

Summer 2020

## The Case for a Federal Statute Authorizing Compensation for Legally Imposed Segregation

Thomas B. Stoel Jr.

Follow this and additional works at: [https://repository.uchastings.edu/hastings\\_race\\_poverty\\_law\\_journal](https://repository.uchastings.edu/hastings_race_poverty_law_journal)



Part of the [Law and Race Commons](#)

---

### Recommended Citation

Thomas B. Stoel Jr., *The Case for a Federal Statute Authorizing Compensation for Legally Imposed Segregation*, 17 HASTINGS RACE & POVERTY L.J. 297 (2020).

Available at: [https://repository.uchastings.edu/hastings\\_race\\_poverty\\_law\\_journal/vol17/iss2/4](https://repository.uchastings.edu/hastings_race_poverty_law_journal/vol17/iss2/4)

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Race and Poverty Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact [wangangela@uchastings.edu](mailto:wangangela@uchastings.edu).

---

---

## The Case for a Federal Statute Authorizing Compensation for Legally Imposed Segregation

THOMAS B. STOEL, JR.\*

### Abstract

*This article, “The Case for a Federal Statute Authorizing Compensation for Legally Imposed Segregation,” proposes enactment of a law to provide reparations to the African Americans who suffered economic, physical, and psychological harm because they were victims of legally imposed racial segregation.*

*In 1973, Yale Law School Professor Boris Bittker published *The Case for Black Reparations*, a perceptive, legally rigorous analysis of the issue. Bittker concluded that a focus on reparations for slavery was likely to prove unproductive, and concentrated instead on the prospect for achieving broad-scale reparations for legally imposed segregation. Bittker reached no definitive conclusions; he ended his book by declaring: “I have sought to open the discussion, not to close it.”*

*Since then, there has been much discussion of reparations for African Americans, most of it focused on reparations for slavery, or for slavery together with other forms of discrimination. Only a handful of African Americans have received meaningful compensation for past injustices, in the form of payments authorized by states to compensate for specific acts of racially inspired violence. There has been no politically significant debate about payment of reparations to African Americans by the Federal Government.*

*This article addresses Professor Bittker’s central questions:*

- *Is there a realistic way of achieving meaningful, broad-scale reparations for injustices done to African Americans?*
- *Should reparations to African Americans include reparations for slavery?*
- *Can reparations to African Americans be obtained through*

---

\* Attorney, Washington, D.C. LL.B. *magna cum laude*, Harvard Law School; D. D.Phil. (Law), Oxford University. Law Clerk to U.S. Supreme Court Justice John M. Harlan, 1967-69; Deputy Director, U.S. Cabinet Committee on Education, 1970.

---

---

*lawsuits, or must they be authorized by legislation?*

- *Should reparations to African Americans be paid to individuals or to a group?*
- *Would a statute authorizing reparations be constitutional?*

*After analyzing these issues, this article recommends enactment of a federal statute authorizing payment of compensation to individual victims of legally imposed segregation. That statute would be analogous to the Civil Liberties Act of 1988, which authorized payment of \$20,000 to each surviving Japanese American who was unjustly interned during World War II. The article points out that if reparations are to reach African American victims who are still living, there is a need to act very soon, because their number is dwindling year by year.*

## I. INTRODUCTION

In the spring of 1969, civil rights leader James Forman dramatically called for payment of \$500 million in reparations to African Americans, because “for centuries” they had been “victimized by the most vicious, racist system in the world.” Forman’s demand and the reaction to it, together with an earlier question posed by an African American law student, caused Yale Law School Professor Boris Bittker to become interested in the reparations issue. Concluding that the reparations debate suffered from a “paucity of analysis,” Bittker decided “to see if a lawyer, using the tools of his trade, can clarify its implications.”<sup>1</sup> The result, a book entitled *The Case for Black Reparations*, appeared in 1973.<sup>2</sup>

Near the beginning of his book, Bittker noted that the discussion of reparations had focused mainly on reparations for slavery. He concluded that this approach was likely to prove unproductive:

This preoccupation with slavery, in my opinion, has stultified the discussion of black reparations by implying that the only issue is correction of an ancient injustice, thus inviting the reply that the wrongs were committed by persons long since dead, whose profits may well have been dissipated during their own lifetimes or their descendants’ and whose moral responsibility should not be visited upon succeeding generations, let alone upon wholly unrelated

---

1. BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* 7 (Beacon Books 2003). James Forman’s call for reparations is set forth in Appendix A. Bittker was a leading scholar of tax law.

2. BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (Vintage Books 1973). Subsequent citations in this article are to the second edition, published by Beacon Books in 2003 and cited *supra* note 1.

---

---

persons.<sup>3</sup>

Accordingly, Bittker concentrated on the prospect for achieving broad-scale reparations for legally imposed segregation. He mentioned the option of a new statute, but he mainly explored the possibility that African American plaintiffs might obtain compensation through lawsuits. He also discussed other issues: how to calculate the “damages” caused by segregation; whether compensation should be paid to individuals or to groups; whether compensation to individuals should fit the circumstances of each beneficiary or be calculated according to a schedule; how to identify the beneficiaries; and the constitutionality of reparations.

Bittker reached no definitive conclusions. He observed that his “inquiry has spawned more questions than answers,” declared that “this book is an inquest, or perhaps the prelude to an inquest—not a trial,” and ended by saying: “We are, or ought to be, at the beginning of a national debate on these questions. I have sought to open the discussion, not to close it.”<sup>4</sup>

Forty-six years have passed since publication of *The Case for Black Reparations*. There has been much discussion of possible reparations for African Americans, especially during the past 25 years, mostly concerning reparations for slavery, or for slavery together with other forms of discrimination.

That discussion hasn’t produced significant actions. Only a handful of African Americans have received monetary compensation for past injustices, and those payments were authorized by states to compensate for specific acts of racially inspired violence.<sup>5</sup> There has been no politically significant debate about payment of reparations to African Americans by the Federal Government.<sup>6</sup> One of the only broad-scale federal compensation programs for racial injustice was the award of \$20,000 to each living Japanese American who had been unjustly interned during World War II, authorized by the Civil Liberties Act of 1988.<sup>7</sup>

The idea of reparations for African Americans is in danger of drifting

---

3. BITTKER, *supra* note 1, at 9.

4. BITTKER, *supra* note 1, at 7 and 137.

5. As described in Part VII, those who have received compensation include the nine living survivors of the 1923 massacre of African Americans in Rosewood, Florida, and some of their descendants; and some descendants of survivors of the Tulsa Race Riot of 1921.

6. H.B. 40, which has been introduced at the beginning of each Congress since 1989 and would establish a commission to study and make recommendations concerning “reparations for the institution of slavery, its subsequent de jure and de facto racial and economic discrimination against African-Americans, and the impact of these forces on living African-Americans,” had never been the subject of a hearing until June 19, 2019. *Infra* note 108 and accompanying text.

7. 50 U.S.C. App. §§ 1989 *et seq.* (1988).

---

---

into the realm of academic theory or merely becoming fodder for endless ideological debate. I believe it's time to return to Professor Bittker's central questions:

- Is there a realistic way of achieving meaningful, broad-scale reparations for injustices done to African Americans?
- Should reparations to African Americans include reparations for slavery?
- Can reparations to African Americans be obtained through lawsuits, or must they be authorized by legislation?
- Should reparations to African Americans be paid to individuals or to a group?
- Would a statute authorizing reparations be constitutional?

Unlike Professor Bittker's book, this article reaches definite conclusions. It concludes that the injuries suffered by millions of African Americans who were victims of legally imposed segregation warrant compensation and recommends enactment of a federal statute authorizing that compensation. It points out that if that compensation is to reach victims who are still living, there is a need to act quickly, because their number is dwindling year by year.

## II. HISTORY AND EFFECTS OF LEGALLY IMPOSED SEGREGATION

### A. The Jim Crow Segregation Laws

Legally imposed segregation was sometimes perpetrated by the Federal Government.<sup>8</sup> However, racial segregation was mainly required by "Jim Crow" laws in Southern and border states that were enacted after the Reconstruction era ended in 1877. Those laws forced African Americans to live under profoundly harmful segregation regimes until the 1950s, the 1960s, or even the 1970s.<sup>9</sup>

The prelude to the enactment of Jim Crow laws was the abandonment or negation of federal actions to ensure equal treatment of African Americans, especially in the South, following the Civil War. The

---

8. *See* Part V.

