

PRECEDENT FOR REPARATIONS? A LOOK AT HISTORICAL MOVEMENTS FOR REDRESS AND WHERE AWARDED REPARATIONS FOR SLAVERY MIGHT FIT

I. INTRODUCTION

While by no means a new concept,¹ the debate over modern reparations for slavery has taken on a new intensity in recent years, especially among the African American community.² Much of this focus has come as a result of the Civil Liberties Act of 1988,³ congressional legislation awarding reparations for the World War II internment of thousands of Japanese Americans.⁴ On the heels of the Act's passage, Representative John Conyers (D. Mich.) quickly moved to introduce a bill in the House addressing the issue of reparations for African Americans.⁵ Over a decade later and despite being renewed every year by Conyers,⁶ the bill has failed to get out of committee.⁷ The movement for reparations did, however, gain tremendous momentum throughout the 1990s.⁸ The debate has proven a proverbial goldmine for stimulating academic discourse. Five major U.S. cities have adopted resolutions urging Congress to launch a serious inquiry into the issue.⁹ Prime time television has even introduced the discussion of repara-

1. Tuneen Chisolm has identified five historically distinct waves of activism that have promoted reparations for slavery: "(1) the Civil War Reconstruction Era, (2) the turn of the twentieth century, (3) the Garvey movement, (4) the Civil Rights movement, and (5) the resurgence of efforts following the Civil Liberties Act of 1988." Tuneen E. Chisolm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 683 (1999) (citations omitted).

2. John McWhorter, *Against Reparations*, THE NEW REPUBLIC, July 23, 2001 (reviewing RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000)), available at <http://www.thenewrepublic.com/072301/mcwhorter072301.html> (last visited Nov. 4, 2002).

3. Pub. L. No. 100-383, 102 Stat. 903 (1988).

4. See DAVID HOROWITZ, *UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY* 106 (2002).

5. H.R. 1684, 102d Cong. (1st Sess. 1991). As Horowitz points out, the purpose of the bill was to: [A]cknowledge the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to examine the institution of slavery, subsequent *de jure* and *de facto* racial and economic discrimination against African Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes.

HOROWITZ, *supra* note 4, at 106-07.

6. Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV. 385, 389 (1998).

7. Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2536 n.20 (2001).

8. *Id.* at 2555.

9. The cities adopting such resolutions are Chicago, Detroit, Washington, D.C., Cleveland, and

tions into mainstream American thought.¹⁰ There is no indication that the controversy will disappear anytime in the near future.

A small, but intriguing, facet of the reparations dilemma lies in determining exactly what precedent past redress legislation will provide for this most recent manifestation. Surprisingly, both proponents and opponents of the movement are quick to claim that precedent is on their respective side. Proponents boldly contend that “[t]here exist United States . . . precedents for reparations,”¹¹ “[w]e have historical precedents of reparations to [other] injured groups,”¹² and “[t]here is precedent . . . to justify reparations.”¹³ Conversely, opponents of reparations do not agree. David Horowitz, for example, states unequivocally that “[t]he [h]istorical [p]recedents [u]sed to [j]ustify the [r]eparations [c]laim [d]o [n]ot [a]pply.”¹⁴

While it is true that, in the past, several groups have successfully moved for reparations in response to various atrocities waged against them,¹⁵ the question remains: How can both sides of the debate over reparations for slavery claim to be the exclusive beneficiary of that legacy? The answer is simple: Both sides are wrong (or at least both are incomplete in their analyses). Neither side of the debate truly understands how precedent applies, and both sides fail to realize that simply claiming entitlement to that precedent is not sufficient.¹⁶ Only by a close examination of the actual legislative schemes that have been implemented to redress other wrongs can one begin to see where a claim for paying reparations for slavery indeed might fit.

Dallas. *Id.* at 2536 n.24.

10. See, e.g., *The O'Reilly Factor: Should the Descendants of Slaves Receive Reparations?* (FOX NEWS television broadcast, Apr. 3, 2001), available at <http://www.foxnews.com/oreilly>.

11. Irma Jacqueline Ozer, *Reparations for African Americans*, 41 HOW. L.J. 479, 482 (1998).

12. *Id.* at 499.

13. Calvin J. Allen, *The Continuing Quest of African Americans to Obtain Reparation for Slavery*, NBA NAT'L B. ASS'N MAG., May-June 1995, at 33.

14. HOROWITZ, *supra* note 4, at 13.

15. Obviously, the Japanese American reparations previously mentioned are the most prominent grant of redress by the federal government. The State of Florida, however, has awarded reparations for the 1923 Rosewood massacre. As the leading precedent for reparations on the federal and state levels, both instances will be addressed in detail. Additionally, the federal government has paid reparations to Native Americans, but as Vincene Verdun correctly points out, these claims provide no real precedent for the reparations for slavery argument, as those awards “were more analogous to relationships between separate nations rather than between a nation and its own citizens.” Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 648 (1993); see also *Cato v. United States*, 70 F.3d 1103, 1108 (9th Cir. 1995) (stating “there is nothing in the relationship between the United States and any other persons, including African American slaves and their descendants, that is legally comparable to the unique relationship between the United States and Indian Tribes”). Consequently, any discussion of Native America reparations would be beyond the scope of this Comment.

16. Neither proponents nor opponents of reparations have done an adequate job of addressing the legislation they hail as precedent. To the contrary, support from the legislation is often claimed, but attention is quickly turned elsewhere and rarely is the actual text of the legislation examined.

