an intangible benefit to whiteness, though I think it is impossible to quantify the benefits of "whiteness."

106. On that difficult issue, one might contrast STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (1997) (finding roughly equal opportunity) with ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992) (emphasizing both unequal achievement and lack of opportunity). For a middle approach, see ORLANDO PATTERSON, THE ORDEAL OF INTEGRATION 83–108 (1997).

107. I address the incoherence of this argument above; here, my only point is that offsetting the benefits is a doctrine one must consider when talking about a *debt*.

ment theory carries with it substantial limiting principles. And in situations like slavery, where tracing the wealth created by the institution presents an almost insuperable task, it may make sense to adopt other analogies. Perhaps the better way of thinking about reparations is as another case of the government's obligation to assist in repairing the lives of people who have been harmed. Or, as an analogy to a tort case, where there is no need to trace benefits conferred (and still retained) and benefits received. On that argument—of the need to repair damage that is still affecting people today—Horowitz has less to say, other than that life is good enough right now.[108]

Moving Away from the Judicial Model

For those reasons—the limitations of lawsuits, limited ability of courts to provide comprehensive relief—reparations scholarship in recent years has focused heavily on making the case to legislatures. Robert Westley's 1998 article, "Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?" in the *Boston College Law Review*, quite likely the most important article on slave reparations published in the 1990s—and arguably the most important article ever published on reparations—spent little time on the possibility of lawsuits.[109] Westley's article poses reparations as a response to the demise of affirmative action.[110] He views legislative reparations as an entitlement—something owed African Americans.[111] Westley does not want to be confined by legal doctrine, so lawsuits are of small importance to him. He is advancing a new language and new modes of thinking about race. Westley established the case for legislative reparations, through a systematic (though given the nature of the enterprise a necessarily selective)

108. HOROWITZ, *supra* note 101, at 125–27. R

> Given the dramatic trends of black upward mobility in the last sixty years, it is far more reasonable to assume that if there *are* lingering legacies of slavery, segregation and discrimination they are rapidly vanishing, than to conclude that their accelerating damage is so great that reparations are required to overcome them. It is certainly not clear that all or even a majority of blacks alive today suffer economic injuries from past injustice requiring reparative measures, and it is an unanswered question as to whether those blacks who are still poor are suffering from the legacies of oppression or from personal dysfunctions which have little to do with 'social injustice' or race.

See also id. at 127–28.

109. Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998).

110. *Id.* at 429–30.

111. *Id.* at 473.

exploration of the ways that African Americans have been discriminated against by the federal government since the era of slavery.[112] He links that compelling exploration with evidence about the consequences of that discrimination on African American wealth and educational opportunities today.[113]

Where some talk about unjust enrichment, Westley focuses on the gap in economic achievement and educational opportunity—and the culpability of the United States government for the present plight—as the predicate for reparations. Reparations are due because of a failure to repair the damage done by slavery—as well as the government's decades-long involvement with Jim Crow:

> There is no need to recount here the horrors of slavery. Suffice to say that, if the land redistribution program pursued by Congress during Reconstruction had not been undermined by President Johnson, if Congress' enactments on behalf of political and social equality for Blacks had not been undermined by the courts, if the Republicans had not sacrificed the goal of social justice on the altar of political compromise, and Southern whites had not drowned Black hope in a sea of desire for racial superiority, then talk of reparations—or genocide—at this point in history might be obtuse, if not perverse.[114]

Elsewhere, however, Westley sees reparations as "redress for exploitation through government sanctioned white supremacy."[115] Or, as he boldly phrases the issue: "The basis of the claim for Black reparations is not need, but entitlement."[116] Westley proposes group-based reparations, which will permit institution-building. He proposes a trust of a large but unspecified amount for the benefit of all black Americans, which would be funded by the federal government.[117] The trustees (elected by the beneficiaries) would use the corpus to fund projects aimed at educational and economic em-

112. *Id.* at 464–66.

113. Similarly, Tuneen Chisholm's 1999 essay in the *University of Pennsylvania Law Review*, for instance, was focused on the legislative case. *See* Tuneen E. Chisholm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677 (1999).

114. Westley, *supra* note 109, at 464. R

115. *Id.* at 471. There is some tension, it seems, in a reparations program that argues that it is necessary because African Americans have not been able to succeed economically and then still asks for compensation for those who have succeeded. Of course, Westley would likely point out that even those who succeeded did so in the face of—and in spite of—government discrimination.

116. *Id.* at 473.

117. *Id.* at 470.

powerment.[118] Indeed, much of reparations scholarship has the ultimate goal of empowering the African American community, even if there is question about how that might be best accomplished.[119] Lee Harris, for instance, taking a cue from the creation of Israel, suggests another form that reparations could take: a separate political state for African Americans.[120]

Such is a general picture of what the legal academics are saying about how traditional legal doctrine can be harnessed in support of reparations, as well as ways of using legislative reparations to get around some of the problems of lawsuits. Many of those theorists focus on the issue of group reparations. To determine how contemporary legal doctrine approaches group-based remedies, we should next focus on whether Congress could constitutionally provide reparations for slavery.

III.
THE CONSTITUTIONALITY OF REPARATIONS FOR SLAVERY

At one level it is a perverse question: does Congress have the power to take remedial action to eradicate slavery and its vestiges? One might expect that the answer—given that the Thirteenth and Fourteenth Amendments were aimed at abolishing slavery and ensuring political rights for African Americans—would be an easy yes.[121] However, now that we are more than one hundred thirty

118. *Id.* He goes on to acknowledge that "determining a method by which all Black people can participate in their own empowerment will require a much more refined instrument than it would be appropriate for me to attempt to describe here." *Id.*

119. Watson Branch's recent note, which synthesizes much of the reparations scholarship, for instance, urges reparations as a solution to what he believes are failed integrationist and affirmative action policies. *See* Watson Branch, Comment, *Reparations for Slavery: A Dream Deferred*, 3 SAN DIEGO INT'L L.J. 177, 194 (2002) ("Because integrationist policies and affirmative action based on civil rights statutes have failed to solve the problems of racial discrimination and subordination of blacks, it is time to undertake a new program of race reform—namely reparations.").

120. Lee A. Harris, *Political Autonomy as a Form of Reparations to African-Americans*, 29 S. U. L. REV. 25 (2001). Harris locates the reparations debate in concerns about corrective and distributive justice—that is, claims for correcting past injustices and claims for assuring equal (or fairer) distributions of wealth now. His solution, though, is a radical one.

121. Roy Brooks and Boris Bittker have argued persuasively that reparations ought to be constitutional. *See* Roy L. Brooks & Boris I. Bittker, *The Constitutionality of Black Reparations*, *in* WHEN SORRY ISN'T ENOUGH 374, 384–85 (Roy L. Brooks ed., 1999).

years removed from slavery, it is worth considering Congress's power to enact race-based remedies for slavery. This question is closely related to the discussion in the last section regarding group harm, because when Congress acts on the basis of racial group identity, it raises equal protection questions similar to those raised when courts deal with requests for group relief when only some members of the group can demonstrate harm.

A critical initial question is whether a program of reparations for slavery would be subject to equal protection scrutiny as a race-based program. There is some possibility that a reparations program might not be subject to heightened scrutiny because it is tailored to people who are descended from slaves—and such a program is not necessarily race-based. Such an argument draws upon the Supreme Court's analysis in *Geduldig v. Aiello*, which upheld California's exclusion of pregnant women from coverage under its state disability insurance program against a charge that it discriminated against women.[122] The Supreme Court concluded that the discrimination was not against women. It concluded that "California does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program."[123] The fact that only women can be pregnant was not important to the Supreme Court, because California did not exclude people based on gender.[124] Using *Geduldig* to uphold reparations to descendants of slaves—all of whom are at least part African American or Native American—will be a tough sell. *Geduldig* has been heavily criticized for what David Cruz recently called "formalism run rampant."[125]

Moreover, *Geduldig* involved a claim that exclusion of people with special characteristics is not an equal protection violation against those people excluded. It will be a harder sell to demonstrate that conferring special status on a large segment of the popu-

122. Geduldig v. Aiello, 417 U.S. 484 (1974).

123. *Id.* at 494.

124. The Court reasons that:

> While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. . . . The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second included members of both sexes.

Id. at 497 n.20.

125. David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1043 (2002) (citing Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 n.107 (1984)).

lation (descendants of slaves)—which has a high correlation with race—is permissible. In other words, *Geduldig* upheld an exclusion of a limited segment of the population from benefits conferred on the general population; reparations for slavery confers a special benefit on a significant but still limited population based on factors that correlate closely with race.