9. Only in October 1969 did the Supreme Court finally order that all Southern "school districts [must] begin immediately to operate as unitary school systems within which no person is to be effectively excluded from any school because of race or color." *Alexander v. Holmes Cty. Bd. of Educ.*, 396 U.S. 19, 20 (1969). Many schools districts weren't officially desegregated until the 1970-71 school year. George P. Shultz, *How a Republican Desegregated the South's Schools*, N.Y. TIMES (Jan. 8, 2003), <https://www.nytimes.com/2003/01/08/opinion/how-a-republican-desegregated-the-south-s-schools.html>.

---

Compromise of 1877 that declared Rutherford B. Hayes the winner of the 1876 presidential election ensured that federal troops would not be deployed to protect the federally guaranteed rights of African Americans in the South.<sup>10</sup> Subsequently, those rights were steadily diminished by state laws, extra-legal intimidation, and Supreme Court decisions.

Late in the Reconstruction era, the Congress passed, and President Grant signed the Civil Rights Act of 1875, which banned racial discrimination in “inns, public conveyances on land or water, theaters, and other places of public amusement . . .” Persons who discriminated were subject to a civil fine and criminal fines and/or imprisonment.<sup>11</sup>

In 1883, those provisions were held to be unconstitutional. The Supreme Court found in the *Civil Rights Cases* that racial discrimination provisions exceeded Congress’s powers under the Fourteenth Amendment because they prohibited purely private discrimination involving no state action, and that they overstepped Congress’s authority under the Thirteenth Amendment because the forbidden forms of discrimination didn’t constitute “badges of slavery.”<sup>12</sup> The first Justice Harlan dissented, finding that there was congressional power under the Thirteenth Amendment because the prohibited discrimination was a “badge of servitude” and under the Fourteenth Amendment because “no . . . corporation or individual wielding power under State authority for the public benefit or the public convenience, can, consistently either with the freedom established by the fundamental law or with that equality of civil rights which now belongs to every citizen, discriminate against freemen or citizens in those rights because of their race . . . .”<sup>13</sup>

Even before that decision, Tennessee enacted the first state racial segregation law, an 1881 act requiring railroads to “furnish separate cars, or portions of cars cut off by partition walls,” for “colored passengers who pay first class rates.”<sup>14</sup> In 1890, the U.S. Supreme Court, in *Louisville, New Orleans & Texas Ry. Co. v. Mississippi*, held constitutional a Mississippi “separate car” law that applied only to intrastate commerce.<sup>15</sup> The case was

---

10. See C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (Oxford U. Press 1991).

11. 18 Stat. 335 §§ 1-2 (1875).

12. 109 U.S. 3, 21 (1883). The cases before the Court involved racially motivated denial of services in an inn or hotel; discrimination in seating in theaters in San Francisco and New York; and refusal to accommodate an African American in the “ladies’ car” of a Tennessee railroad.

13. *Id.* at 43, 59.

14. See Stanley J. Folmsbee, *The Origin of the First Jim Crow Law*, 2, *THE J. OF S. HIST.*, 234, 240 (1949).

15. *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U.S. 587, 589 & 595 (1890) (Harlan, J., dissenting).

---

---

brought by the state against the railroad, and the Court said that “[t]he question is limited to the power of the state to compel railroad companies to provide, within the state, separate accommodations for the two races. Whether such accommodation is to be a matter of choice or compulsion does not enter into this case.”<sup>16</sup> Accordingly, the Court held only that the law did not infringe on Congress’s power to regulate interstate commerce and didn’t mention the Thirteenth and Fourteenth Amendments.

Other southern states soon adopted similar laws. In 1896, the Supreme Court heard *Plessy v. Ferguson*, a case in which an African American, traveling by rail between two points in Louisiana, was ejected from a “white” railroad car pursuant to a Louisiana law that required railroad companies to “provide equal but separate accommodations for the white and colored races” in separate cars or sections of cars, and directed railroad officials to “assign each passenger to the coach or compartment used for the race to which such passenger belongs . . .”<sup>17</sup>

With respect to the Thirteenth and Fourteenth Amendments, the Court held:

[T]he enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws within the meaning of the Fourteenth Amendment . . .<sup>18</sup>

The Court stated that the Louisiana law was no “more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia . . . or the corresponding acts of state legislatures.”<sup>19</sup> The Court dismissed “the plaintiff’s . . . assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority,” saying, “[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”<sup>20</sup>

The first Justice Harlan famously dissented, asserting that the Louisiana law “puts the brand of servitude and degradation upon a large class of our fellow citizens.”<sup>21</sup> He declared that “[i]n my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made

---

16. *Id.*

17. *Plessy v. Ferguson*, 163 U.S. 537, 540–41 (1896).

18. *Id.* at 548.

19. *Id.* at 551.

20. *Id.*

21. *Id.* at 562 (Harlan, J., dissenting).

---

---

by this tribunal in the *Dred Scott Case*.”<sup>22</sup>

Southern states and localities proceeded to pass laws that required segregation in many spheres of everyday life. These included public and private schools, colleges, and universities; all forms of public transportation, including taxis; train and bus stations and airports; hotels, restaurants, and bars; government offices, courtrooms, and jails; libraries; public entertainment and sports and their venues; swimming pools; public and private hospitals, nursing homes, and retirement homes; telephone booths; funeral homes and cemeteries; restrooms and drinking fountains in public places and businesses; parks and beaches; playing games like cards or checkers; and others.<sup>23</sup>

Various justifications were offered for these laws, which minimized contacts between whites and African Americans in situations where they might be deemed to be equals.<sup>24</sup> One of the most common rationales was the desire to prevent interracial contact between the sexes which might lead to “amalgamation” of the races (in practice, the aversion was to contact or sex between white women and African American men). Sociologist Gunnar Myrdal analyzed these justifications in his magisterial and perceptive 1944 study *An American Dilemma* and found them to be rationalizations. He concluded that “what white people really want is to keep the Negroes in a lower status,” treating them as a “subordinate caste.”<sup>25</sup>

At the Tuskegee Institute graduation ceremony in 1897, Alabama Governor William Oates said in his brief address: “You might as well understand that this is a white man’s country, as far as the South is concerned, and we are going to make you keep your place. Understand that. I have nothing more to say to you.”<sup>26</sup> And historian Ulrich Phillips concluded in 1928 that “the central theme of Southern history” was a “common resolve indomitably maintained—that it shall be and remain a white man’s country.”<sup>27</sup>

---

22. *Id.* at 548–562.

23. *See, e.g.*, PAULI MURRAY, STATES’ LAWS ON RACE AND COLOR (U. of Ga. Press, 1997).

24. Any hint of African American equality was verboten. In 1946, Greenville, Mississippi, newspaper editor and Army veteran Hodding Carter “exploded in anger when a move to establish a monument to [honor] local veterans was derailed by whites who opposed to listing black and white names together.” JAMES C. COBB, *AWAY DOWN SOUTH: A HISTORY OF SOUTHERN IDENTITY* 189 (Oxford U. Press 2005).

25. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY*, 589–591 (Harper & Bros., 1944).

26. BUDD BAILEY, *BOOKER T. WASHINGTON AND THE TUSKEGEE INSTITUTE*, 29 (Cavendish Square Publishing, 2016).

27. Ulrich Phillips, *The Central Theme of Southern History*, 34 *THE AM. HIST. REV.*, 30–31 (1928); *see also* LEON LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW*, 179–216 (Alfred A. Knopf, 1998).