II. JAPANESE AMERICAN INTERNMENT AND REDRESS

On the morning of December 7, 1941, as the first bombs were falling on the U.S. naval base at Pearl Harbor, most Japanese Americans already lived a difficult existence. On the one hand, many Japanese Americans had found relative success in the California farming industry.¹⁷ Stressing traditional values of hard work and family, many Japanese immigrants (*Issei*) hoped to improve social and political circumstances for themselves and especially for their American-born children (*Nisei*).¹⁸ At the outbreak of war, Japanese Americans in California had control of almost one-half of one million acres of some of the state's finest farmland and produced as much as 90% of some key crops.¹⁹ Their children were beginning to prosper, as well, and had begun assimilating better into American society.²⁰ On the other hand, however, harsh and widespread discrimination remained a reality. To a large extent, Japanese Americans had always been excluded from mainstream America. They endured racially segregated public schools,²¹ were prohibited from owning agricultural land,²² and faced great obstacles in obtaining employment.²³ Despite these difficulties, many Japanese Americans chose to remain and placed their hopes for a better life in the future.²⁴

Once war on Japan was declared, the plight of Japanese Americans quickly deteriorated from a condition of difficulty to one of near impossibility. Although government officials certified that Japanese Americans "possessed an exceptional degree of loyalty to the United States and that they were no threat to America's security,"²⁵ political pressures and public sentiment prevailed. On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066, forever altering the lives of thousands of Japanese Americans.²⁶ The purpose of the Order was "to prescribe military areas . . . from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military

17. LESLIE T. HATAMIYA, *RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988*, at 8 (1993).

18. MITCHELL T. MAKI ET AL., *ACHIEVING THE IMPOSSIBLE DREAM* 23 (1999).

19. HATAMIYA, *supra* note 17, at 8.

20. *Id.* at 9.

21. MAKI ET AL., *supra* note 18, at 21.

22. In 1913, the California legislature passed the Alien Land Law, which prevented aliens from buying land or leasing it for over three years. HATAMIYA, *supra* note 17, at 8. However, many were able to circumvent this legislation by registering land in the names of their native born children or by setting up corporations to hold the land. MAKI ET AL., *supra* note 18, at 22.

23. See MAKI ET AL., *supra* note 18, at 25 (stating "[c]ollege educated Nisei could find only limited employment outside their community and were forced into low-paying jobs in the ethnic economy"). The situation only worsened during the Great Depression when whites would resent competition with Japanese Americans more than ever. *Id.* at 24.

24. *Id.* at 23.

25. HATAMIYA, *supra* note 17, at 10. State Department, FBI, and Naval intelligence all rejected the proposition that Japanese Americans posed a significant threat to national security. *Id.*

26. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

Commander may impose in his discretion."²⁷ While not expressly mentioning any particular group or groups, those who would carry out the order understood that Japanese Americans were the implied targets.²⁸ In all, approximately 120,000 Japanese Americans from the West Coast were detained in internment camps in the nation's interior.²⁹ Interestingly, although Executive Order 9066 ostensibly was to provide "every possible protection against espionage and against sabotage,"³⁰ that authority was never used to remove any of the 690,000 Italians or 314,000 Germans living domestically.³¹

In 1944, the United States Supreme Court finally dealt the fatal blow to Japanese American internment, ruling that loyal citizens could not be detained nor prevented from going to the West Coast, regardless of ethnicity.³² The War Department was given an advance copy of the decision and, one day before the decision was issued, removed all exclusion orders from the West Coast.³³ By March 1946, all internment camps had officially closed their doors.³⁴

Not until the 1970s would the issue of redress truly resurface.³⁵ Spearheaded by the Japanese American Citizens League, the movement made great progress during the next two decades.³⁶ The Commission on Wartime Relocation and Internment of Civilians Act³⁷ was signed into law, Fred Korematsu's 40-year-old conviction was vacated,³⁸ and various proposals for redress were put before Congress.³⁹ Ultimate success, however, did not come until August 10, 1988, when President Ronald Reagan signed the Civil Liberties Act of 1988 into law.

As applicable to Japanese Americans, the purpose of the Civil Liberties Act of 1988 was four fold. These purposes of the Act were to:

27. *Id.*

28. HATAMIYA, *supra* note 17, at 14.

29. *Id.* at 19. A total of ten permanent internment camps were constructed in the following states: California (Manzanar and Tule Lake), Arizona (Poston and Gila River), Arkansas (Rohwar and Jerome), Idaho (Minidoka), Wyoming (Heart Mountain), Utah (Topas), and Colorado (Granda). *Id.*

30. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

31. HATAMIYA, *supra* note 17, at 18.

32. *Ex parte* Endo, 323 U.S. 283 (1944).

33. MAKI ET AL., *supra* note 18, at 46.

34. *Id.*

35. Initially, most internees received only train fare home and \$25. Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 450 (1998). Interned families received a \$50 allowance upon release. MAKI ET AL., *supra* note 18, at 44. The American-Japanese Evacuation Claims Act of 1948 provided compensation for documented property losses directly resulting from evacuation and internment, but amounts over \$2500 had to be approved by Congress. *Id.* at 249 n.9.

36. *See generally* MAKI ET AL., *supra* note 18, at 64-212 (chronicling the modern Redress Movement from 1970 to 1990).