Further light comes from the Civil Liberties Act of 1988, which provided compensation to Japanese Americans interned during World War II. Arthur Jacobs, an American of German ancestry who was interned during the war, challenged the act as a violation of equal protection because it did not provide him with compensation. Writing before the Supreme Court had imposed strict scrutiny on Congressional race-based set-asides, the District of Columbia Circuit Court of Appeals gave great weight to Congress' conclusion that Japanese Americans were interned because of racial prejudice. There was no similar evidence that German and Italian Americans had been interned for similar reasons.[126] Therefore, the court concluded that Congress' decision to compensate Japanese Americans but not German Americans was "substantially related (as well as narrowly tailored) to the important (and compelling) governmental interest of compensating those who were interned during World War II because of racial prejudice."[127]

A reasonable interpretation of the Equal Protection Clause—which looked to the likely effect of reparations—would almost certainly conclude that reparations is a race-based program.[128] Still, it is worth considering the possibility that reparations for slavery would be viewed as a non-racial program.[129]

126. Jacobs v. Barr, 959 F.2d 313, 320 (D.C. Cir. 1992).

127. *Id.* at 321. It is significant that the District of Columbia Circuit Court thought it necessary to talk in terms of Congress' racial classification, even though not all Japanese Americans—but only those interned during World War II—were entitled to compensation under the Civil Liberties Act of 1988. That suggests reparations for slavery would also be evaluated as a racial classification.

128. A similar analysis was used to determine that facially neutral "Grandfather Clause" rules regarding suffrage were actually discrimination based on race. *See* Guinn v. United States, 238 U.S. 347 (1915).

129. Or, that it might be the kind of program that Congress is permitted to pass. *See* Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998) (concluding, based on study of Reconstruction-era legislation, that Congress is permitted to enact race-conscious legislation).

If a *Geduldig*-based argument were upheld, then one might expect that Congress would invoke reparations for slavery in talismanic fashion to uphold its affirmative action programs. Thus, one might see programs like the one struck down in *Adarand* justified as reparations for slavery, though the set-aside scheme

Assuming—as I suspect is likely—that reparations for slavery would be considered a race-based program, there are two other issues to address: first, the standard for judging the government's race-based action (and whether that standard applies to reparations for slavery); second, whether Congress can expand its power under Section Five of the Fourteenth Amendment (or under the Thirteenth Amendment). The United States Supreme Court has established that Congress may take race-based action only when it serves a compelling governmental interest and when it is narrowly tailored to further that interest.[130] Any racial classification—which is presumably what reparations would be—must meet "strict scrutiny."[131] The question then becomes, of course, what satisfies strict scrutiny?

To satisfy strict scrutiny—which the Supreme Court has emphasized is strict in theory, though not fatal in fact—Congress would need to show that the program meets a compelling governmental interest and that it is narrowly tailored.[132] To show that the program is compelling probably requires that there be some important governmental interest—such as repairing past discrimination. As the Supreme Court has repeatedly recognized, governmental bodies may take action to respond to past discrimination.[133] The problem is defining "compelling governmental interest" and what kind of evidence would show the pattern of discrimination in the past.

To show that the program is narrowly tailored requires showing that the program is aimed at remedying discrimination against African Americans in the past in the specific location and of the

would have to be modified to provide preferential treatment for those who are descended from slaves, rather than for all African Americans. Some commentators have drawn that connection, even before the recent reparations writing. *See* Note, *Forty Megahertz and a Mule: Ensuring Minority Ownership of the Electromagnetic Spectrum*, 108 HARV. L. REV. 1145 (1995) (invoking imagery of reparations for slavery in discussing Federal Communications Commission minority preference programs).

It is more likely that the Supreme Court will conclude that a program so closely aligned with race would be subject to heightened scrutiny. At the very least, one would expect that there would have to be the same showing of close connection between past harm and remedial purpose that the Supreme Court imposes in affirmative action cases.

130. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995).

131. *Id.* at 227.

132. *Id.* at 237.

133. *See, e.g., id.* ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."); Richmond v. J.A. Croson, 488 U.S. 469, 509 (1989).

specific type being remedied. The *Croson* court, which struck down a program that set aside 30% of construction contracts from the city of Richmond, Virginia for minority-owned businesses, identified some types of evidence that would support a limited race-based affirmative action program: systematic exclusion from the construction industry; a significant statistical disparity between the minority contractors qualified to receive contracts and those who receive them.[134] The latter test sets a high standard—and suggests that the court wants a close connection between the past discrimination and the remedy being sought. Many people might have been excluded (or discouraged) long before they became contractors and, therefore, were eligible to be counted in the pool of potential bidders. Yet, the court seems unwilling—or at least reluctant—to look further into the past.[135] That is part of their focus on "narrowly tailoring" between the remedy and the past discrimination.

The narrow tailoring is a central point of conflict between reparations supporters and opponents. For many reparations supporters, the connection between past discrimination and present harm is easily discernable.[136] Many supporters point to evidence of discrimination in the disparate economic status of African Americans and whites.[137] Then they use group identity as a proxy for status as victim of past discrimination as suggested by Matsuda. However, the Supreme Court demands substantially greater evidence of discrimination by the particular entity that is taking race-based action—and of discrimination against those who are now being given preference.[138] It is a question of how one views evidence—and the amount and type of evidence that is necessary to conclude that some remedial action is permissible.

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134. *Croson*, 488 U.S. at 509.

135. Justice O'Connor acknowledged the shameful history of racism–and its likely effect on the number of African American contractors. However, she concluded that history was insufficiently tied to the quota that Richmond established. *Id.* at 499 ("The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone.").

136. *See, e.g.*, Verdun, *supra* note 36, at 643. R

137. *See, e.g.*, MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL EQUALITY (1995) (documenting racial disparities in income and wealth); *id.* at 188–90 (discussing reparations as a partial solution).

138. *See, e.g.*, *Croson*, 480 U.S. at 499, 507 (dismissing "outright racial balancing" as an appropriate goal of race-based action and finding that the facts underlying the ordinance failed to provide solid evidence of discrimination); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (dismissing evidence of disparity in racial composition of students and teachers as evidence of discrimination in employing teachers).

It is particularly difficult to decipher the meaning of Supreme Court precedent in this area, because the Supreme Court has said that general societal discrimination is an insufficient basis for race-based actions.[139] However, meaningful reparations programs are aimed at precisely those problems of society-wide racial crimes. Here, those of us advocating reparations need to link the remedies we advocate as closely as possible with specific instances of past racial crime or discrimination. Reparations advocates do not need to show that the people receiving benefits now are the exact people discriminated against—nor even that they are related to the people who were discriminated against. However, it appears from *Croson* that there must be a showing of specific discrimination—by the entity responsible for making the reparations now or people within its jurisdiction.[140]

In deciding whether a program is narrowly tailored, the Supreme Court has also considered a program's duration and whether the same goal might be accomplished through non-race-based means.[141] In short, there has to be more than a "generalized assertion that there has been past discrimination in an entire indus-

139. Adarand Constructors v. Pena, 515 U.S. 200, 220 (1995) (stating that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy") (quoting *Wygant*, 476 U.S. at 276); *Croson*, 488 U.S. at 497 (observing that past cases have distinguished "between 'societal discrimination' which is an inadequate basis for race-conscious classifications, and the type of identified discrimination that can support and define the scope of race-based relief"); *Wygant*, 476 U.S. at 276. Reliance upon evidence of societal discrimination makes figuring an appropriate remedy—and logical stopping point—difficult. *See Croson*, 488 U.S. at 498. The distinction between "societal discrimination" and more specific evidence of discrimination in a location is—obviously, one supposes—a distinction based on the amount of evidence that one expects before a court will grant relief. This is precisely the issue that critical race scholars criticize the courts for adopting: the requirement of a close nexus between past racial crimes (or discrimination) and current harm. Many of these problems, one supposes, could be solved with further evidence. Thus, the city of Richmond might very well have been able to defend much of its racial set-asides for minority contractors *if* it could have shown evidence of discrimination in the construction trades or in the award of government contracts in the past. *See Croson*, 488 U.S. at 509.

The closeness of this issue—and its contentiousness—is illustrated by the dissenting opinions in *Adarand*. Four justices have suggested that findings of societal discrimination might support race-conscious action. *See Adarand*, 515 U.S. at 269 (Souter, J., dissenting, joined by Ginsburg, J., and Breyer, J.); *id.* at 242 (Stevens, J., dissenting).

140. *See Croson*, 488 U.S. at 500 ("There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry.") (emphasis in original).

141. *Adarand*, 515 U.S. at 237–38.

try," for such a statement "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."[142] Or, as Justice O'Connor concluded in *Croson*, we need proper findings "to define both the scope of the injury and the extent of the remedy necessary to cure its effects."[143]

To evaluate more fully the constitutionality of reparations, one would need to begin focusing on specific plans. Take, for example, Robert Westley's proposal of a federally funded trust for ten years, to be administered by trustees elected by African Americans, with the general directions to fund institution-building programs.[144] There the limited-duration program is designed to repair the discrimination and racial crimes that have limited the ability of the African American community to fund adequate schools, financial institutions, and health care facilities. It seems unlikely that there would have to be a showing that each institution funded by the trust was necessary to remedy the past discrimination in its location. One suspects that the trustees would already have been required to show that the institutions served a significant need in the community before they were allowed to finance it. But what about the racial limitation on the people who elect the trustees? Is that narrowly tailored? The issues quickly become complex and warrant substantially more attention (and thought) than I have devoted to them.