That conclusion is reinforced by the fact that the Jim Crow legal system was supplemented by demeaning practices, such as refusing to call African Americans by their last names or the titles “Mr.” and “Mrs.”<sup>28</sup> White supremacy was enforced by extra-legal terror regimes intended to keep African Americans subordinate to whites in every area of life. The African American community as a whole was terrorized by white vigilante groups like the Ku Klux Klan. African Americans who were deemed to be “uppity” or demanding or otherwise out of line were subjected to economic deprivation, beatings, and sometimes lynching. Some of these acts were perpetrated by law enforcement officers; in other cases, legal authorities simply looked the other way.<sup>29</sup>

For many decades, the Supreme Court’s “separate but equal” decision in *Plessy v. Ferguson* shielded state laws requiring racial segregation from successful challenge under the U.S. Constitution. The Court brushed aside challenges in 1908 to a Kentucky law requiring segregation in private colleges<sup>30</sup> and in 1927 to a Mississippi law that assigned a girl of Chinese descent to a “colored” school.<sup>31</sup>

Beginning in the 1930s, the NAACP and later the NAACP Legal Defense Fund, under the leadership of Charles Hamilton Houston and his former pupil Thurgood Marshall, implemented a strategy of challenging segregated schools on the ground that they didn’t provide the “equal” education required by the Supreme Court’s decision in *Plessy v. Ferguson*.<sup>32</sup> They focused on postgraduate institutions, especially law schools. The Supreme Court held that the education provided to African Americans was unequal in two cases in which African Americans were denied admission to the only law schools in their states;<sup>33</sup> one in which an African American was denied admission to the University of Texas Law School and relegated to a hastily established “law school for Negroes”;<sup>34</sup> and one in which a doctoral

---

28. The Supreme Court in 1964 reversed *per curiam* and without oral argument an Alabama Supreme Court decision upholding the contempt conviction of an African American woman who objected when an Alabama prosecutor insisted on calling her only by her first name. *Hamilton v. Ala.*, 376 U.S. 650 (1964), *rev’d per curiam*, *Ex parte Hamilton*, 275 Ala. 574 (1963).

29. LITWACK, *supra* note 27; REMEMBERING JIM CROW: AFRICAN AMERICANS TELL ABOUT LIFE IN THE SEGREGATED SOUTH (William S. Chafe et al. eds., The New Press 2001); see *Screws v. U.S.*, 325 U.S. 91 (1945) (for a disgusting example).

30. *Berea C. v. Ky.*, 211 U.S. 45, 54 & 58 (1908) (Harlan J., dissenting) (Harlan J., also dissented in *Plessy v. Ferguson*).

31. *Gong Lum v. Rice*, 275 U.S. 78, 82–83 (1927).

32. See *NAACP History: Charles Hamilton Houston*, NAACP (last visited Jan. 29, 2020) <https://www.naacp.org/naacp-history-charles-hamilton-houston/>.

33. *Missouri ex re. Gaines v. Can.*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948).

34. *Sweatt v. Painter*, 339 U.S. 629, 631–633 (1950).

candidate was forced to sit in separate areas of the classroom, library, and cafeteria.<sup>35</sup>

The campaign to overturn the “separate but equal” doctrine culminated in 1954. In that year, the Supreme Court’s ruled unanimously in *Brown v. Board of Education of Topeka* that requiring African American children to attend separate schools inevitably instills in them a sense of inferiority that impairs their learning experience; and, therefore, “[s]eparate educational facilities are inherently unequal” and deprive African Americans of the equal protection of the laws.<sup>36</sup>

It was taken for granted that the rationale of the *Brown* decision applied to all “separate but equal” institutions operated, controlled, or licensed by governments. Though federal courts and other federal agencies sometimes were slow to act, especially in the Deep South,<sup>37</sup> implementation of the *Brown* decision swept away the great bulk of the Jim Crow legal structure.<sup>38</sup> Pressure from the African American community sometimes accelerated the process. Examples include the 1955 Montgomery, Alabama, bus boycott led by Rosa Parks and Dr. Martin Luther King<sup>39</sup> and the 1961 “Freedom Rides” that challenged segregated seating on interstate buses.<sup>40</sup>

Especially in the early 1960s, students and others who conducted “sit-ins” that violated the seating requirements in restaurants in local branches of chain stores defied segregated seating in southern restaurants. Those protests caused a number of restaurants to change their policies. However, segregation in public accommodations, including restaurants and lodging places, was ended only by passage of Title II of the Civil Rights Act of 1964.<sup>41</sup>

In keeping with the ideology of white supremacy, many states at various times have enforced anti-miscegenation laws forbidding marriage between African Americans and whites. They weren’t limited to the Jim Crow South;

---

35. *McLaurin v. Okla. St. Regents*, 339 U.S. 637, 640 (1950).

36. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494–95 (1954).

37. Some southern school districts remained segregated until the 1970s and some are still subject to court desegregation orders. Alexander *supra* note 9.

38. *But see* ALA. CONST. §256 (“[s]eparate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.”).

39. However, the end of bus segregation in Montgomery finally required a decision by the U.S. Supreme Court. *See Browder v. Gale*, 352 U.S. 903 (1956), *aff’d per curiam*, 142 F. Supp. 707 (M.D. Ala. 1956) (the Court held that the Montgomery, Alabama statutes and ordinances requiring segregation of the white and colored races on the motor buses of a common carrier of passengers violated Fourteenth Amendment to the Constitution of the United States).

40. *Morgan v. Va.*, 328 U.S. 37 (1946); *Boynton v. Va.*, 364 U.S. 464 (1960) (The Supreme Court declared segregated seating to be unconstitutional).

41. 42 U.S.C. §§ 2000a(a)- 2000a(e), 2000a-6(a)- 2000a-6(b) (1964).

it appears that some 29 states enforced them into the 1940s and beyond.<sup>42</sup> The Supreme Court held in 1967 that the anti-miscegenation laws in the remaining sixteen states violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.<sup>43</sup>

During the Jim Crow era, white supremacy also was enforced by denying millions of African Americans the right to vote.<sup>44</sup> Solomon S. Calhoun, president of Mississippi's 1890 constitutional convention, announced in his opening address: "We came here to exclude the negro. Nothing short of this will answer."<sup>45</sup> The resulting constitution sought to achieve that goal by requiring prospective voters to pass a literacy test and pay a poll tax.<sup>46</sup> Other southern and border states soon followed Mississippi's example.

Another device used to deny African Americans the vote was a "grandfather clause" in state constitutions that limited the franchise to those whose ancestors could vote at times when African Americans could not. After the Supreme Court held in 1915 that grandfather clauses violated the Fifteenth Amendment,<sup>47</sup> some southern states turned to "white primaries." Under that system, voter qualifications in primary elections were determined by the dominant Democratic Party, which excluded African Americans. The Supreme Court held in 1944 in *Smith v. Allwright*<sup>48</sup> that Texas' white primary violated the Equal Protection Clause of the Fourteenth Amendment. However, racial discrimination in voting wasn't effectively ended until the passage of the Voting Rights Act of 1965.<sup>49</sup>

## B. The Effects of Jim Crow Laws on African Americans

It is difficult to disentangle the effects of the Jim Crow laws from the impacts of the overall Jim Crow system that was designed to keep African Americans subordinate to whites, a system that included not only laws but also the pernicious customs and the terror regime described above. Since the compensation statute proposed here is intended to provide compensation for

---

42. See James R. Browning, *Anti-Miscegenation Laws in the United States*, 1 DUKE BAR J. (1951).

43. *Loving v. Va.*, 388 U.S. 1 (1967).

44. See *Race and Voting in the Segregated South*, CONST. RIGHTS FOUND., <http://www.crf-usa.org/brown-v-board-50th-anniversary/race-and-voting.html>.

45. Quoted in Allen Coon, Opinion, 'Free the ballot box', THE DAILY MISSISSIPPIAN (Nov. 17, 2017), <https://thedmonline.com/opinion-free-ballot-box/>.

46. MISS. CONST. OF 1890, art.12, §§243-244 (the poll tax was definitively outlawed by the Twentyfourth Amendment to the U.S. Constitution, ratified in 1964).

47. *Guinn v. U.S.*, 238 U.S. 347 (1915).

48. *Smith v. Allwright*, 321 U.S. 649, 650, 664-666 (1944).

49. 42 U.S.C. §§ 1973-1973aa-6 (1965).

---

---

nonmaterial as well as economic injuries, it seems useful to describe the overall negative effects of the system on African Americans as well as the specific impacts that can be ascribed to the legal regime. We can separate these effects into several categories: educational; economic; psychological and health; and a catch-all category we might term quality of life.