37. Pub. L. No. 96-317, 94 Stat. 964 (1980).

38. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

39. *See supra* note 36.

- (1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II;
- (2) apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens;
- (3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals so as to prevent the recurrence of any similar event; [and]
- (4) make restitution to those individuals of Japanese ancestry who were interned.⁴⁰

The first nine redress payments authorized by the Act were distributed during a ceremony at the Department of Justice on October 9, 1990.⁴¹ In total, 82,219 persons were granted redress, with twenty-eight refusing to accept payment and less than 1,500 who could not be located.⁴² While the passage of the Civil Rights Act of 1988 and its corresponding redress payments were closing the chapter on this unfortunate era of American history, there was no way of knowing that the chapter being opened might prove even larger and more controversial.

III. THE ROSEWOOD MASSACRE

During the early morning hours of January 1, 1923, a bruised Frances Taylor emerged from her Sumner, Florida, home and alleged that a black man had assaulted and robbed her.⁴³ Within minutes, a mob of white men led by Sheriff Robert Elias Walker was in pursuit of the suspected perpetrator, an escaped convict by the name of Jesse Hunter.⁴⁴ The search for Hunter led the group to nearby Rosewood.⁴⁵ In the days that followed, six blacks and two whites were killed in the search for Frances Taylor's assailant.⁴⁶ The quest for justice turned into a full-scale racial riot.

When the violence ended, the small town of Rosewood, along with its 120 mostly African American residents, lay in ruins.⁴⁷ The history of racial peacefulness in the town once commonly known as the "black mecca of Florida"⁴⁸ had come to an end. Black churches and businesses, as well as

40. 50 U.S.C. app. § 1989 (1988).

41. HATAMIYA, *supra* note 17, at 187.

42. MAKI ET AL., *supra* note 18, at 225.

43. MICHAEL D'ORSO, *LIKE JUDGMENT DAY: THE RUIN AND REDEMPTION OF A TOWN CALLED ROSEWOOD 2* (1996).

44. *Id.* at 2-3.

45. *Id.* at 3.

46. *Id.* at 5-11.

47. FLA. BD. OF REGENTS, *THE ROSEWOOD REPORT: A DOCUMENTED HISTORY OF THE INCIDENT WHICH OCCURRED AT ROSEWOOD, FLORIDA, IN JANUARY 1923* (1993), available at <http://bgess.berkeley.edu/ratogi/access/files/rosewood.html> [hereinafter ROSEWOOD REPORT].

48. Eileen Finan, *Delayed Justice: The Rosewood Story*, 22 HUM. RTS. 8, 9 (Spring 1995).

every black residence, were burned to the ground.⁴⁹ Rosewood's African American residents were forced into the woods, never to return.⁵⁰

It would be 1994 before Florida state legislation was signed into law to provide compensation to the victims of Rosewood.⁵¹ In addition to acknowledging the terrible events that occurred in Rosewood and admitting governmental responsibility for them,⁵² the legislation provided "payment of compensation from the State of Florida of up to \$150,000" to the victims of the horror.⁵³ Additionally, both a scholarship fund⁵⁴ and a research fund⁵⁵ were established to benefit future generations of African Americans.

IV. HOW DO REPARATIONS FOR SLAVERY FIT INTO THE FRAMEWORK?

Perhaps the initial question should be to ask why it is relevant to examine the legislative precedents for paying reparations to other injured groups. The answer is simple: If African Americans have any hope of finding redress from the government for the wrongs of slavery, it almost certainly will be through the legislative process.⁵⁶ Although much discussion has been given to various claims against the government,⁵⁷ *Cato v. United States*⁵⁸ suggests that pursuit of a judicial remedy could be a virtual waste of time.⁵⁹ In *Cato*, the plaintiffs filed complaints in forma pauperis against the United States seeking damages "due to the enslavement of African Americans and subsequent discrimination against them, for an acknowledgment of discrimination, and for an apology."⁶⁰ In affirming the dismissal of the com-

49. *Id.*

50. *Id.*

51. 1994 Fla. Sess. Law Serv. 94-359 (West).

52. *Id.* § 1; see Finan, *supra* note 48, at 9 (stating that "[m]edia accounts at the time indicate that local and state officials were aware of the violence but did nothing to intervene"); see also ROSEWOOD REPORT, *supra* note 47 (stating "[m]edia accounts state that the Governor . . . was aware of the events, but had gone hunting" and that "[i]t also appears that [the] Sheriff . . . had informed the Governor that there was no need to call in National Guard troops").

53. 1994 Fla. Sess. Law Serv. 94-359 § 4 (West).

54. FLA. STAT. ch. 240.4126 (2002) (repealed Jan. 7, 2003).

55. *Id.* ch. 240.636.

56. An attempt is being made to seek redress from private corporations that might have benefited from the slave trade. A class action lawsuit has been filed in New York on behalf of 35 million African Americans seeking "financial payments for the value of 'stolen' labor and unjust enrichment and calls for the companies to give up 'illicit profits.'" Peter Viles, *Suit Seeks Billions in Slave Reparations* (Mar. 27, 2002), at <http://www.cnn.com/2002/LAW/03/26/slavery.reparations/index.html>.

57. Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 502-10 (1998); see also Ozer, *supra* note 11, at 488-92 (surveying academic analysis of potential common law claims against the government (*i.e.*, contract law, trust law, restitution law, and tort law), as well as potential Constitutional claims under the Thirteenth and Fourteenth Amendments).