It is much harder to see how Lee Harris' proposed political state for African Americans could pass strict scrutiny.[145] If the state were open to all African Americans (and not others), then it would be hard to see the compelling governmental interest, at least as that is currently understood. Segregation seems to have made little headway in recent years as a governmental goal, although Harris might argue that political autonomy—using an analogy to Native American sovereignty—meets important interests of those who want to migrate to the separate state. Moreover, it is difficult to see how the separate state goal—even if it serves a compelling governmental purpose—is narrowly tailored. How does the "separate state" serve to remedy past discrimination? When does the remedy end?

Vincene Verdun's reparations proposal poses a different—but significant—set of problems. Verdun finds that "[s]ociety, through all of its consumers, producers, governments, laws, courts, and eco-

142. *Croson*, 488 U.S. at 498.

143. *Id.* at 510.

144. Westley, *supra* note 109, at 470–71. R

145. For details of the proposal, see Harris, *supra* note 120. R

nomic institutions, perpetrated and supported the institution of slavery."[146] As a result, "all of society must pay."[147] Verdun recognizes that under mainstream approaches of linking victims to harm, "the difficulty of matching the injured party with the wrongdoer and limiting the responsibility of each wrongdoer to the scope of the wrong would be monumental."[148] Verdun's moderate proposal to "distribute the compensation for all students who could have entered professions, calculated by comparative ratios with a white control group, to all African Americans who were undereducated,"[149] as discussed above, redistributes property into equal shares and is an example of racial balancing. Without passing judgment on the appropriateness of such a proposal right now, one can observe that it presents some of the same problems as the Richmond ordinance invalidated in *Croson*.[150]

Take yet another commonly discussed proposal: cash payments to African Americans. Payments are arguably directed to the very problem being remedied—two hundred fifty years of uncompensated labor and another one hundred of grossly undercompensated labor. To the extent that they are traced to the descendants of people whose labor was stolen or (in the era after slavery) were underpaid, they may be narrowly tailored.[151] However, when there is no linking of payments to specific victims—and there will obviously be enormous problems in making those links—then the payments appear much more like a remedy for general societal discrimination, which is where this whole debate began![152]

To stand a reasonably strong chance of survival, reparations ought to be linked to specific discrimination by governmental entities and private actors in the location where reparations will be spent. Findings should demonstrate the precise constitutional and statutory violations (or what would now be statutory violations if the

146. Verdun, *supra* note 36, at 637. R

147. *Id.* at 638.

148. *Id.* at 642.

149. *Id.* at 642.

150. *Croson*, 448 U.S. at 507 ("[T]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.") (quoting Local 28, Sheet Metal Workers' Int'l Assoc. v. EEOC, 478 U.S. 421, 494 (1986) (O'Connor, J. concurring in part and dissenting in part)).

151. There are some problems in linking the payments to the discriminating body.

152. *See* Westley, *supra* note 109, at 429–30 (lamenting decline of affirmative action). R

events occurred before the contemporary civil rights acts) and demonstrate the current impact they are having. That linking is critical, although the Supreme Court has cast doubt on whether it will accept multi-step arguments that past discrimination has limited current opportunities.[153] There should be specific remedial goals, so that the remedies have a logical, definite stopping point. There also has to be consideration of whether the goals of reparations might be accomplished through some basis other than race.[154] Are there community-building plans aimed at low-income communities, for example, that might increase educational and economic opportunities for victims of racial crimes—and others, too? This is an exceedingly complex issue, which deserves substantial attention.

There is an additional consideration here: Congress' power under Section Five of the Fourteenth Amendment to define and repair constitutional problems. It is possible, though decreasingly likely, that Congress' Section Five powers permit it to legislate in a race-conscious fashion even if there is not an existing constitutional violation. Congress might still have the power to make extensive findings, determine the scope of the problem, and then take limited race-conscious action. A series of recent cases in the Supreme Court, however, call into question Congress' Section Five powers in the context of questions regarding the behavior that Congress can prohibit.[155] As the Supreme Court has recently stated, Congress

153. At several places in *Croson*, for instance, Justice O'Connor suggested there was a need for evidence that there had been discrimination *in* the local construction industry. 488 U.S. at 500 (questioning whether there is "'strong basis in evidence'" that remedial action is necessary, because "[t]here is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry") (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)) (emphasis in original). By implication, discrimination against African Americans that occurred outside the industry, but had negative effects on the number of African Americans in the industry, is an insufficient basis for race-based action. *See id.* at 501 (rejecting evidence that minorities are underrepresented in employment when there are special qualifications); *id.* at 507 (questioning the "assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population").

154. *See Croson*, 488 U.S. at 507 (observing that Richmond never considered whether there were race-neutral alternatives that would accomplish the same purpose). *Croson* suggested one race-neutral program—city funding for small businesses—that might increase minority participation in the construction industry. *Id.*

155. The recent Section Five cases address Congress' power to prohibit behavior or to otherwise limit states' authority. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (constraining Congress' power under Eleventh Amendment to abrogate states' immunity from suit); City of Boerne v. Flores, 521 U.S. 507 (1997)

has only remedial power under Section Five. It cannot expand the scope of Fourteenth Amendment rights.[156] Congress' power is limited to remedial purposes and in those instances, there has to be "congruence between the means used and the ends to be achieved."[157] In determining Congress' remedial power under Section Five, the Court also looks to whether the means are proportional to the remedial objective.[158] In *City of Bourne v. Flores*, for instance, the Supreme Court rejected the argument that the Religious Freedom Restoration Act (RFRA), which gave a federal cause of action to people whose religious practices were burdened by state action and required the application of the test announced in *Wisconsin v. Yoder*[159] and *Sherbert v. Verner*[160] that government must establish a compelling interest to burden those practices, was a proper exercise of Congress' Section Five power.[161] The Court struck down RFRA because it was not congruent to any currently existing constitutional violations. There was not evidence of "modern instances of generally applicable laws passed because of religious bigotry."[162] Hence, the attempted alteration of the legal standard for burdening the free exercise of religion was not remedial—and, therefore, beyond Congress' power.[163]

What appears critical is a showing of currently existing constitutional problems and a proportional response by Congress.[164] One might compare reparations proposals with the Voting Rights

(striking down statute that limited state government's power to burden religious exercise). Congress' power to define violations of the Equal Protection Clause ought to be the same whether Congress is trying to expand its power to prohibit action that it believes would violate the Equal Protection Clause or to take action to promote equal protection. *Cf.* Adarand Constructors v. Pena, 515 U.S. 200, 223 (1995) (applying consistent standard governing Equal Protection Clause, regardless of whether government is burdening or benefiting racial minority). *See generally* Note, *In Light of the Evil Presented: What Kind of Prophylactic Antidiscrimination Legislation Can Congress Enact after* Garrett*?*, 43 B.C. L. REV. 697 (2002) (discussing Congress' power under Section Five).

156. *See City of Boerne*, 521 U.S. at 527.

157. *Id.* at 530.

158. *Id.* at 532.

159. 406 U.S. 205 (1972).

160. 374 U.S. 398 (1963).

161. *See* Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb(a)–(b) (1988); *City of Boerne*, 521 U.S. at 515 (describing RFRA act).

162. *City of Boerne*, 521 U.S. at 530.

163. *Id.* at 532 (RFRA "cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.").

164. *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356, 374 (2001). ("[T]here must be a pattern of discrimination . . . and the remedy imposed by Congress must be congruent and proportional to the targeted violation.").

Act of 1965, for instance. The Act, which was authorized under Section Two of the Fifteenth Amendment—an analogous provision to Section Five of the Fourteenth Amendment—was upheld in *Katzenbach v. Morgan*.[165] The Act included race-conscious remedies, such as taking race into consideration in drawing districts. The Supreme Court upheld the limited remedies, because (at least as it was explained by the Supreme Court in 2001 in *Board of Trustees of the University of Alabama v. Garrett*), there had been a marked pattern of unconstitutional action contemporaneous with the Act.[166] Those principles make Section Five an unlikely candidate in supporting reparations for slavery.

Representative Conyer's reparations study commission could be critical in making findings of the scope and effect of past racial crimes, which will meet the standard for Congressional action. In the process of studying slavery and its legacy, we can help to make the case for race-based action: how have past racial crimes and discrimination led to current inequalities? What goals can be set, so that a narrowly tailored program might remedy them? That leads naturally to another question, which the Supreme Court does not require that we answer, but which is indispensable for effective reparations: what programs are best calculated to lead to equality?