### 1. Educational Impacts

School segregation in the South predated the Jim Crow era. Even during the Reconstruction period that emphasized racial equality, school segregation was the rule in the former Confederate states.<sup>50</sup> After Reconstruction, state-imposed school segregation was a linchpin of the Jim Crow legal system. Laws requiring school segregation were enforced in southern and border states, and in seemingly unlikely places like Kansas.<sup>51</sup>

The Supreme Court held in *Plessy v. Ferguson* that legally imposed segregation was constitutional so long as the separate facilities for members of the two races were equal.<sup>52</sup> However, the segregationists' belief in white supremacy ensured that African American schools were rarely if ever equal to white ones.

Some southern leaders scorned the very idea of education for African Americans. James K. Vardaman, who was Governor of Mississippi for four years beginning in 1904 and U.S. Senator for six years after 1913, said: "The only effect of educating [a Negro] is to spoil a good field hand and make an insolent cook."<sup>53</sup> Benjamin Tillman, South Carolina Governor from 1890 to 1894 and U.S. Senator from 1895 to 1918, similarly asserted: "When you educate a Negro you educate a candidate for the penitentiary or spoil a good field hand."<sup>54</sup> With leaders like these, it was inevitable that post-Reconstruction education for African Americans, if it existed at all, would be both segregated and inferior.<sup>55</sup>

#### a. Elementary and Secondary Education

---

50. RECONSTRUCTION: A HISTORICAL ENCYCLOPEDIA OF THE AMERICAN MOSAIC 172 (Richard Zuczek ed., Greenwood 2015) ("[O]f all the school systems that appeared in the South during Reconstruction, only the one in New Orleans is known to have integrated schools. . . .")

51. Law of 1879, ch. 81, Kans. Laws 1901, §§ 6290-6296 (repealed) (stating that a Kansas law of 1879 allowed larger cities to operate racially separate primary schools).

52. *Plessy*, *supra* 17 at 551.

53. *Quoted in* DAVID M. OSHINSKY, *WORSE THAN SLAVERY* 89 (The Free New Press, 1996).

54. *Quoted in* ADAM FAIRCLOUGH, *A CLASS OF THEIR OWN: BLACK TEACHERS IN THE SEGREGATED SOUTH* 135 (Harv. U. Press, 2007).

55. *See also* *The Relative Status of the Negro Population in the United States*, 22 THE J. OF NEGRO EDUC., 338, 338-404 (1953).

African American education at these levels was unequal in many ways, as shown by economist Robert Margo and others:

- *Expenditures per pupil for instruction.* In 1935, spending on instruction of African-American students in eight southern states ranged from 23% to 64% of expenditures for instruction of whites; only in North Carolina was the figure higher than 50%. In 1950, there was still a large gap: instructional expenditures on African American students in those states ranged from 31% to 93% of those for whites; in four states, the ratio was below 70%.<sup>56</sup>
- *Teacher pay.* In 1935, teachers in African American schools in seven southern states, were paid, on average, less than half as much as white teachers with similar qualifications. By 1950, the pay gap had narrowed, but it still averaged about 20%.<sup>57</sup>
- *Length of school year.* In 1935, a number of southern states mandated a significantly shorter school year for African American schools than for white ones; in four states the difference was more than 10%. However, by 1950 the gap had largely been eliminated.<sup>58</sup>
- *Years of school completed.* According to a description of Jim Crow schools by the American Federation of Teachers: “The educational status of blacks in the Jim Crow states remained abysmally low in 1950 . . . . Black adults in Mississippi had completed an average of 5.1 years in school, while those in Georgia and South Carolina had even lower figures of 4.9 and 4.8 years.”<sup>59</sup> (These 1950 figures may seem hard to believe, but in that year 32.6% of African Americans in the entire United States had completed less than five years of elementary school, only 13.7% had graduated from high school, and just 2.2% had

56. ROBERT A. MARGO, RACE AND SCHOOLING IN THE SOUTH, 1880-1950: AN ECONOMIC HISTORY 21-22 (U. of Chi. Press, 1990) (out of print); *available in part at* <http://www.nber.org/chapters/c8792.pdf> (the eight states were Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia).

57. *Id.* at 54 tbl.4.1 (the seven states were those listed in note 56 minus Georgia); *See also* Rebecca Onion, *This Pay Chart Shows Exactly How Louisiana Used To Discriminate Against Black Teachers*, SLATE MAGAZINE (Jan. 16, 2013) [http://www.slate.com/blogs/the\\_vault/2013/01/16/thurgood\\_marshall\\_and\\_civil\\_rights\\_the\\_chart\\_showing\\_how\\_orleans\\_parish.html#comments](http://www.slate.com/blogs/the_vault/2013/01/16/thurgood_marshall_and_civil_rights_the_chart_showing_how_orleans_parish.html#comments).

58. MARGO *supra* note 56, at 26 tbl.2.6 (the seven states cited were those listed in note 56 minus Georgia).

59. Peter Irons, *Jim Crow's Schools*, AMERICAN FEDERATION OF TEACHERS (Summer 2014), <https://www.aft.org/periodical/american-educator/summer-2004/jim-crows-schools>.

---

---

completed four years or more of college.)<sup>60</sup>

- *Restricted curricula.* African American schools in the South were designed to prepare students for relatively menial jobs, which usually were the only ones open to them. Accordingly, curricula were focused on manual training and industrial education. The first high school for African Americans in Louisiana was an “industrial high school” in New Orleans, intended “to educate the negro in the trades and positions to which negroes are best qualified, and in no circumstances to educate them to compete with white labor of this city.”<sup>61</sup> The first African American high school in Columbus, Georgia, decided that “traditional” courses in the sciences and liberal arts would be of little use to African Americans. It also omitted “commercial” courses, because white businesses wouldn’t employ African American secretaries or typists.<sup>62</sup>

b. Higher education

Private African American colleges in the South, established after the Civil War, included, among others, Morehouse and Spelman in Atlanta, Fisk in Nashville, Hampton Institute in Virginia, Tuskegee Institute in Alabama, and Grambling in Louisiana. They were mainly supported by Northern philanthropists and religious societies.

In the arena of public higher education, the Morrill Act of 1862 provided federal funding for public “land-grant” colleges, but only three of 17 southern states shared those funds with African American students.<sup>63</sup> The Second Morrill Act of 1890 bowed to segregationist sentiment in the former Confederate states by providing that, while there should be no land-grant funding for “a college where a distinction of race or color is made in the admission of students,” establishment of a separate college for African American students “shall be held to be a compliance with the provisions of this act if the funds . . . be equitably divided.”<sup>64</sup>

---

60. Info Please, *Educational Attainment by Race and Hispanic Origin, 1940-2014*, TEACH SANDBOX NETWORKS, INC., PUBLISHING AS INFOPLEASE (last visited Feb.1, 2020),

61. JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935*, 219 (U.of N.C. Press 1988).

62. LESLIE V. TISCHAUSER, *JIM CROW LAWS* 44 (Greenwood 2012).

63. See Morrill Act of 1862, Pub. L. No. 37-108, 12 Stat. 503 (1862). The three states were Mississippi, Virginia, and South Carolina. Land-grant colleges were federally funded via grants of land.

64. Act of August 30, 1890, ch. 841, 26 Stat. 417, 7 U.S.C. §§ 322 *et seq.*

The state laws mandating segregation clearly applied to public institutions. The Supreme Court decided in the 1908 case of *Berea College v. Kentucky*<sup>65</sup> that states could require racial segregation in private colleges as well.