58. 70 F.3d 1103 (9th Cir. 1995).

59. See, *e.g.*, *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984) (dismissing class action suit filed on behalf of the 120,000 Japanese Americans interned during World War II on statute of limitations grounds). The statute of limitations also prevented the Rosewood claims from being pursued through litigation. Finan, *supra* note 48, at 30.

60. *Cato*, 70 F.3d at 1105.

plaint, the court realized that “Cato’s action appears to be patterned after the reparations authorized by Congress for individuals of Japanese ancestry who were forced into internment camps during World War II,”⁶¹ but explained that “[t]he legislature, rather than the judiciary, is the appropriate forum for plaintiff’s grievances.”⁶²

So exactly how would reparations for slavery fit into the overall framework of legislative precedent? Not so neatly as either proponents or opponents of the movement would like to suggest. The truth is somewhere in the middle. As a perfect fit with any past award of reparations is an impossibility, the best determination can be made simply by examining the components of past legislation and analyzing their potential application to the modern movement. Because it is most commonly cited as precedent for any such claim, the Civil Liberties Act of 1988 will dominate the following discussion.⁶³

A. Official Apology

Among the primary purposes of the Civil Liberties Act were to acknowledge a governmental wrong and to extend a national apology to those who suffered as a direct result of that wrong. As a part of the Act, Congress recognized that “a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II.”⁶⁴ The Act also acknowledges that “[t]he excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made.”⁶⁵ The Act continues, stating that “[f]or these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.”⁶⁶

Considering that African Americans suffered more both in sheer numbers and duration than did the interned Japanese Americans, why has there never been an official apology for the wrongs of slavery? Attempts have been made. In 1997, Representative Tony Hall (D. Ohio) introduced a house resolution calling for an apology to those who suffered as slaves under the Constitution and laws of the United States.⁶⁷ The public, however, was not prepared to extend such a gesture. According to a national poll conducted at that time, an official apology for slavery was looked upon with disfavor by

61. *Id.* at 1106.

62. *Id.* at 1105.

63. It has been said that “the importance of the [Civil Liberties Act] lies in the precedent established for compensation of wronged groups within the American System.” Westley, *supra* note 35, at 451.

64. 50 U.S.C. app. § 1989a(a) (1988).

65. *Id.*

66. *Id.*

67. H.R. Res. 96, 105th Cong. (1997).

61% of those questioned.⁶⁸ The quest for an apology has made little progress since.

While some might argue that an apology for slavery would be inconsequential, it is hard to deny that there is at least some logic to the statement that “[a] formal apology is a crucial element of any reconciliation process.”⁶⁹ A congressional apology would put into the open what most Americans have long known: that for almost a hundred years⁷⁰ the United States government sanctioned the systematic enslavement of a significant portion of its people. As can be seen from the reaction of the interned Japanese Americans, the healing effect that such recognition would have could be truly significant. Such a measure would both compensate for the wrongs committed and help rid the nation’s conscience of guilt.⁷¹ The response of Manoru Eto, a survivor of internment, is typical: “By finally admitting a wrong, a nation does not destroy its integrity but, rather, reinforces the sincerity of its commitment to the Constitution and hence to its people.”⁷²

President Clinton hoped to accomplish a similar result in offering an apology for the governmental wrongs imposed during the Tuskegee syphilis experiment.⁷³ In admitting that “[t]he United States government did something that was wrong”⁷⁴ for which “[t]he American people are sorry,”⁷⁵ Clinton speculated that “without remembering [our past], we cannot make amends and we cannot go forward.”⁷⁶ The bottom line is that “[w]ithout an admission of guilt and at minimum an official apology, there can be little meaningful accomplishment of reduced racial tensions that persist.”⁷⁷ Be-

68. Iijima, *supra* note 6, at 389 (citing Paul Leavitt & Robert Silvers, *Poll: Congress Shouldn't Make Apology for Slavery*, U.S.A. TODAY, July 2, 1997, at A5). This result occurred in spite of the fact that two-thirds of African Americans favored the measure. *Id.*

69. Jon M. Van Dyke, *The Fundamental Human Right to Prosecution and Compensation*, 29 DENV. J. INT'L L. & POL'Y 77, 87 (2001).

70. This figure is derived by considering only the years that slavery existed after the United States government came into existence (1776-1865). It is hard to imagine an argument, though such have been made, which would attempt to hold the United States government liable for slavery that occurred before the government existed.

71. See HATAMIYA, *supra* note 17, at 173.

72. MAKI ET AL., *supra* note 18, at 213.

73. See TUSKEGEE SYPHILIS STUDY LEGACY COMMITTEE, FINAL REPORT OF MAY 20, 1996, at <http://www.med.virginia.edu/hs-library/historical/apology/report.html>. That report states that:

In 1932, the United States Public Health Service . . . initiated the Tuskegee Syphilis Study to document the natural history of syphilis. The subjects of the investigation were 399 poor black sharecroppers from Macon County, Alabama, with latent syphilis and 201 men without the disease who served as controls. The physicians conducting the Study deceived the men, telling them that they were being treated for “bad blood.” However, they deliberately denied treatment to the men with syphilis and they went to extreme lengths to ensure that they would not receive therapy from any other sources.

Id. (citations omitted); see also JAMES H. JONES, *BAD BLOOD* (1993) (tracing the Tuskegee study’s legacy in the age of AIDS).