IV.
FASHIONING GROUP REMEDIES: THE FORWARD-LOOKING REMEDY

Central to building a case for reparations is a program that is both constitutional and likely to be effective. What might the remedy look like and how might it take race into account to repair past damage and build something better for the future? There are several components of that question. What do we want to accomplish with reparations? How do you design a program that most effectively accomplishes those goals in a politically acceptable fashion? How can a reparations program for slavery transcend both political

165. 383 U.S. 301, 308 (1966).

166. The Court detailed Congress' findings:

> Congress documented a marked pattern of unconstitutional action by the States. State officials, Congress found, routinely applied voting tests in order to exclude African-American citizens from registering to vote. . . . Congress also determined that litigation had proved ineffective and that there persisted an otherwise inexplicable 50-percentage point gap in the registration of white and African-American voters in some States.

See Garrett, 531 U.S. at 373.

opposition and work a fundamental change in the educational opportunity and economic status of African Americans?

Part of the problem with fashioning appropriate remedies is disagreement among reparations advocates of exactly what they are seeking.[167] Some claims are modest and relatively limited—an apology, a renewed voting rights act, increased spending on education for pre-college students in poor neighborhoods, increased welfare funding, funding for community empowerment, funding for low-income housing.[168] Some include direct cash payments. The agenda quickly becomes more nebulous, however. There is the desire to have radical redistribution of property and wealth, culminating in, one suspects, equal wealth per capita of blacks and whites.[169] There are also the general, utopian ideals set out by some, of elimination of white supremacy and empowerment of the African American community.[170] Those ideas are based on the belief that reparations will lead to a variety of goals, such as justice, multi-racial harmony and distributive justice (redistribution of property).[171] As

167. *Cf.* Devon V. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1305 (2002) (noting that "it is difficult to know precisely where on the bottom to look and how to make sense of what one sees"). On the multitude of problems of race more generally, see Art Alcausin Hall, *There Is a Lot To Be Repaired Before We Get to Reparations: A Critique of the Underlying Issues of Race that Impact the Fate of African American Reparations*, 2 SCHOLAR 1 (2000).

168. Chisholm provides an excellent summary of the moderate agenda. *See* Chisholm, *supra* note 113, at 722–26. R

169. Verdun suggested a damages formula of "compensation for all students who would have entered professions, calculated by comparative ratios with a white control group, to all African Americans who were undereducated." That formula would, it seems, determine what percentage of whites entered each profession and then award damages to undereducated African Americans based on the earnings of whites who entered professions. It is a complex way of providing that the difference between what whites earned above what African Americans earned will be redistributed to African Americans. *See* Verdun, *supra* note 36, at 643. R

170. Magee sets those idealist goals—and urges an alternative conscience. It is less clear how they will be achieved—how we bridge the gap between present and racial equity. In the conclusion to her article, Magee seems to suggest that wealth transfers in the form of reparations are an important part of that scheme. *See* Magee, *supra* note 22, at 913–16. R

171. *See generally* Sanford Cloud, Jr., *The Next Bold Step Toward Racial Healing and Reconciliation: Dealing with the Legacy of Slavery*, 45 How. L.J. 157 (2001); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. Rev. 477 (1998). The movement is certainly gaining strength and supporters at the highest levels; *see, e.g.,* Nathaniel R. Jones, *The Sisyphean Impact on Houstonian Jurisprudence*, 69 U. CINN. L. REV. 435, 449 (2001) (citing instances of official support for reparations from the perspective of a United States Court of Appeals judge).

one advocate explains, reparations are "a prerequisite to racial harmony and any movement toward race neutrality."[172]

One of the most optimistic recent assessments of reparations comes from the April 2002 *Harvard Law Review* Note, "Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future."[173] It focuses on winning political acceptance for the idea of reparations. As the author observes, "before achieving victory in a court of law, African-American reparations must succeed in the court of public opinion."[174] It might be possible to achieve limited victories in court, of course, before conversion of the national conscience to the idea of reparations. However, transformative reparations will almost certainly come through the legislature, if at all. The anonymous author of "Bridging the Color Line" proposes a gradual, political[175] process of accommodating the national conscience to reparations—first, through study of the effects of slavery and Jim Crow, then through exploration of remedies, which emphasizes issues of justice and economics, rather than race:

> Incrementalism that focuses first on the creation of a commission to investigate the wrong will provide politicians and reparationists with the opportunity to lay the evidentiary groundwork necessary to educate the public regarding the effects, past and present, of slavery and Jim Crow—creating a strong moral and economic claim for reparations in the second phase.[176]

The essay makes some suggestions about what such a reparations program might look like. The initial study of the effects of slavery and Jim Crow would both lay the groundwork for a national consensus on reparations and also serve a cathartic purpose, which would offer emotional closure for victims.[177]

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172. Chisholm, *supra* note 113, at 726–27. **R**

173. 115 HARV. L. REV. 1689 (2002).

174. *Id.* at 1693.

175. *Id.* at 1704 (noting that "[p]oliticians and community leaders, not just lawyers, should frame the public debate over reparations").

176. *Id.* at 1706.

177. *Id.* at 1708. That is certainly an important goal–and study must, obviously, precede action. One is concerned, however, that such the author of "Bridging the Color Line" is placing too much hope in the ability of a study to transform American thought. One thinks of similar episodes in history, like the Kerner Commission Report on racial violence, and their inability to transform values fundamentally. The politics of historical commissions is itself an important topic, deserving substantial attention. *See generally* ELZAR BARKAN, THE GUILT OF NATIONS (2000).

In terms of concrete proposals, Robert Westley and Mari Matsuda have advanced the case the farthest in legal journals. Westley draws upon private trust law, with trustees elected by African Americans and the corpus of the trust funded by Congress. One needs to think about who is entitled to vote for the trustees.[178] Will all African Americans be entitled? Or only those who can trace to ancestors who were slaves? Or who suffered discrimination under Jim Crow? The trustees also need guidelines governing their expenditures. How should trustees decide on which programs to fund? How would communities be sure to receive their share of payments? Westley's proposal places great confidence in politics, just as the Alaska Native Claims Settlement Act (ANCSA) placed great confidence in business as a model of reparations.[179] As with other reparations plans, defining the beneficiaries is difficult and important.

Professor Matsuda's reparations plan presents different problems in defining beneficiaries. Where Westley analogized to private trust law, Matsuda looks to class action cases, where the relief comes in the form of damages paid to members of a community (defined by geography). Matsuda points to cases in regulated industries, for instance, where the consumers injured cannot be specifically identified. Thus, Matsuda uses examples from antitrust, in which businesses over-charged consumers. The practical problems associated with locating each of the injured consumers are enormous—perhaps insurmountable. Instead, courts routinely award

178. *See* L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702 (2001) (discussing the problems associated with limiting trustee electors based on race).

179. *See* 43 U.S.C. §§ 1601–1629 (2000); Nell Jessup Newton, *Compensation, Reparations, and Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 474–75 (1994). The history of the ANCSA, which was premised on the idea that tribes were best served when they had the power and resources to form corporations, suggests some of the limitations (as well as benefits) of Westley's proposal. *See, e.g.*, Duane Champagne, *Challenges to Native Nation Building in the 21st Century*, 34 ARIZ. ST. L.J. 47, 53 (2002) (discussing problems implementing corporate forms in Native American communities but noting potential of tribal capitalism). The idea of a trust evokes images of the Supreme Court's decision in *Rice v. Cayetano*, 528 U.S. 495 (2000), which held unconstitutional the state constitutional provision limiting the right to vote for trustees of the country's largest private trust to native Hawaiians. *See* Gavin Clarkson, *Not Because They Are Brown, but Because of* Ea: *Why the Good Guys Lost in* Rice v. Cayetano*, and Why They Didn't Have to Lose*, 7 MICH. J. RACE & L. 317–18 (2002); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 343–44 (2001); John Heffner, *Between Assimilation and Revolt: A Third Option for Hawaii as a Model for Minorities World-Wide,* 37 TEX. INT'L L.J. 591, 598–600 (2002).

compensation to current customers.[180] The "fluid class" remedy has great appeal. It recognizes the wrong that has been committed, and then offers some compensation to people who stand (in some metaphysical sense) in the shoes of the victims. Typically, the fluid class remedy appears in settlements, which assess damages, then try to locate the plaintiff class—or a reasonable alternative for it, using an analogy to *cy pres*.[181] When some absent members of a class cannot be located, their share of the settlement is sometimes given to charities that represent the interests of people similar to the absent class members. Thus, in 1997 the Eighth Circuit approved, as part of the settlement of an employment discrimination class action, the establishment of a college scholarship fund for African American students from counties where most of the class members lived.[182]

Westley's and Matsuda's proposals fit well with the background principles of American law. Trust law and remedial principles derived from class action cases both provide important guideposts for contemplating what reparations might look like. One might also look to desegregation cases as an analogy for reparations plans. The most useful strain of precedent is *Swann v. Charlotte-Mecklenburg Board of Education*, decided in 1971, which contemplated a broad power to integrate the Charlotte-Mecklenburg school system.[183] The Supreme Court required that the school "achieve the greatest possible degree of actual desegregation."[184] There was a focus on the result of desegregation, rather than merely drawing racially neutral attendance zones. That race-conscious remedy was required, it seems, by the past discrimination, as well as by the court's traditional equity powers. For, as the court concluded, "the nature

180. Matsuda, *supra* note 18, at 386 (citing, among other cases, Colson v. Hilton Hotels Corp., 59 F.R.D. 324, 326 (N.D. Ill. 1972)). R

181. One might question the constitutionality of assessing damages without knowing the composition of the class. *Cf.* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973) (dismissing class action suit for failure to meet notice and manageability requirements, regardless of fluid class recovery theory), *vacated by* 417 U.S. 156 (1974). Douglas Laycock observes that after the Second Circuit rejected fluid class remedies in *Eisen*, "there have been few further experiments with fluid class recoveries in adjudicated class actions." DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 1129 (3d ed. 2002). *But see* Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n, 84 F.3d 451, 457458 (D.C. Cir. 1996) (ordering that excessive fares collected from D.C. bus riders in the 1960s should be used to purchase new buses).