The southern African American colleges (which today constitute the majority of the Historically Black Colleges and Universities, or HBCUs) were severely deficient when compared with white institutions:

- *Inadequate funding.* Support for private African American colleges came almost entirely from outside the region. It was limited compared with that for locally supported white institutions. The public African American institutions also were starved of funds.<sup>66</sup> Federal grants under the Morrill Acts were relatively small. State support was consistently unequal to that provided for white institutions, both overall and in the crucial area of support for research.
- *Emphasis on a “practical” curriculum.* Early leaders in African American higher education, notably the charismatic and influential Booker T. Washington, promoted the concept of “industrial education,” which eschewed classical liberal education in favor of more practical instruction for African Americans.<sup>67</sup> Washington’s Tuskegee Institute and other African American institutions with a similar philosophy were supported by wealthy white benefactors who didn’t want to disturb the Jim Crow order. Washington’s great rival was the equally charismatic, Harvard-educated W.E.B. Dubois, who argued for a liberal arts education, believing that “The true college will ever have one goal—not to earn meat but to know the end and aim of that life which meat nourishes.”<sup>68</sup> Washington’s philosophy gradually lost favor, but the idea of a “practical” education continued to influence the curricula of HBCUs. The land-grant colleges were limited by law to education in “agricultural and mechanical arts.” And many people believed that a liberal arts education was unsuited to the

---

65. *Berea C.*, *supra* note 30.

66. See generally, Gil Kujovich, *Public Black Colleges: The Long History of Unequal Funding*, 2 THE J. OF BLACKS IN HIGHER EDUC. 73 (1993-1994). No. 2, Winter 1993-1994, pp. 73-82.

67. See BOOKER T. WASHINGTON, *INDUSTRIAL EDUCATION FOR THE NEGRO* (1903), available at <http://teachingamericanhistory.org/library/document/industrial-education-for-the-negro>.

68. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 36 (A. C. McClurg & Co., Chi., 1903) available at <https://www.gutenberg.org/files/408/408-h/408-h.htm>.

---

---

realities of African American life in the South and even elsewhere.<sup>69</sup>

- *Lack of postgraduate educational opportunities.* The dearth of support for research at African American land-grant institutions restricted the opportunities for postgraduate work in science. Private African American colleges could provide a sound undergraduate education, but their postgraduate programs were limited. Of the few African Americans who were able to study at the postgraduate level, many attended universities outside the South.<sup>70</sup> In some fields, including law and medicine, openings for graduate study by African Americans were practically nonexistent.<sup>71</sup> Responding to the requirement that they provide a separate but equal education, some southern states authorized support for graduate education outside the state when none was available within.<sup>72</sup>

The deficiencies of African American education at all levels had severe, long-term consequences for African Americans, including many who are still alive. One such result was a higher rate of illiteracy among African Americans than among whites. Professor Margo estimated that in 1950 the literacy rate for African Americans in the South age ten and above was 8.9-

---

69. In 1946, two scholars wrote that the curriculum of African American colleges “must prepare the student for both the adjustment to a world which restricts his movements due to his race and color and the participation in the struggle for and enjoyment of the real freedom and equality yet to be attained.” Walter G. Daniel & Robert P. Daniel, *The Curriculum of the Negro College*, 19 J. OF EDUC. SOC. 496, 498 (1946). See generally, Carter G. Woodson, *The Mis-Education of the Negro*, HIST. IS A WEAPON, <http://historyisaweapon.com/defcon1/misedne.html> (last visited Jan. 27, 2020).

70. For example, W.E.B. Dubois and historian John Hope Franklin received their doctorates from Harvard. Agricultural scientist George Washington Carver received his master’s degree from Iowa State.

71. There were exceptions. Howard University in Washington, D.C., began offering a legal education in 1869. Under the leadership of Charles Hamilton Houston, who served as Dean from 1929-35, Howard Law School produced many first-class African American lawyers, including Thurgood Marshall of the Class of 1933. Meharry Medical College in Nashville, which has offered medical education since 1876, and Howard Medical School, which opened its doors in 1868, educated a large proportion of African American doctors in the South during the Jim Crow era.

72. For example, in 1948 fourteen southern states entered into a compact to provide support for “regional” African American educational institutions, notably Meharry Medical College, to make up for their own inability to educate African Americans. See, e.g., STATES’ LAWS ON RACE AND COLOR: STUDIES IN THE LEGAL HISTORY OF THE SOUTH 23 (Pauli Murray ed., 1997) (summarizing Alabama Statutes, Title 52 §§ 40(1)-40(2) (1947 Cum. Supp.)). This scheme to evade the requirement that states provide education that was “separate but equal” failed due to pressure from civil rights organizations and court decisions like that in *Missouri ex rel. Gaines v. Canada*, *supra* note 33.

12.0%, whereas the rate for whites was only 2.4%-3.3%.<sup>73</sup> The inability to read obviously has enormous significance for a person's economic prospects and overall quality of life.

Another consequential impact of Jim Crow education was that African Americans graduated from college and achieved postgraduate degrees at a much lower rate than whites. The following table shows the large racial discrepancies in the percentage of the population with college degrees in 1990 in six states that were leading sponsors of segregated education.

**% OF POPULATION IN 1990 WITH  
A BACHELOR'S DEGREE OR HIGHER**

STATE	WHITE	AFRICAN AMERICAN
ALABAMA	17.3	9.3
GEORGIA	21.8	11.0
LOUISIANA	18.7	9.1
MISSISSIPPI	17.2	8.8
SOUTH CAROLINA	19.8	7.6
VIRGINIA	27.0	11.1

Of course, the racial discrepancy would have been greater in earlier decades.

## 2. Economic Impacts

African Americans were remarkably resilient in the face of vicious racism and mistreatment. However, the Jim Crow regime that limited their opportunities was bound to discourage many from thoughts of advancement for themselves and their children, with negative economic impacts. An African American teacher in Mississippi during the Jim Crow era lamented: "You educate your children—then whatcha gonna do? . . . You got any jobs for 'em? You got any business for 'em to go into?"<sup>74</sup>

In many instances, African Americans were simply robbed of their land, their possessions, and money due them for wages and crops. It was useless for them to seek redress from a racially biased officers of the law, and to do so might have subjected them to further harm.<sup>75</sup>

It's obvious that the earnings of African American professionals were reduced by restrictions imposed by segregation. Lawyers, doctors, dentists,

73. MARGO, *supra* note 56, tbl. 4.1.

74. LITWACK, *supra* note 27, at 60.

75. *See generally, Id.*; REMEMBERING JIM CROW, *supra* note 29; LITWACK, *supra* note 27, at 147-79; SOUTHERN JUSTICE (Leon Friedman ed., Pantheon Books 1965).

---

---

funeral directors, and others weren't allowed to serve clients and patients in the wealthier white and corporate communities.<sup>76</sup>

Generally speaking, African Americans weren't allowed to occupy positions that involved supervision over whites, or positions of prestige in the larger community.<sup>77</sup> This severely narrowed their opportunities for economic advancement.

The inferior system of black education had widespread economic impacts. Illiteracy, the lack of a college or postgraduate degree, and poorer skills in such essentials as reading and mathematics limited the jobs that African Americans could hope to fill.

In 2014, economists Celeste K. Carruthers and Marianne H. Wanamaker published a study analyzing the extent to which the inferior quality of African American education was responsible for the wage gap that existed between African Americans and whites in the South in 1940. They found that the impact of unequal education was substantial: if African Americans had been provided an education that was racially separate but equal in quality to that received by whites, the wage gap between the two races in 1940 would have been 6-18%, whereas the actual gap was a staggering 53%. They concluded that “[e]ducation equality would have been a powerful tool for raising black economic standing in the South.”<sup>78</sup>

The U.S. Commission on Civil Rights found in a 1982 study that during the Jim Crow era illiteracy often prevented African Americans from becoming farm owners as opposed to tenant farmers or sharecroppers.<sup>79</sup> This was one reason why the number of African American farms declined by 40% between 1920 and 1950, while the number of white farms dropped by only 13%.<sup>80</sup> Since most African Americans in the South were part of the agricultural economy, this shrinkage in landowning had large economic impacts.

The deficiencies in African American education under Jim Crow, together with other forms of discrimination, prevented many African

---

76. The restricted opportunities available to African American lawyers under Jim Crow are described in Michael Meltsner, “Segregated Justice,” in S. JUST., *supra* note 75, at 157–158.

77. When the Atlanta Police Department finally hired African American police officers in 1948, they weren't allowed to arrest white people. Karen G. Bates, ‘Darktown’ Imagines What It Was Like For Atlanta’s First Black Policemen, NPR (Sept. 23, 2016), <https://www.npr.org/2016/09/23/495065415/darktown-imagines-what-it-was-like-for-atlantas-first-black-policemen>.