74. President Bill Clinton, Remarks by the President in Apology for Study Done in Tuskegee (May 16, 1997), available at <http://clinton4.nara.gov/textonly/New/Remarks/Fri/19970516-898.html>.

75. *Id.*

76. *Id.*

77. 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, 26 (2000).

cause a formal apology for slavery might also help the American people find closure from the terrible acts of their nation's past, there is no good reason why such an apology could not and should not be extended.⁷⁸

B. Education Fund

The Civil Liberties Act also established a public education fund to increase awareness as to the truth about internment.⁷⁹ This fund was to exist for a maximum period of ten years.⁸⁰ The purpose of the fund was "to sponsor research and public educational activities . . . so that the events surrounding the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry will be remembered, and so that the causes and circumstances of this and similar events may be illuminated and understood."⁸¹ After some initial difficulty, the money was used to fund projects in areas such as curriculum, landmarks and institutions, community development, arts and media, research, national fellowships, and research resources.⁸² In redressing the Rosewood massacre, the Florida legislature similarly established a fund to "continue the research of the Rosewood incident and the history of race relations in Florida and develop materials for the educational instruction of these events."⁸³

There is no reason why a similar fund should not be established to educate better the public on the truth about slavery in America. An education fund "would provide redress for the gross historical understatement of the African American contribution to the development of the United States."⁸⁴ Such an education fund also should be targeted at correctly demonstrating how slavery factored into the founding of the nation. Randall Robinson, for example, has painted Thomas Jefferson "a racist" who believed "that a black life has lesser value" than a white life.⁸⁵ While Jefferson was only human and undoubtedly influenced by the norms of his time, Robinson conveniently overlooks other aspects of Jefferson's character before unfairly equating him with such tyrannical figures as Genghis Khan and Hitler.⁸⁶ In reality, though Jefferson was a slaveholder, he also recognized that the institution of slavery was a "great political and moral evil."⁸⁷ Jefferson expressed concern over the fate that such an inherently evil system would

78. *But see* Chisolm, *supra* note 1, at 677 n.2 (citing Paul Magnusson, *A New Ground Zero in the Race Debate?*, *BUS. WK.*, Sept. 22, 1997, at 10, 12 (reviewing STEPHEN THERNSTROM & ABIGAIL THERNSTROM, *AMERICAN IN BLACK AND WHITE: ONE NATION INDIVISIBLE* (1997) (questioning whether a formal apology for slavery will have a significant impact on race relations)).

79. 50 U.S.C. app. § 1989b-5 (1988).

80. *Id.* § 1989b-3(d).

81. *Id.* § 1989b-5(b)(1).

82. MAKI ET AL., *supra* note 18, at 226-27.

83. FLA. STAT. ANN. ch. 240.636 (Harrison 1998).

84. Chisolm, *supra* note 1, at 723.

85. RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 52 (2000).

86. *Id.* at 51.

87. THOMAS JEFFERSON, *Notes on Virginia*, in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 173, 210 (Adrienne Koch & William Peden eds., Modern Library 1944).

bring on the nation, lamenting "I tremble for my country when I reflect that God is just; that his justice cannot sleep forever."⁸⁸ An education fund should be administered so as to teach all Americans (especially American children) the truth about slavery and its role in our nation's past, while at the same time avoiding the type of selective excerpting employed by Robinson.

With a better understanding of the past, hopefully all Americans would not only appreciate the great burden imposed on African Americans during the era of slavery, but also better realize the huge contributions of their labor and sacrifice to the prosperity enjoyed today. When that process has begun, perhaps also will the isolation with which many view African American participation in our nation's history begin to subside, further helping the nation heal the wounds of its past.⁸⁹

C. Individual Payments

1. Burden Falls on Modern Taxpayers

David Horowitz has a problem with all Americans being forced to carry the financial burden that would result from paying monetary reparations for slavery.⁹⁰ Horowitz is entirely accurate in claiming that "[o]nly a tiny minority of Americans ever owned slaves"⁹¹ and also in that "[t]he two great waves of American immigration occurred after 1880 and then after 1960."⁹² It is perfectly understandable that his underlying question would follow: "Why should their descendants [those who did not own slaves] owe a debt?"⁹³ What is not so understandable is how he fails to see the answer.

On the surface, every American taxpayer should be aware that much (or at least some) of his tax money goes to fund programs that will never benefit him individually. Yet those taxes are paid from understanding of a concept of "public good." This concept alone should be enough to refute those who share Horowitz's position. Most Americans likely even would not be cognizant of their contribution to a redress fund, and such contributions would be no further removed from the average taxpayer than tax dollars paid by a small farmer in the Midwest used to support remote space exploration. This line of reasoning also is entirely consistent with the scheme imposed by the Civil Liberties Act of 1988, where the \$1,250,000,000⁹⁴ in funds was pulled from the general tax revenue.

88. *Id.* at 279.

89. *See* Chisolm, *supra* note 1, at 726 (calling reparations "a prerequisite to racial harmony and any movement toward race neutrality").

90. *See* HOROWITZ, *supra* note 4, at 12-16.

91. *Id.* at 12.

92. *Id.* at 13.

93. *Id.* at 12.