182. Powell v. Georgia-Pac. Corp, 119 F.3d 703 (8th Cir. 1997); *see also* Jones v. Nat'l Distillers, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999) (citing cases involving payments of settlement funds to charities); LAYCOCK, *supra* note 181, at 1129–30. R

183. Swann v. Charlotte-Mecklenburg Board of Ed., 402 U.S. 1 (1971).

184. *Id.* at 26.

of the violation determines the scope of the remedy.[185] In the reparations context, such equitable powers support a broad—though inexact—reparations plan, which seeks to achieve the greatest degree of educational and economic opportunities.[186]

More recent desegregation cases, however, require a closer connection between evidence of discrimination and the remedy itself. In *Milliken v. Bradley*,[187] decided three years after *Swann*, the Supreme Court faced a desegregation order designed to integrate the Detroit school system with the Detroit suburbs. There was an acknowledged history of segregation by the Detroit school board, although the district court concluded that a desegregation order aimed only at Detroit would be ineffective. The Supreme Court emphasized—in contrast to *Swann*—that "the scope of the remedy is determined by the nature and extent of the constitutional violation."[188] A more recent case, *Dayton Board of Education v. Brinkman*,[189] limited the court's equitable power even within a unified school district. There had been limited *de jure* segregation years before the district court ordered district-wide busing. The Supreme Court required a showing of the "incremental" segregation attributable to the prohibited *de jure* segregation.[190] The question for the Court was how much segregation there was in the school system as a result of the constitutional violations. "The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy."[191] The Supreme Court has extended its focus on the segregation that exists because of a constitutional violation to cases where school districts seek to terminate desegregation efforts. Fourteen years after a desegregation decree was entered, the Oklahoma City school district sought to terminate the decree, contending that it had achieved a "unitary" school system and, therefore, the decree ought to be terminated. In *Board of Education of Oklahoma City v. Dowell*, the Court

185. *Id.* at 16.

186. Laycock concludes that *Swann* "may be best understood as an attempt to do complete equity, unconstrained by any direct link to a defined violation or the rightful position." LAYCOCK, *supra* note 181, at 291. R

187. 418 U.S. 717 (1974).

188. *Id.* at 744.

189. 433 U.S. 406 (1977).

190. *Dayton*, 433 U.S. at 420.

191. *Id. See also* Milliken v. Bradley, 433 U.S. 267, 282 (1977) ("[F]ederal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . . .").

focused on the question whether the "vestiges of *de jure* segregation had been eliminated as far as practicable."[192] *Dowell* illustrates the Supreme Court's requirement of a close link between present remedy with evidence of past discrimination, for it relied upon the district court's finding that residential segregation—which prevented complete desegregation—was "too attenuated to be a vestige of former school segregation."[193]

The post-*Swann* desegregation cases are corollaries to the affirmative action cases *Croson* and *Adarand*. They are less helpful in suggesting models of reparations than *Swann*; indeed, they illustrate the limitations of legal analogies in making the case for reparations. They also remind us—as do the affirmative action cases—that reparations may need to be tied to evidence of discrimination in the location where the reparations are being made; they also need to be closely tailored to the harm. Yet, every case illustrates that there can be remedies for people who have subsequently moved into the area and that remedies designed to repair past damage can affect the next generation. Thus, even if the particular people who are being aided were not themselves victims, it is appropriate to target them for a desegregation remedy.

There is one other area, affirmative action, where the remedy—typically orders requiring correction of a racial imbalance in the workplace—is not linked to discrimination against the exact people who are receiving the remedy.[194] For, as Justice Blackmun explained in dissent in *Firefighters Local Union No. 1784 v. Stotts* in 1984, a case that refused to order the displacement of workers hired under a discriminatory system, "[t]he distinguishing feature of race-conscious relief is that no individual member of the disadvantaged class has a claim to it, and individual beneficiaries of the relief need not show that they were themselves victims of the discrimination for which the relief was granted."[195] Affirmative action cases that impose quota-based estimates of what the racial composi-

192. 498 U.S. 237, 250 (1991).

193. *Id.* at 250 n.2. More recently, in *Missouri v. Jenkins*, 515 U.S. 70, 101 (1995), the Supreme Court has restated the test as whether the harms—in that case poor student achievement—have been "remedied to the extent practicable." That subtly lowers the burden on the school district, for they are then liable only if the harm can be remedied *and* they caused it.

194. *See, e.g.*, United States v. Paradise, 480 U.S. 149 (1987); Local 28, Sheet Metal Workers Int'l Assoc. v. Equal Employment Opportunity Comm'n, 478 U.S. 421, 447 (1986).

195. 476 U.S. 561, 613 (1984); *see also* Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982).

tion of the workforce would be absent discrimination might actually come closer to putting the injured class back in the position it would have been without the illegal discrimination than if plaintiffs had to show the effects of each past act of discrimination.[196]

Professor Laycock has recently framed the conflict between liberal remedies and more recent Supreme Court decisions requiring a close connection between harm and remedy:

> [O]ur legal system's traditional view [is] that litigation remedies particular wrongs to particular plaintiffs. To change that practice as a general matter would require a wholly different law of remedies, and perhaps a wholly different role for courts in the constitutional scheme. If a remedy is not designed to restore someone to his rightful position, in what sense is it a remedy?[197]

Of course, reparations advocates think that reparations *are* restoring the recipients to their rightful position—or are moving in that direction.

In addition to rebuilding communities, reparations also aim to repair psychological harm. An important element of this goal can be truth commissions, like the one proposed by Representative Conyers. A historical commission can go back and seriously reconstruct the evidence of the contributions of African Americans to the social and economic development of the United States, marshal the evidence of the losses that the community has suffered,[198] and make us understand how we ended up where we are.[199]

The time has not yet arrived that we can construct a comprehensive plan. Randall Robinson proposes in *The Debt* a "new starting point" for thinking about what reparations might look like. He begins with Robert Westley's proposal of a trust for community-building. The exact amount of the trust, Robinson believes, should be determined once "an assessment can be made of what it will cost

196. This line of reasoning is suggested by Douglas Laycock. *See* LAYCOCK, *supra* note 181, at 1134. R

197. *Id.* at 1133.

198. *Cf.* Davison M. Douglas, *Justifying Racial Reform*, 76 TEX. L. REV. 1163 (1998) (reviewing DARYL MICHAEL SCOTT, CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880-1996 (1997)) (questioning the utility and appropriateness of focusing on the harm to the community).

199. *See* ROBINSON, *supra* note 99, at 247 ("This is a struggle that we cannot lose, for in the very making of it we will discover, if nothing else, ourselves."); *see also* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); Rose Weston, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 ARIZ. J. INT'L & COMP. L. 1017 (2001). R

to repair the long-term social damage."[200] Robinson proposes that the trust fund at least two generations of pre-college education (with boarding schools for at-risk children); college for those who cannot afford it; additional weekend schools that teach "the diverse histories and cultures of the black world;"[201] study of the extent to which companies and families have been enriched by slavery; funding of black civil rights and political organizations; commitments to Caribbean and African countries, including "full debt relief, fair trade terms, and significant monetary compensation."[202] This, however, is only a beginning, not a comprehensive plan.[203]

We need, I think, a rhetoric of public responsibility to support reparations. There is a rich tradition of use of the community's resources to repair damage done, even when there is no fault on the part of the community. In the wake of September 11, all Americans are familiar with the extraordinary efforts of Congress to aid, to the extent possible, the families of people who died that day. The Air Transportation Safety and Stabilization Act, which provides generous payments to victims' families, is only the most recent and visible of a long line of government aid programs.[204] There are other precedents as well, for government payments to those who have been injured, or need assistance.[205]

Talk of disgorgement of profits is difficult to sustain and implies a significant limit on the liability of American society. Repair of damages and restoration of justice may be a more appropriate

200. ROBINSON, *supra* note 99, at 244. R

201. *Id.* at 245.