78. Celeste K. Carruthers & Marianne H. Wanamaker, *Separate and Unequal in the Labor Market: Human Capital and the Jim Crow Wage Gap* (Feb. 2014), [https://econ.laps.yorku.ca/files/2015/11/Carruthers\\_Wanamaker\\_WageInequal\\_FEB2014.pdf](https://econ.laps.yorku.ca/files/2015/11/Carruthers_Wanamaker_WageInequal_FEB2014.pdf).

79. Pamela Browning, *The Decline of Black Farming in America*, U.S. COMMISSION ON CIVIL RIGHTS (Feb. 1982), <https://files.eric.ed.gov/fulltext/ED222604.pdf>.

80. *Id.* at 10 tbl. 1.1.

---

---

Americans from becoming professionals. The 1950 census revealed a severe shortage in the South of African American professionals other than teachers and members of the clergy. According to law professor Gil Kujovich:

[I]f teachers and clergymen are excluded, the black share of remaining professionals [in the 1950 census] drops to less than 4 percent, for a population that made up 20 percent of the work force. . . . [I]n a black work force of more than 3.5 million in the 17-state region there were only 4600 lawyers and judges, engineers, chemists and other natural scientists, physicians and surgeons, dentists, pharmacists, architects, accountants and auditors, surveyors, designers and draftsmen—just over 1 percent of the 401,000 professionals in those professions. The black professional class was far smaller than necessary to serve the black community. For example, the white population of the segregationist states was served by physicians and surgeons at the rate of 115 per 100,000; for every 100,000 blacks there were only 18 doctors.<sup>81</sup>

### 3. Impact on Physical and Mental Health

Under Jim Crow, the healthcare system in the South was comprehensively segregated. Some Jim Crow hospitals refused to serve African Americans or shunted them into segregated wards, either through obedience to state law or as a matter of hospital policy.<sup>82</sup> As was noted previously, there were fewer African American than white physicians as a percentage of the two races' populations. African American physicians were handicapped because the American Medical Association allowed its local affiliates to deny them membership. Nurses were prohibited from tending to patients of other races.

The Federal Government acquiesced in healthcare segregation when the Congress in 1946 included in the Hospital Survey and Construction Act, part of the Hill-Burton Act, a provision stating that in order for hospitals to receive federal funding:

[T]he State plan shall provide for adequate hospital facilities for

---

81. Kujovich, *supra* note 66, at 82.

82. State-mandated segregation in hospitals was unlawful after the Supreme Court's 1954 decision in *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). Racial discrimination by private hospitals was held unlawful in *Simkins v. Moses H. Cone Mem'l Hosp.*, 323 F.2d 959 (4th Cir. 1963), and was finally dispatched by the Civil Rights Act of 1964 and the 1965 law that created Medicare.

---

---

the people residing in a State, without discrimination on account of race, creed, or color but an exception shall be made in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision on the basis of need for facilities and services of like quality for each such group . . .<sup>83</sup>

The federally funded hospitals built under Hill-Burton were carefully designed to keep African Americans segregated from whites, either in separate buildings or in separate parts of the same building.

Despite the segregated setting, it appears that from the mid-1930s onward, healthcare for African Americans in the South improved substantially (as did healthcare generally in the region) and the racial disparity in care narrowed.<sup>84</sup> This record caused historian Karen Cruse Thomas to conclude that “legally sanctioned segregation, despite its myriad deleterious social and psychic effects, was not the principal cause of racial disparities in health” during the years 1935-54.<sup>85</sup> Those racial disparities apparently were due mainly to other factors, such as African American poverty and poor living conditions, both of which were due in large part to legally imposed segregation and other forms of racial discrimination.

In addition to contemporary effects, studies have found that African Americans who lived under Jim Crow have experienced longer-term adverse health impacts, compared with African Americans who lived elsewhere. A 2014 study found that, among African Americans born between 1921 and 1945, those who lived in Jim Crow jurisdictions were 20% more likely to die prematurely.<sup>86</sup> A 2017 study suggests that, among U.S. women currently diagnosed with breast cancer, being born in a Jim Crow state increased African American women’s risk of being diagnosed with tumors that have a worse prognosis.<sup>87</sup>

Apart from the physical health effects just described, there is evidence that being constantly exposed to racism—as African Americans were under Jim Crow—is “consistently related to poor mental health.” These effects

---

83. 42 U.S.C. § 291e(f) (1946). That provision was held to be unconstitutional in *Simkins v. Moses H. Cone Mem’l Hosp.*, *supra* note 82.

84. *See generally* KAREN KRUSE THOMAS, *DELUXE JIM CROW: CIVIL RIGHTS AND AMERICAN HEALTH POLICY 1935-1954* (Athens: U. of Ga. Press 2011).

85. *Id.* at 265.

86. Nancy Krieger et al., *Jim Crow and Premature Mortality Among the Black and White Population, 1960-2009: An Age-Period-Cohort Analysis*, 25 *EPIDEMIOLOGY* 494, 504 (2014).

87. Nancy Krieger et al., *Breast Cancer Estrogen Receptor Status According to Biological Generation: US Black and White Women Born 1915-1979*, 187 *AM. J. EPIDEMIOLOGY* 960–970 (2017).

---

---

include depression and post-traumatic stress disorder.<sup>88</sup>

#### 4. Effect on the overall quality of life

The Jim Crow regime negatively affected the living conditions of African Americans in their homes and neighborhoods. And in general, it infected them with a constant sense of inferiority and subjugation.

##### a. Housing and municipal services

Residences in the cities and towns of the Jim Crow South were commonly segregated by race (this was true in other parts of the country as well). That rule was mainly enforced not by law but by custom, backed by the threat of violence against those who violated it. Attempts to enact laws requiring residential segregation largely ceased after the Supreme Court in the 1917 case of *Buchanan v. Warley* held unconstitutional a Louisville ordinance forbidding African Americans to occupy houses in blocks where the majority of houses were occupied by whites.<sup>89</sup> After that, residential segregation in the South (and elsewhere) was legally imposed through restrictive covenants in property deeds.<sup>90</sup>

The neighborhoods where African Americans lived were usually inferior to those enjoyed by whites:

To find the black neighborhood in almost any town or city, one needed no map or signs. The streets in black districts were seldom if ever paved, and in rainstorms they were certain to turn into quagmires of mud. The housing was the least desirable, sometimes places discarded by whites.<sup>91</sup>

Those inferior living conditions were due in large part to racial discrimination by municipal governments. In the leading case of *Hawkins, v. Town of Shaw*,<sup>92</sup> the Fifth Circuit Court of Appeals held that a Mississippi

---

88. Yin Paradies, *Racism as a Determinant of Health: A Systematic Review and Meta-Analysis*, PLOS ONE (Sept. 23, 2015), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone>. Sociology Professor Ruth Thompson-Miller contends that traumatic experiences under Jim Crow can cause “segregation stress syndrome,” with symptoms similar to those of PTSD. See generally, RUTH THOMPSON-MILLER ET AL., *JIM CROW’S LEGACY: THE LASTING IMPACT OF SEGREGATION* (Rowman & Littlefield 2015).

89. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917). The Court reiterated that holding in *Harmon v. Tyler*, 273 U.S. 668 (1927).

90. The Supreme Court held in *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948), that court enforcement of those covenants violated the Fourteenth Amendment.