94. 50 U.S.C. app. § 1989b-3(e) (1988 & Supp. 2001). This amount subsequently was increased to \$1.65 billion by a 1992 amendment. *Id.*

Admittedly, the fit with reparations for slavery is not perfect. The most obvious difference arises in that at least a portion of the affected taxpayers under the Civil Liberties Act were alive during the atrocity of Japanese American internment. As a result, it might seem easier to justify burdening the entire pool of taxpayers under those circumstances. By that reasoning, it might seem more difficult to burden modern taxpayers for the wrongs of slavery, especially considering that the last of the American slaveholding class has long since died off, with no current taxpayer having any connection with the institution. This is probably the point Horowitz was attempting to make.

That point alone, however, does not destroy the fit with the modern argument in favor of reparations for slavery. For example, Vincene Verdun has pointed out several groups of “innocents”⁹⁵ that were burdened by the Civil Liberties Act of 1988. Among those innocently impacted were: “1) people who were not born in 1941; 2) people who were alive but objected strenuously to the internment; 3) people who immigrated to the United States after the internment was over; and 4) a host of other people who just had nothing whatsoever to do with it.”⁹⁶ In the case of reparations for slavery, it is arguable that the entire class of affected taxpayers would be “innocents,” being neither alive during slavery nor having anything to do with it. Instead of taking the position that such an imposition would be more unfair and intrusive than awarding reparations to Japanese Americans, perhaps the opposite position makes more sense. There is something logical in the notion that it seems more fair, or at least as fair, that everyone be innocent and pay equally rather than the guilty and the innocent both being burdened alike (as occurred with the Civil Liberties Act).

While funding individual payments for redress of slavery seems to pose little problem in theory, a very large practical problem exists. The total amount of funding that such a program would require dwarfs that required under the Civil Liberties Act.⁹⁷ Individual payments were feasible for interned Japanese Americans and survivors of Rosewood because those groups were relatively small in number, with the resulting payments creating only “a small blip on the radar of the American economy.”⁹⁸ To the contrary, some estimates of the value of unjust enrichment resulting from slavery approach \$5-10 trillion.⁹⁹ As Eric Yamamoto calculates, even individual \$20,000 redress payments to the twenty million living descendants of slaves would result in an overwhelming \$400 billion expenditure.¹⁰⁰ Certainly,

95. Verdun, *supra* note 15, at 653.

96. *Id.*

97. See *supra* note 94 (stating that the Civil Liberties Act cost approximately \$1.65 billion); see *infra* note 98 and accompanying text (estimating that the cost of African American reparations could be six hundred times the amount paid under the Civil Liberties Act).

98. Yamamoto, *supra* note 57, at 515.

99. Michael S. Rosier, *Do Something*, NBA NAT'L B. ASS'N MAG., Sept.–Oct. 2001, at 1.

100. Yamamoto, *supra* note 57, at 515.

such economic ramifications pose a serious obstacle to paying reparations for slavery—obstacles that reparations advocates need to address.

2. *Direct Victims Do Not Exist*

While determining who would pay any potential reparations seems clear (every American taxpayer), viewing the Civil Liberties Act as precedent for determining who would receive those benefits is much more problematic. The Act identifies two groups as being eligible for redress: (1) actual victims,¹⁰¹ and (2) those having a very close and direct connection to an actual victim.¹⁰² Based on this model, finding an identifiable class to whom reparations for slavery could be awarded is not easy.

At its most basic level, the Civil Liberties Act establishes precedent for providing redress directly to those upon whom atrocities were actually inflicted. The same is true for the Rosewood legislation.¹⁰³ In fact, it was the timing of those movements, occurring near the last chance at which such compensation could be accomplished before all the victims died, which helped such legislation to pass.¹⁰⁴ There is no question that such an award to actual survivors has no bearing on any argument favoring reparations for slavery and merits little discussion. Several generations have passed since the last slaves lived. Any claim for redress to actual victims would be based upon either subsequent racism¹⁰⁵ or upon state-sponsored segregation,¹⁰⁶ which should be considered as issues entirely separate from that of reparations for slavery.

The Civil Liberties Act does, however, establish some precedent for looking beyond the narrow class of actual victims. For a deceased individual who is otherwise eligible, the Act provides that payment shall be made:

- (i) If the eligible individual is survived by a spouse who is living at the time of payment, such payment shall be made to such surviving spouse.
- (ii) If there is no surviving spouse described in clause (i), such payment shall be made in equal shares to all children of the eligible individual who are living at the time of payment.
- (iii) If there is no surviving spouse described in clause (i) and if there are no children described in clause (ii), such payment shall be

101. 50 U.S.C. app. § 1989(4) (1988).

102. *Id.* at § 1989b-4(7).

103. The Florida legislation provides compensation only to those “who [were] present and affected by the violence that took place at Rosewood in January, 1923, and [were] evacuated the week of January 1, 1923.” 1994 Fla. Sess. Law Serv. 94-359 § 4 (West).

104. MAKI ET AL., *supra* note 18, at 232.

105. *See infra* Part V.A.

106. *See infra* Part VI.

made in equal shares to the parents of the eligible individual who are living at the time of payment.¹⁰⁷

Again, any precedent established by the Act appears to work against the case for providing reparations to African Americans for slavery. Certainly no spouses or parents of any former slaves are still alive (excluding clauses (i) and (iii)). Similarly, the number of living children of former slaves, if there are any alive and discoverable, would be too miniscule to have any real impact beyond providing a mere token gesture (excluding clause (ii)). Even if otherwise feasible, therefore, there exists no eligible class to whom individual payments of redress for slavery could be made (at least under the model of the Civil Liberties Act).