202. *Id.* at 245–46.

203. *Id.* at 246 ("The ideas I have broached here do not comprise anything near a comprehensive package."); *see also* Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L. J. 2531 (2001) (reviewing ROBINSON, *supra* note 99) (discussing Robinson's reparations proposals). R

204. *See* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

205. *See, e.g.*, ELIZABETH ANN REGOSIN, FREEDOM'S PROMISE: EX-SLAVE FAMILIES AND CITIZENSHIP IN THE AGE OF EMANCIPATION (2002) (discussing pensions for African American veterans of the Civil War and their dependants); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1996) (discussing pensions in United States history). Christine Desan has recovered an important—and little understood—legislative tradition of settling claims. That tradition is an important precedent for legislative reparations and is an important part of the legislature's tradition of protecting members of the community. *See* Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998).

basis for recovery.[206] We should look at a series of programs for community-based repair, from head start programs to well-funded schools and scholarships for educational purposes. Such forward-looking programs may win political support. Perhaps the program should be—indeed, absent a constitutional amendment it may have to be—aimed at an entire class, rather than a single race. Such a reparations program could diffuse the racially charged atmosphere surrounding reparations for slavery while accomplishing most of its goals.[207] It would also address the problem that the Supreme Court poses in affirmative action cases: has Congress considered a racially neutral program that might accomplish the same purpose?[208] A

206. *See* Anthony E. Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, 68 GEO. WASH. L. REV. 959 (2000).

207. *See, e.g.*, Michael Selmi, *Remedying Societal Discrimination Through the Spending Power*, 80 N.C. L. REV. 1575, 1578, 1580 (2002) (arguing for Congress' power to correct societal discrimination through the spending power). Professor Selmi's provocative article suggests that Congress might consider the racial composition of a government bidder's workforce as a factor in awarding government contracts. I remain concerned that recent affirmative action cases prohibit the consideration of race in that way. In *Metro Broadcasting*, for instance, the Supreme Court found issues of remedying past discrimination unpersuasive, though it recognized the importance of programming diversity. Metro Broadcasting v. Fed. Communications Comm'n., 497 U.S. 547, 566 (1990).

There are huge problems related to fairness of distribution of benefits, obviously. For example, one of the problems with affirmative action admissions to schools based on class rather than race is that African Americans would get very little benefit from it. At each income level, non-Hispanic whites score above African Americans. *See, e.g.*, Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 940 (1997); Deborah C. Malamud, *A Response to Professor Sander*, 47 J. LEGAL EDUC. 504, 505 (1997); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996). Those problems could be partially addressed by focusing remedies on poorly achieving students and on economically disadvantaged communities. The critical issue, as the leading proponents of reparations Randall Robinson and Charles Ogletree both point out, is the most disadvantaged, the people who have been left furthest behind. *See, e.g.*, ROBINSON, *supra* note 99, at 8. For, as Robinson says, **R**

> affirmative action programs are not *solutions* to our problems. They are palliatives that help people like *me*, who are poised to succeed when given half a chance. They do little for the millions of African Americans bottom-mired in urban hells by the savage time-release social debilitations of American slavery. They do little for those Americans, disproportionately black, who inherit grinding poverty, poor nutrition, bad schools, unsafe neighborhoods, low expectation, and overburdened mothers.

Id.

208. *See* Richmond v. J.A. Croson, 488 U.S. 469, 507 (1989) ("[T]here does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting."). Justice O'Connor

class-based reparations program, aimed at the class of Americans who need assistance the most, might remove some, perhaps most, of the opposition to reparations.[209] It also holds out the promise of building something positive for the future, from which everyone with needs could benefit.[210]

V.
"REPARATIONS TALK" AND THE CULTURAL WARS OVER REPARATIONS

Reparations talk is part of a much larger debate about redistribution of property and about how we perceive the role of history in advocacy. Opponents of reparations, for example, claim that mere discussion often does more harm than good, because it causes proponents to blame others for the problems that the African American community should solve for itself.[211] Reparations talk has opened a new front in the cultural war that leaves us with important questions about the debate. Does discussion of reparations do more harm than good? Focus attention on the wrong issues? Cause people to look to others rather than try and solve their

went on to quote the Supreme Court's test from *United States v. Paradise*, 480 U.S. 149, 171 (1987): "In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies." *Croson*, 488 U.S. at 507.

209. It might, of course, be designed in a way that would disproportionately benefit African Americans. Already, some are writing about racial reparations as a model for reparations to Appalachia. *See* Wendy B. Davis, *Out of the Black Hole: Reclaiming the Crown of King Coal*, 51 AM. U. L. REV. 905, 958–59 (2002). This may indicate the beginning of a link between groups asking for reparations and the beginning of considerations of reparations on a meaningful scale. If that is the case, it will be all the more important to consider which kinds of programs can reconstruct communities most effectively and repair past harm. *See also* Marion Crain, *Colorblind Unionism*, 49 UCLA L. REV. 1313, 1313 (2002) (contemplating labor unions' historic role in redistributing property and some of its common cause with reparations for slavery).

210. *Cf.* Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 53 ALA. L. REV. (forthcoming 2003) (discussing a jurisprudence based on considerations of humanity, which would avoid racial categories and focus on need of community members). *See also* Bryan K. Fair, *The Anatomy of American Caste*, 18 ST. LOUIS U. PUB. L. REV. 381 (1999) (proposing a constitutional right against caste and urging governmental action to break down caste); *cf.* William W. Van Alstyne, *Affirmative Actions*, 46 WAYNE L. REV. 1517 (2000) (discussing what affirmative action might mean, particularly in usages that do not involve racial classifications but which advance equality).

211. For a concise statement of the opposition to reparations, see John McWhorter, *Against Reparations*, NEW REPUBLIC, July 23, 2001, at 32.

problems themselves? Does reparations talk, as some suggest, decrease respect for American values?[212] Or is reparations talk part of a process of healing, of recovering an understanding of America's past, and part of moving forward to a more equitable distribution of society's resources?

There is little common ground between reparationists and their opponents. Clarence Munford summarizes the reparationist position well when he inquires into what should be demanded from "white Western civilization at this stage of our struggle." His answer: "*Demand it all!*"[213] Opponents of reparations take a similarly stark stance in opposition. David Horowitz, for instance, asks at one point about the debt that blacks owe to white America:

> Slavery existed for thousands of years before the Atlantic slave trade was born, and in all societies. But in the thousand years of its existence, there never was an anti-slavery movement until white Christians—Englishmen and Americans—created one. If not for the anti-slavery attitudes and military power of white Englishmen and Americans, the slave trade would not have been brought to an end. If not for the sacrifices of white soldiers and a white American president who gave his life to sign the Emancipation Proclamation, blacks in America would still be slaves. If not for the dedication of Americans of all ethnicities and colors to a society based on the principle that all men are created equal, blacks in America would not enjoy the highest standard of living of blacks anywhere in the world, and indeed one of the highest standards of living of any people in the world. They would not enjoy the greatest freedoms and the most thoroughly protected individual rights anywhere. Where is the gratitude of black America and its leaders for those gifts?[214]

Given these contrasting positions, perhaps one should not expect much even in the way of debate. But for some opponents, the debate about reparations has migrated from such legal issues as culpability and tracing harm to current generations, to more general issues like the role that historical injustice should play in current policy.

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212. *See, e.g.*, HOROWITZ, *supra* note 101, at 105–27 (discussing "[r]eparations and the American idea"). R

213. CLARENCE J. MUNFORD, RACE AND REPARATIONS: A BLACK PERSPECTIVE FOR THE 21ST CENTURY 413 (1996).

214. David Horowitz, *Ten Reasons Why Reparations for Blacks is a Bad Idea for Blacks—and Racist Too*, THE BLACK SCHOLAR, Summer 2001, at 48.

Most of David Horowitz's criticism of reparations, however, goes to the effect that reparations claims have on the African American community. He believes that "the reparations claim is one more attempt to turn African-Americans into victims . . . [and] sends a damaging message to the African-American community" and that "the reparations claim is a separatist idea that sets African-Americans against the nation that gave them freedom."[215] These claims are part of Horowitz's opposition to discussion of the past and its effect on the present. It is part of an attack on the Great Society, in which its opponents seek to place blame on the welfare policies of the 1960s for the current state of African American society, rather than on the legacy of slavery and Jim Crow.[216] Moreover, reparations opponents cite the animosity that reparations talk engenders in the majority community. It is an unfortunate reality that racial justice is in constant tension with the majority's attitude toward race-conscious affirmative action.[217] The connections between the past and the present are significant. The psychological harm, for example, is described vividly by Randall Robinson in *The Debt*:

> Like slavery, other human rights crimes have resulted in the loss of millions of lives. But only slavery, with its sadistic patience, asphyxiated memory, and smothered cultures, has hulled empty a whole race of people with inter-generational efficiency. Every artifact of the victims' past cultures, every custom, every ritual, every god, every language, every trace element of a people's whole hereditary identity, wrenched from them and ground into a sharp choking dust. It is a human rights crime without parallel in the modern world. For it produces victims *ad infinitum*, long after the active state of the crime has ended.[218]

215. *Id.* For a fuller discussion of these issues, see Alfred L. Brophy, *Uncivil Wars: The Cultural Wars Over Reparations for Slavery*, 53 DEPAUL L. REV. (forthcoming 2003); Alfred L. Brophy, *Confronting Some Common Objections to Reparations for Slavery*, 23 B. C. THIRD WORLD L. J. (forthcoming 2003).