91. LITWACK, *supra* note 27, at 336.

92. *Hawkins v. Shaw*, 437 F.2d 1286 (5th Cir. 1971) (opinion by Judge Elbert Tuttle), *aff’d en banc per curiam*, 461 F.2d 1171 (5th Cir. 1972).

town had provided unequal services to its African American residents in such respects as street paving, streetlights, and provision of sewers, storm sewers, and drainage ditches. In a time when African Americans were scorned by whites and never held positions of authority in white-majority towns, this kind of unequal treatment was inevitable (and if this kind of discrimination occurred in the 1970s, when the *Hawkins* case was decided, it must have been much worse in the heyday of the Jim Crow system). Yet the federal courts found it difficult to come to grips with the issue for both practical and legal reasons.<sup>93</sup>

b. Overall Sense of Inferiority and Oppression

Some impacts of legally imposed segregation couldn't be measured but surely were very real. Chief Justice Earl Warren reflected one of these intangibles when he wrote in *Brown v. Board of Education* that "to separate [African American students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."<sup>94</sup>

There appear to be no recorded remarks by African Americans that endorse the Jim Crow segregation regime, except for those uttered to impress whites.<sup>95</sup> Remembrances by African Americans who lived under legally imposed segregation reflect sadness, bitterness, and regret.<sup>96</sup> While African Americans certainly had occasions when they enjoyed their lives, and while segregation fostered African American communities that some remembered with nostalgia,<sup>97</sup> an existence in which they were constantly reminded of their subordinate status left a bitter taste.

The eminent historian John Hope Franklin said about growing up in

---

93. The *Hawkins* case, in which a panel of the Fifth Circuit reversed the decision of a District Judge, reheard the case *en banc*, and finally reaffirmed *per curiam* with one judge (John Minor Wisdom) concurring specially, another concurring in part and dissenting in part, and three others concurring and dissenting in a separate opinion, illustrates these difficulties. See generally, CHARLES M. HAAR, *THE WRONG SIDE OF THE TRACKS* (Simon & Schuster 1986).

94. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

95. The African American leader Booker T. Washington maneuvered cannily in the era of Jim Crow, and sometimes appeared in dealing with whites to accept its restrictions. However, he actually believed that "segregation is ill-advised" and engaged behind the scenes in "extensive efforts against segregation and disenfranchisement." Booker T. Washington, *My View of Segregation Laws*, NEW REPUBLIC (Dec. 2, 1915), <https://newrepublic.com/article/103513/my-view-segregation-laws>; August Meier, *Toward A Reinterpretation of Booker T. Washington*, 23 J. OF S. HIST. at 220 (1957).

96. See generally, REMEMBERING JIM CROW, *supra* note 29.

97. See generally, COBB, *supra* note 24, at 261–287; LITWACK, *supra* note 27, at 374–403.

---

---

Oklahoma: “In my early years there was never a moment in any contact I had with white people that I was not reminded that society as a whole had sentenced me to abject humiliation for the sole reason that I was not white.”<sup>98</sup> The reality that routine interactions with white people involved constant humiliation, and that whites might unexpectedly inflict violence for which there was no redress, caused African Americans to live in a state of stress that affected their physical and mental health.<sup>99</sup>

The extraordinary lawyer, activist, writer, and scholar Pauli Murray wrote of her childhood in North Carolina:

We were bottled up and labeled and set aside—sent to the Jim Crow car, the back of the bus, the side door of the theater, the side window of a restaurant. We came to know that whatever we had was always inferior. We came to understand that no matter how neat and clean, how law abiding, submissive and polite, how studious in school, how church-going and moral, how scrupulous in paying our bills and taxes we were, it made no essential difference in our place.<sup>100</sup>

Dr. Martin Luther King said in his “Letter from a Birmingham Jail”:<sup>101</sup>

Perhaps it is easy for those who have never felt the stinging darts of segregation to say, “Wait.” But . . . when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six year old daughter why she can’t go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people; when you have to concoct an answer for a

---

98. JOHN HOPE FRANKLIN, *THE AUTOBIOGRAPHY OF JOHN HOPE FRANKLIN* 374 (Farrar, Straus and Giroux 2005).

99. Author James Agee movingly described the reaction of a young African American woman who was walking with a companion on a rural Alabama road in 1936, when Agee unthinkingly ran after them to ask a question: “the young woman’s whole body was jerked down tight as a fist into a crouch . . . eyes crazy, chin stretched tight, she sprang forward into the first motions of a running not human but that of a suddenly terrified wild animal.” JAMES AGEE & WALKER EVANS, *LET US NOW PRAISE FAMOUS MEN* 37–38 (First Mariner Books 2001).

100. PAULI MURRAY, *PROUD SHOES: THE STORY OF AN AMERICAN FAMILY* 270 (Beacon Press 1999).

101. “*Letter from a Birmingham Jail [King Jr.]*”, *AFRICAN STUD. CTR. – UNIV. OF PA.* (Apr. 16, 1963), [https://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html).

---

---

five year old son who is asking: “Daddy, why do white people treat colored people so mean?”; when you take a cross county drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading “white” and “colored”; when your first name becomes “nigger,” your middle name becomes “boy” (however old you are) and your last name becomes “John,” and your wife and mother are never given the respected title “Mrs.”; when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance, never quite knowing what to expect next, and are plagued with inner fears and outer resentments; when you are forever fighting a degenerating sense of “nobodiness”—then you will understand why we find it difficult to wait.

It is said that near the end of World War II, an African American GI was asked how Adolph Hitler should be punished if he were captured alive. He replied: “Paint him black and sentence him to life in Mississippi.”<sup>102</sup>

Louis Armstrong expressed his feeling in a sad song: “My only sin is in my skin. What did I do to be so black and blue?”<sup>103</sup>

In addition to the material and psychological injuries that were done to African Americans during the Jim Crow era, there were lingering, lifelong impacts. Life today surely is poorer for most of those who suffered under that regime than if they had experienced a more equal society. An inferior education, illiteracy, reduced economic opportunities, and the long-term consequences of oppression, stress, and inferior medical care have had impacts on wealth, jobs, health, and mental well-being.

### **III. SHOULD REPARATIONS INCLUDE REPARATIONS FOR SLAVERY?**

Many people believe that reparations to African Americans should include reparations for slavery. That question deserves serious attention.

#### **A. The Debate About Reparations for Slavery**

The debate about reparations for slavery goes back at least to the 1865

---

102. JERROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW* 229 (St. Martins Griffin 2002).

103. “Black and Blue” (1929) (music by Fats Waller, lyrics by Harry Brooks and Andy Razaf).

Field Order from Union General William Tecumseh Sherman that entitled former slaves to receive 40 acres of coastal land in South Carolina, Georgia, and Florida during the remainder of the Civil War.<sup>104</sup> Although the Order didn't mention mules, recently freed African Americans came to expect the proverbial "40 acres and a mule."<sup>105</sup> President Andrew Johnson returned the land to its former owners after the war ended, but others kept the idea of reparations alive.<sup>106</sup>

As was noted earlier, civil rights leader James Forman dramatically presented in 1969 a "Black Manifesto" that demanded payment of \$500 million in reparations for centuries of maltreatment of black Americans. That sum was to be paid by "the Christian white churches and the Jewish synagogues." It was not to be paid to individuals, but to support a variety of institutions that would strengthen the African American community.<sup>107</sup> Professor Bittker's book *The Case for Black Reparations*, inspired in part by Forman's demand, appeared a few years later.

In an initiative that is still ongoing, former Rep. John Conyers introduced at the beginning of each congressional session from 1989 to 2017 a bill, H.R. 40, which would establish a Commission to Study Reparations Proposals for African Americans. The preamble of the bill states that the Commission's task would be to "study and consider a national apology and proposal for reparations for the institution of slavery, its subsequent de jure and de facto racial and economic discrimination against African-Americans, and the impact of these forces on living African-Americans, [and] make recommendations to the Congress on appropriate remedies False"

Conyers resigned in 2017, but Rep. Sheila Jackson Lee introduced H.R. 40 again in January 2019 at the beginning of the 116th Congress.<sup>108</sup> As of September 2019, H.R. 40 had 116 cosponsors, all Democrats, including one presidential candidate. In April 2019, Sen. Cory Booker introduced a companion bill, S. 1083, in the Senate. By September 2019, S. 1083 had 16 cosponsors, 15 Democrats and one Independent; the sponsors included six presidential candidates.

---

104. *Order by the Commander of the Military Division of the Mississippi*, FREEDMAN & SOUTHERN SOCIETY PROJECT (Jan. 16, 1865), <http://www.freedmen.umd.edu/sfo15.htm>.

105. Devon McCurdy, *Forty Acres and a Mule*, BLACKPAST (Dec. 15, 2007), <http://www.blackpast.org/aah/forty-acres-and-mule>.