For an award of reparations for slavery to fit within this model, the language of clause (ii), providing for payment to the children of the actual victims, would have to be extended to include grandchildren, great-grandchildren, and beyond. While various methods exist for determining which African Americans might be eligible under such a scheme,¹⁰⁸ the language of clause (ii) implies that such a construction simply would not be an option. Congress could have easily extended eligibility to those remote groups under the Civil Liberties Act. Instead, Congress stipulated that “[i]f there is no surviving spouse, children, or parents . . . the amount of such payment shall remain in the Fund.”¹⁰⁹ By so doing, Congress expressed its intent to disallow remote vesting of the award and to limit redress specifically to those who either suffered directly from the harm of internment or were removed only by one generation.¹¹⁰ Likewise, the drafters of the Rosewood legislation clearly intended to limit direct payments to actual victims and did not authorize any direct award to the descendants of those victims.¹¹¹ Consequently, it is almost a certainty that any redress for slavery could not come through the payment of individualized awards, or as Kevin Hopkins states, “any reparations award . . . that is structured in the form of individual payments to blacks is destined to fail.”¹¹²

107. 50 U.S.C. app. § 1989b-4(7)(A) (1988).

108. See Hopkins, *supra* note 7, at 2541-47 (discussing methods for determining level of descent sufficient to qualify for reparations, including genealogy, blood, and genetic mapping).

109. 50 U.S.C. app. § 1989b-4(a)(7)(A) (1988).

110. MAKI ET AL., *supra* note 18, at 185-86.

111. See 1994 Fla. Sess. Law Serv. 94-359 § 4 (West). It is important to note that the legislation does authorize families of the Rosewood victims to collect for property damage resulting from the incident. *Id.* § 3. This form of compensation, however, is limited to “demonstrate[d] real property and personal property damages.” *Id.* This provision is similar to the redress provided by the Japanese Evacuation Claims Act. See *supra* note 35. Unlike successful claims under those provisions, it would be impossible to document precise property losses imposed upon individual families by the institution of slavery. As a result, this section of the legislation requires no further analysis, and focus should instead be placed on payments to individual victims.

112. Hopkins, *supra* note 7, at 2541.

V. WHAT PRECEDENT DOES NOT ADDRESS

A. *Subsequent Racism*

Perhaps seeing the difficulties of successfully pursuing individual redress for slavery, some have argued that a claim for reparations should include damages suffered from the decades of widespread racism that followed emancipation.¹¹³ That theory, however, is full of problems. First, it is based upon the false assumption that racism is a direct result of slavery as an institution.¹¹⁴ This simply is not the case; racism is not a result of slavery, but a result of ignorance. Racism has been used by the majority against almost every minority group in our nation's history; Native Americans, Jewish and Catholic immigrants, and Japanese Americans are just a few of the many groups that have also felt the harsh effect of oppression by the majority over the past two hundred years. Similarly, not until the 1970s did women really begin to break free of the sexism that had held them back from social and economic advancement. Yet it cannot be maintained that any of those views originated from slavery. Thus, racism against African Americans should not be traced to slavery but should be attributed to what has proven to be a closed-minded society. Consequently, redressing racism should not be considered part and parcel of an attempt to seek reparations for slavery.

Second, there simply is no precedent for providing monetary redress for societal discrimination alone. Japanese Americans suffered years of societal hardship in rebuilding their lives after internment.¹¹⁵ Upon their return from internment, Japanese Americans faced acts of violence from those who wanted to run them out of their own communities.¹¹⁶ Additionally, many found that they were refused service at restaurants, gas stations, grocery stores, and numerous other public accommodations.¹¹⁷ Yet, as Verdun points out, "[T]he Civil Liberties Act did not purport to compensate them for the broader injury that resulted from [those] years of systematic discrimination."¹¹⁸ In fact, Congress explicitly chose to overlook the documented wrongs that had been incited by racism and awarded compensation only to those who had suffered direct harm at the hands of the government.¹¹⁹ If anything, the Civil Liberties Act establishes precedent for the proposition that Congress will not allow societal racism to justify an award

113. See, e.g., Jeremy Levitt, *Black African Reparation: Making a Claim for Enslavement and Systematic De Jure Segregation and Racial Discrimination Under American and International Law*, 25 S.U. L. REV. 1 (1997).

114. See Verdun, *supra* note 15, at 640 (noting that a caste system of white supremacy replaced slavery).

115. HATAMIYA, *supra* note 17, at 130-36.

116. *Id.* at 24-25.

117. *Id.* at 25.

118. Verdun, *supra* note 15, at 653.

119. *Id.* at 657.

for reparations; only when the government has directly caused the injury have such awards be made.