216. One cannot hope to settle—or even fully describe the contours of the debate here. *See generally* THERNSTROM & THERNSTROM, *supra* note 106. *Contra* LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE (1994). R

217. *See, e.g.*, Andrew Blejwas, *Slavery Reparations Misguided, Yale Panel Concludes*, NEW HAVEN REGISTER, Sept. 29, 2002, ("Instead of reconciliation, (reparations attempts have) magnified the perceived injustices around us.") (quoting Professor Peter Schuck of Yale Law School), http://www.zwire.com/site/news.cfm?newsid=5534155&BRD=1281&PAG=461&dept-id+7573&rfi=8 (last visited Feb. 7, 2003).

218. ROBINSON, *supra* note 99, at 216. R

One suspects that the truth lies somewhere between the radical reparationists' claims that the vast majority of white society is racist and the radical oppositionists' claims that the fault for the gap in income and educational achievement between non-Hispanic whites and African Americans lies in African American culture.

That debate may actually be masking more important moral questions about who should pay for the legacy of slavery and Jim Crow. On moral issues, as on legal ones, Americans often emphasize personal fault. This may be yet another remnant of Puritan thought in American culture.[219] Whatever the origins, this emphasis on personal moral culpability parallels American law's liberalism, which seems to deny remedies unless a victim can trace fault back to an identifiable perpetrator.[220] Each generation, it seems, must stand on its own—or at least is not liable for the debts of the previous generation, even if it is entitled to the benefits bequeathed to it.[221] In the context of reparations for slavery there are therefore two ideologies working in tandem to limit public support. The first is racism. The second is the idea that people must succeed or fail on their own merits.[222]

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219. At least that is the suggestion of Wendy Kaminer. *See* Wendy Kaminer, *Up From Reparations*, AMERICAN PROSPECT, May 22, 2000, at 38.

> The Calvinism of seventeenth-century colonials proved less quintessentially American than did the notion that you can choose to be born again in Christ. This is not a culture inclined to embrace ideas of predestination, spiritual or financial. In the mythic, utterly egalitarian America—the democratic America Tocqueville described—we create our own futures, unburdened by our familial pasts.

Id. Whether early American religious and political ideals continue to motivate us is a subject a little beyond the scope of this essay. One might on this issue compare ROBERT A. FERGUSON, THE AMERICAN ENLIGHTENMENT, 1750-1820 (1994), which establishes the boundaries of those ideas, with ANDREW DELBANCO, THE REAL AMERICAN DREAM (1999), which speculates about Americans' declension from certain founding principles.

220. Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987) (emphasizing liberalism in American law); Matsuda, *supra* note 18, at 373–88. R

221. *Cf.* Ralph Waldo Emerson, *The American Scholar*, *in* RALPH WALDO EMERSON: ESSAYS AND LECTURES 53, 56–57 (Joel Porte ed., 1983) ("Each age, it is found, must write its own books; or rather, each generation for the next succeeding. The books of an older period will not fit this.").

222. *See* Jim Sidanius et al., *It's Not Affirmative Action, It's the Blacks: The Continuing Relevance of Race in American Politics*, *in* RACIALIZED POLITICS: THE DEBATE ABOUT RACISM IN AMERICA 191–235 (David O. Sears et al. eds., 1999) (evaluating the significance of racism versus "political ideology and values such as self-reliance, individual responsibility, fairness, and equity" in opposing affirmative action); *see also* Lawrence Bobo, *Race and Beliefs About Affirmative Action*, RACIALIZED POLITICS: THE

The morality of intergenerational liability has great importance for discussions of reparations for slavery and opposition to intergenerational reparations appears to be growing. In environmental law, for instance, the Supreme Court's 1998 decision in *Eastern Enterprises v. Apfel*[223] limited the enterprise liability of a corporation that entered the coal mining business decades after a consent decree imposed liability for injuries to miners. That trend is perhaps particularly troubling for reparationists, because environmental law is one of the areas where courts have most freely imposed strict liability on successors.

Trusts and estates law, which is the area of law most directly concerned with issues of intergenerational liability, limits liability to the value of the estate at the death. Perhaps even more importantly, once an estate is distributed, it is virtually impossible to reopen issues of liability.[224]

The issue of reparations is, of course, not just about liability, but about the redistribution of wealth.[225] More than a century ago, advocates of the abolition of slavery framed the issue of property and race. Abolitionist Ralph Waldo Emerson recognized that opposition to slavery confronted that sacred American value: support for property.

> Every reform is only a mask under cover of which a more terrible reform, which dares not yet name itself, advances. Slavery & Antislavery is the question of property & no property, rent & anti-rent; and Antislavery dare not yet say that every man must do his own work, or, at least, receive no interest for money. Yet that is at last the upshot.[226]

Slaveholders' claims to property were critical to the development of constitutional law and political theory in the years leading

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DEBATE ABOUT RACISM IN AMERICA 137–64 (David O. Sears et al. eds., 1999) (focusing on role that racism plays in opposing affirmative action).

223. 524 U.S. 498 (1998).

224. *See, e.g.*, ALA. CODE § 43-2-350 (1975) (prescribing time for filing claims against estate); Reed v. Campbell, 476 U.S. 852, 855–56 (1986). In the context of reparations for slavery, however, Helen Bishop Jenkins has recently made a provocative argument in favor of re-opening some estates that have now been closed for decades. *See* Helen Bishop Jenkins, *A Study of the Intersection of DNA Technology, Exhumation, and Heirship Determination as It Relates to Modern-Day Descendants of Slaves in America*, 50 ALA. L. REV. 39 (1998).

225. *See, e.g.*, Kaminer, *supra* note 219. R

226. RALPH WALDO EMERSON, EMERSON IN HIS JOURNALS 358 (Joel Porte ed., 1982).

into Civil War.[227] But the belief in the sanctity of property was by no means limited to the South.[228] The anti-rent movement that Emerson referred to was a movement by tenants in upstate New York to acquire the right to purchase the land they held on long-term leases. The movement evoked bitter conflict in the New York courts and legislature—and occasionally armed conflict. Those arguing in favor of property rights frequently invoked the fear of anti-rentism as a talisman to ward off the encroachment of public rights on private property.[229]

The issue is the same today: the question of whether reparations are to be paid has important implications for the redistribution of wealth in the United States. It implicates—as did slavery—other issues of humanity and efficient use of human capital.[230]

Ideas like self-reliance hold great appeal for American character and are often closely linked with more traditional conservative arguments against redistribution of wealth. Emerson captured those arguments in his essay "The Conservative":

227. *See, e.g.*, Alfred L. Brophy, The Intersection of Property and Slavery in Southern Legal Thought: From Missouri Compromise through Civil War 125 (unpublished Ph.D. dissertation, Harvard University, 2001) (discussing centrality of property in Southerners' thinking).

228. *See, e.g.*, GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 (1997) (exploring the competing considerations—of protection of individual and community rights—throughout American legal history); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 31–62 (1977) (identifying changes in property interests that are protected); JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: THE CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992).

229. *See, e.g.*, West River Bridge, 47 U.S. (6 How.) 507, 521 (1848) (arguing that unless cabined, the eminent domain power threatens to advance the "most leveling ultraisms of Anti-rentism or agrarianism or Abolitionism") (argument of Daniel Webster). James Fenimore Cooper's *Littlepage* trilogy revolves around the Anti-rent movement and supports the arguments of the property owners. *See* JAMES FENIMORE COOPER, THE CHAINBEARER; OR, THE LITTLEPAGE MANUSCRIPTS (New York, Burgess, Stringer & Co. 1845); JAMES FENIMORE COOPER, SATANSTOE; OR, THE LITTLEPAGE MANUSCRIPTS (New York, Burgess, Stringer & Co. 1845); JAMES FENIMORE COOPER, THE REDSKINS; OR INDIAN AND INJIN . . . (New York, Stringer & Townsend, 1846). *See also* CHARLES W. MCCURDY, THE ANTI-RENT ERA IN NEW YORK POLITICS, 1839-1865 (2001).

230. *See, e.g.*, JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 1226 (3d ed. 2002) (discussing the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101–2102 (1999)); *see also* JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000) (discussing accommodation of property rights with social considerations).

> 'Touch any wood, or field, or house-lot on your peril,' cry all the gentlemen of this world; 'but you may come and work in ours, for us, and we will give you a piece of bread.'
>
> And what is that peril?
>
> Knives and muskets, if we meet you in the act; imprisonment, if we find you afterward.
>
> And by what authority, kind gentlemen?
>
> By our law.
>
> And your law,—is it just?
>
> As just for you as it was for us. We wrought for others under this law, and got our lands so.[231]

Emerson was merely presenting the argument of conservatism. But many others believed in the importance of opposing redistribution of wealth and power. Speaking to the Harvard Phi Beta Kappa Society shortly after the Fugitive Slave Act of 1850 was passed, as abolitionists were urging that Americans refuse to abide by the law, law professor Timothy Walker warned about the dangers of reform:

> We cannot, indeed, change the past,—that is for ever immutably fixed; but we can repudiate it, and we do. We can shape our own future, and it shall be a glorious one. Now shall commence a new age,—not of gold, or of silver, or of iron, but an age of emancipation. We will upheave society from its deepest foundations, and have all but a new creation. In religion and politics, medicine and law, morals and manners, our mission is to revolutionize the world. And therefore we wage indiscriminate war against all establishments. Our ancestors shall no longer be our masters. We renounce all fealty to their antiquated notions. Henceforth to be old is to be questionable. We will hold nothing sacred which has long been worshiped, and nothing venerable which has long been venerated. These are the GLAD TIDINGS which we the reformers of the age, are commissioned to announce.[232]

Nevertheless, there were others in antebellum America who recognized, with Emerson, the role that claims to "vested rights" played in stopping reform. George Bancroft, one of the parents of the discipline of American history and an important advisor to President Andrew Jackson, delivered a Fourth of July oration on prop-

231. Ralph Waldo Emerson, *The Conservative, in* EMERSON: ESSAYS AND LECTURES, *supra* note 221, at 173, 179. R

232. TIMOTHY WALKER, THE REFORM SPIRIT OF THE DAY 5–6 (Boston, James Monroe and Co. 1850).

erty rights. He critiqued the Whig party for its adherence to property:

> This system regards liberty as the result of a bargain between the government and the governed; and as measured by the grant. The methods of government being once established, are therefore esteemed fixed forever. . . . Instead of saying, It is Right, it says, It is established. . . . You will further perceive, that this system of an original compact is hardly one step of an advance towards a truly liberal system. It regards every injustice, once introduced into the compact, as sacred; a vested right that cannot be recalled; a contract that, however great may be the pressure, can never be cancelled. The whig professes to cherish liberty, and he cherishes only his chartered franchises. The privileges that he extorts from a careless or a corrupt legislature, he asserts to be sacred and inviolable. . . . He professes to adore freedom, and he pants for monopoly.[233]

Ralph Waldo Emerson's twentieth-century namesake Ralph Waldo Ellison addresses these same concerns in his posthumously published novel, *Juneteenth*.[234] The novel revolves around an African American jazz musician-turned-minister, Alonzo Hickman, who raises a boy, Bliss, of ambiguous racial heritage (though he is probably white). That boy was born to a woman who had falsely accused Hickman's brother of rape. Hickman takes in the woman and her child when she has nowhere else to turn.[235] The young boy later runs away and becomes a race-baiting politician, Senator Sunraider. Yet, somehow, the lessons that Sunraider learned as a child seep through and—in his last speech in Congress—he addresses the connections between past injustice and the future. Sunraider asks "How can the many be as one? How can the future deny the Past? And How can the light deny the dark?"[236] Ellison is addressing the question, which he had explored in his essays as well, of how contradictions in American society—like the complete dismissal of African American contributions from the myths of America's founding,

233. George Bancroft, An Oration Delivered Before the Democracy of Springfield and Neighborhood Towns (July 4, 1836), at 6–7.

234. RALPH ELLISON, JUNETEENTH (John F. Callahan ed., 1999).

235. *See id.* at 286–309.

236. *Id.* at 19. The question of "[h]ow can the future deny the past" is susceptible to several interpretations. It seems from the context that Sunraider is asking how the future can overcome the past. Some of Sunraider's speech is Bliss speaking through the mask of the Senator; other parts of it are pure, racist Sunraider. *See id.* at 17 (Senator asking himself, "*Am I drunk, going insane?*").

for example—can be reconciled? Sunraider warns about the need to confront those contradictions and to work them out:

> Our forefathers then set our course ever westward, not, I think, by way of turning us against the past and its lessons, although they accused it vehemently—for we are a product of those lessons—but that we should approach our human lot from a fresher direction, from uncluttered perspectives. Therefore it is not our way, as some would have it, to reject the past; rather it is to overcome its blighting effects upon our will to organize and conduct a more human future. . . . Our sense of reality is too keen to be violated by moribund ideals, too forward-looking to be too long satisfied with the comforting arrangements of the present, and thus we move ever from the known into the unknown, for there lies the more human future, for there lies the idealistic core.[237]

Ellison identified—through Sunraider—the need to remake Americans' understanding of the contributions of African Americans to America and to make sure that (at least in the future) that understanding is part of the reconstruction of the world.[238] Yet, Ellison knew that reconstruction was a long way off. What is more common is for the "winners of a given contention . . . to concern themselves with only the fruits of victory, while leaving it to the losers to grapple with the issues that are left unresolved."[239] That is the issue that we all face when considering reparations for slavery. It is a struggle in which everyone must be involved, for it implicates

237. *Id.* at 15–16.

238. *See id.* at 23.

239. Ralph Ellison, *Going to the Territory*, *in* THE COLLECTED ESSAYS OF RALPH ELLISON 591, 595 (John F. Callahan ed., 1995). One might wonder what position Ellison would take on issues like reparations. For so much of his work emphasizes the individual—and the individual's triumph over issues like race. *See* Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 317–18 (1995) (emphasizing individuality in Ellison's work). I think it is possible for Ellison's followers to talk about the way in which people have triumphed, without giving up claims for reparations. *Cf.* Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229, 377 n.275 (1994) (discussing Ellison's imagery of invisibility in context of African American claims for identity); Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 878 n.66 (locating Ellison as emphasizing cultural mixing, without assimilation); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2159 n.101 (1992) (same).

the redress of past injustice and the construction of something better for the future.

VI.
CONCLUDING THOUGHTS

Reparations for slavery and more recent racial crimes implicate critical questions: who is entitled to reparations, what will they look like, who must pay? Though for many purposes, Congress is not limited to legal doctrine in determining what reparations will look like and who must pay, there are questions about the constitutionality of reparations. Moreover, much reparations scholarship has used analogies to legal principles as a way of framing answers to those questions.

Part of the problem with using analogies to legal doctrine is that the doctrine can be quite confining. Within the last decade there has been a hearty re-emergence of liberalism in judicial doctrine. Across a broad spectrum, from standing, to Congress' power under Section Five of the Fourteenth Amendment,[240] affirmative action,[241] limitations on strict liability,[242] and desegregation cases,[243] the Supreme Court has consistently required a close linking of harm with the plaintiff and a demonstration that the harm can be remedied.[244] The courts are expecting, and it is likely that Congress would also demand, a close connection between past harm and race-conscious action in considering reparations.

There remain important legal analogies, however, including affirmative action in employment and desegregation. And as we continue to debate reparations, it will be critical to identify with great

240. *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356, 374 (2001).

241. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200, 235 (1995).

242. *See* E. Enters. v. Apfel, 524 U.S. 498 (1998).

243. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70 (1995).

244. In other areas, like takings, the Supreme Court has retreated to common law principles, which limit the power of judges to interpret the law in light of changing conditions. *See* Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1992) (limiting South Carolina's power to restrict harmful uses of property that prohibit all economically beneficial use of the land to cases where "background principles of the State's law of property and nuisance already place [restrictions] upon land ownership"). Taken together, the cases suggest an emergence of a jurisprudence of restrictive common law principles, a retreat to a narrow interpretation of rights of plaintiffs, and a limitation of judges to grant relief.

Professor John Goldberg recently made a similar point about the reemergence of liberalism—and its implications for reparations. *See* John C.P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1504 n.13 (2002) (charting "the reemergence of the individual *qua* rights-bearer and responsible agent as the focal point of modern thinking about justice").

precision the ways that slavery and the legacy of Jim Crow have harmed people, how they have a current impact, and how those harms might best be corrected. As reparations plans are formulated, it is imperative that we consider how best to repair the psychological scars, as well as close the educational and economic disparity that currently exists.[245] We also need to consider—in as much detail as practicable—what we want the world to look like, then move towards that world. The process of achieving reparations requires serious consideration of what reparations will be like and what goals we want to achieve. The most expedient remedy may be something that combines reparations for slavery and Jim Crow with other racial crimes—and with reparations for people, regardless of race, who need assistance. We must also focus on emphasizing the common interests of everyone in this mission because we need to find a way for our common future to overcome the past.

245. *See, e.g.*, BARKAN, *supra* note 177, at 308–49 (discussing theory of reparations based on moral obligations). R