B. Community Awards

An alternative to individual redress payments would be to provide some form of a community award to African Americans. In *The Debt*, Randall Robinson articulates his plan for such community-based reparations.¹²⁰ Robinson proposes an educational trust fund that would extend over two successive kindergarten-through-college educational generations.¹²¹ Proceeds from the trust would be used to fund schools with special residential facilities to house children living in at-risk environments.¹²² These schools would supplement basic courses by emphasizing the “histories and cultures of the black world.”¹²³ Finally, Robinson proposes to use the trust to fund the college education of all academically qualified African Americans demonstrating a financial need.¹²⁴

Kevin Hopkins also favors a community trust fund.¹²⁵ Unlike Robinson, however, Hopkins’s proposal would not be limited to education and could be used for various purposes benefiting the African American community.¹²⁶ Hopkins’s vision includes applying the funds “to provide housing subsidies and educational scholarships for blacks . . . to provide start-up capital for ownership of black businesses and banks, and to ensure that all blacks receive adequate health care and medical insurance coverage.”¹²⁷ Similarly, Robert Westley proposes a private trust to benefit all African Americans.¹²⁸ The trust would be funded from the general revenue of the United States over a maximum ten-year period.¹²⁹ Like Hopkins’s proposal, the purpose of the Westley trust would not be limited to education only, but could also be used for the “economic empowerment of the trust beneficiaries . . . on the basis of need.”¹³⁰

These types of group awards face tremendous obstacles. Such proposals are based upon the idea that all African Americans have been harmed equally as a group.¹³¹ Slavery, however, imposed individual harms on individual slaves. Not all African Americans who lived during the period of American slavery were held as slaves, nor are all African Americans today descendants of slaves. Consequently, community-based awards fall well

120. ROBINSON, *supra* note 85, at 244-47.

121. *Id.* at 244.

122. *Id.* at 244-45.

123. *Id.* at 245.

124. *Id.*

125. Hopkins, *supra* note 7, at 2554.

126. *Id.*

127. *Id.*

128. Westley, *supra* note 35, at 470.

129. *Id.*

130. *Id.*

131. *See id.* at 468 (“Blacks have been and are harmed as a group . . . racism is a group practice.”).

outside the framework established by other redress legislation.¹³² Most importantly, they do not require actual victim status as a prerequisite for eligibility.¹³³ By requiring no threshold showing that one is a lineal descendant of a slave in order to qualify as a beneficiary, the true rationale for imposing such measures would be to compensate the African American community for the loss of opportunity resulting from years of societal discrimination. While it might be correct to say “racism is a group practice,”¹³⁴ racism alone simply cannot be the basis of providing redress.¹³⁵

Even should a community-based plan seriously be proposed, the constitutionality of such a program would be suspect at best. Community-based reparations will be much more difficult to validate after the Supreme Court’s decision in *Adarand Constructors, Inc. v. Peña*.¹³⁶ *Adarand* overruled prior law¹³⁷ and held “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”¹³⁸ Under *Adarand*, “[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”¹³⁹ It is important to note, however, that Justice O’Connor, writing for the majority, insisted that such strict scrutiny was not “strict in theory, but fatal in fact.”¹⁴⁰ Consequently, there still remains some hope, no matter how small, that a plan for African American reparations might be upheld against a Constitutional attack, assuming such a plan could be proven necessary to remedy “the practice and the lingering effects of racial discrimination against minority groups in this country”¹⁴¹ and is narrowly tailored to that end.

VI. CONCLUSION

The institution of slavery was a tremendous moral wrong and will remain a blot on our nation’s history long into the future. No one can reasonably argue otherwise. The issue, therefore, should not be the importance of slavery in our history, but over its proper place in our present. The debate over reparations to African Americans should assume the foreground of such discussion, with the focus of that debate shifting from arguing whether something should be done to asking what should be done. As discussed in

132. See *supra* Part IV.C.

133. See, e.g., Verdun, *supra* note 15, at 656 (“[T]he reparationist asserts the right to an inheritance for the benefit of the group—African Americans living today—from the stolen estates of another group—slaves and victims of discrimination.”).

134. *Id.* at 468.

135. See *supra* Part V.A.

136. 515 U.S. 200 (1995).

137. *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (holding intermediate scrutiny should be applied to benign racial classifications).

138. *Adarand*, 515 U.S. at 227.

139. *Id.* at 235.

140. *Id.* at 237 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)).

141. *Id.*

Part IV.A, an official apology for the utter atrocities of slavery cannot come too soon. Although certain to be viewed by some as an inadequate measure, an apology is the first step to more meaningful progress. The apology should be coupled with a plan to provide an education fund similar to those provided by the Civil Liberties Act and the Rosewood legislation, which would resemble the plan discussed in Part IV.B.

The most difficult, not to mention the most controversial, aspect of any effective scheme for providing reparations will be what type of monetary award that will be given, if any. As discussed, individual payments of redress for slavery are a near impossibility and proposed community-based payments are problematic. Perhaps a better plan for providing reparations would be first to remove slavery or racism as the basis of the claim and instead insert state-sponsored educational segregation as the justification. This would allow for a link between the recipients and the actual victims that would not be as attenuated as such a link would be with slavery. Once this basis is articulated, a scholarship fund then could be established to benefit the survivors of such *de jure* segregation and their children. Like the Rosewood scholarship fund, the program would be limited to minority persons, with preference being given to the direct descendants of those who were subjected to a government-sponsored, segregated education. Although the classification might be suspect, perhaps such a scheme that limited recipients to those directly impacted by past governmental discrimination would be more narrowly tailored and, thus, would stand a better chance of being upheld than across-the-board proposals that would name all African Americans as beneficiaries on the basis of race alone.

Once a meaningful program of redress is undertaken, perhaps the “racial harmony and . . . movement toward race neutrality”¹⁴² espoused by Chisolm will begin to become a reality. Achieving such reconciliation will require a process of dedication and cooperation on the part of all Americans. That process should begin today.

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142. Chisolm, *supra* note 1, at 726.