106. See, e.g., Miranda B. Perry, *No Pensions for Ex-Slaves: How Federal Agencies Suppressed Movement to Aid Freedpeople*, PROLOGUE MAG. (Summer 2010), <https://www.archives.gov/publications/prologue/2010/summer/slave-pension.html>; Roy E. Finkenbine, *Reparations for Slavery? It's an Old Idea*, HIST. NEWS NETWORK (2004), <https://history.newsnetwork.org/article/6393>; Garrine P. Laney, *Proposals for Reparations for African Americans: A Brief Overview*, CRS REP. (Aug. 27, 2008), [https://www.everycrsreport.com/files/20080827\\_RS20740\\_ec91e07ad3f40d3c39f445760d434fb690751c1d.pdf](https://www.everycrsreport.com/files/20080827_RS20740_ec91e07ad3f40d3c39f445760d434fb690751c1d.pdf).

107. BITTKER, *supra* note 1, at 159–176.

108. The current version is H.R. 40, 116th Cong. (2019).

---

---

If a study commission is established, there is a danger that it will become bogged down in contentious discussions of reparations for slavery and issues like housing discrimination and ignore the much less controversial issue of compensation for legally imposed segregation. It would be desirable for the commission to consider and report on the compensation issue separately and on an expedited schedule, especially in view of the advanced age of many of those who would be eligible for compensation.

In 1998, Tulane Law School Professor Robert Westley published an article entitled *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*<sup>109</sup> Professor Westley adopted a theoretical rather than a practical perspective. He suggested that African American reparations should be treated as “a legal norm reflecting and reinforcing the interests and perspectives of the subordinated,” and stated that his goal was to “reap the intellectual benefit of starting to talk more seriously about the relationship between race and class, even if actual material compensation remains the baseless fabric of a vision.”<sup>110</sup> He rejected the idea of “individual reparations as a primary policy objective,” and proposed that:

[A] private trust should be established for the benefit of all Black Americans. The trust should be administered by trustees popularly elected by the intended beneficiaries of the trust. The trust should be financed by funds drawn annually from the general revenue of the United States for a period not to exceed ten years. The trust funds should be expendable on any project or pursuit aimed at the educational and economic empowerment of the trust beneficiaries to be determined on the basis of need.<sup>111</sup>

In 2001 a book by African American activist Randall Robinson entitled *The Debt: What America Owes to Blacks*<sup>112</sup> became a best seller and prompted much discussion. Robinson described eloquently the material and psychological harm suffered by African Americans due to slavery, Jim Crow, and other forms of racial discrimination. In addition to a “full-scale reparations debate” that would have a cathartic effect, he called for massive reparations. “[T]here are billions of dollars owed to Africa and the descendants of slaves for pain and suffering, for the value of slaves’ work, and for wealth lost in a post-slavery environment of government-approved

---

109. Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations*, 19 B.C. THIRD WORLD L.J. 429 (1998).

110. *Id.* at 432, 437.

111. *Id.* at 470.

112. RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (Penguin 2001).

---

---

racial discrimination.”<sup>113</sup>

Concerning the form of these reparations, Robinson endorsed Professor Westley’s proposal for a private trust. Robinson proposed that the trust should engage in specific types of educational and other activities that would benefit all African Americans.<sup>114</sup>

In a widely read 2014 article in *The Atlantic* entitled “The Case for Reparations,”<sup>115</sup> author Ta-Nehisi Coates described the discrimination encountered by African Americans not only under slavery and Jim Crow but also in recent decades, due primarily to unequal access to housing. After recounting the failure of lawsuits to obtain reparations from governments and corporations, Coates ended not with a specific reparations proposal but with a call for a congressional debate, because “the crime with which reparations activists charge the country . . . implicates the entire American people [and] deserves its hearing in the legislative body that represents them.” He declared:

John Conyers’s HR 40 is the vehicle for that hearing. No one can know what would come out of such a debate. Perhaps no number can fully capture the multi-century plunder of black people in America. Perhaps the number is so large that it can’t be imagined, let alone calculated and dispensed. But I believe that wrestling publicly with these questions matters as much as—if not more than—the specific answers that might be produced.

In June 2019, the House Judiciary Committee finally held hearings on H.R. 40.<sup>116</sup> The Committee heard from nine witnesses and received written testimony from others.

Many people oppose reparations for slavery. Shortly after James Forman issued his 1969 call for \$500 million in reparations, the respected labor and civil rights leader Bayard Rustin responded: “The idea of reparations is a ridiculous idea. If my grandfather picked cotton for 50 years, then he may deserve some money, but he’s dead and nobody owes me anything.”<sup>117</sup>

Activist David Horowitz has offered “Ten Reasons Why Reparations for Blacks is a Bad Idea for Blacks - and Racist, Too!”<sup>118</sup> Conservative author

---

113. *Id.* at 244.

114. ROBINSON, *supra* note 112, at 244–46. *See also* ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 141–79 (U. of Cal. Press 2004).

115. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC, June 2014.

116. *H.R. 40 and the Path to Restorative Justice Before the H. Comm. on the Judiciary*, 116th Cong. (2019).

117. ‘Reparations’ Move Deplored by Rustin, N.Y. TIMES, May 9, 1969, at 44.

118. Horowitz’s reasons are set forth in Charles P. Henry, LONG OVERDUE: THE POLITICS

---

---

Dinesh D’Souza rejected reparations because today’s African Americans “are better off as a consequence of their ancestors being hauled from Africa to America.”<sup>119</sup>

Professor John McWhorter made a reasoned case for opposing reparations—at least in the form of payments to individuals—in a 2001 review of Randall Robinson’s *The Debt*.<sup>120</sup> He made the point, also asserted by Horowitz, that “for almost forty years America has been granting blacks what any outside observer would rightly call reparations,” in the form of programs enacted as part of the War on Poverty and especially “a huge and historic expansion of welfare.” McWhorter noted that African Americans have made great economic progress in the past 60 years, with many moving solidly into the middle class. Accordingly, he argued for “a plan of black reparations” that wouldn’t include compensation for individuals but would emphasize existing governmental and private efforts to help African Americans prepare for jobs, buy their own homes, start small businesses, and get scholarships. In addition, he proposed that “affirmative action policies—of the thumb-on-the-scale variety designed to choose between equally qualified candidates—be imposed in businesses, where subtle racism can still slow promotions”; and recommended actions to “ensure that black children had access to as good an education as possible.”

### **B. Difficult Issues Concerning Reparations for Slavery**

Putting aside heated rhetoric and the more outlandish arguments, the issue of reparations for slavery presents difficult moral, political, and practical issues. Among these issues are:

*Why should we provide reparations for a practice that ended a very long time ago?* Some opposition, or indifference, to reparations for slavery is based on the fact that America’s “peculiar institution” was abolished by the Thirteenth Amendment more than 150 years ago. The issue lacks immediacy and emotional appeal because there are no living ex-slaves who can testify to their own suffering or receive compensation for it. Some ask why this generation of Americans, whose ancestors (or they themselves) may have come to this country after the end of slavery or whose forebears may have opposed slavery and fought for the Union in the Civil War, should pay reparations for an evil that ended long ago.

---

OF RACIAL REPARATIONS 112–16 (NYU Press 2009); *The Controversial Anti-Reparations Ad* by David Horowitz, Adversity.Net (Mar. 12, 2001), [http://www.adversity.net/reparations/anti\\_reparations\\_ad.htm](http://www.adversity.net/reparations/anti_reparations_ad.htm).

119. DINESH D’SOUZA, *AMERICA: IMAGINE A WORLD WITHOUT HER* 134 (Regnery Publishing 2014).

120. John McWhorter, *Against Reparations*, THE NEW REPUB., July 23, 2001.

---

---

*The problems faced by today's African Americans may not be due to slavery.* Some people contend that the present-day ills of African Americans are too removed from the days of slavery for there to be a significant causal connection. They point to the success achieved by many individual African Americans, harm caused by drug use and black-on-black crime, and other factors to argue that individual behaviors, not slavery, are the cause of present-day problems.

*What is the rationale for reparations?* If our government is to pay reparations for slavery, it's important to be precise about what it would be compensating for and what we can expect to achieve. We must keep in mind that:

- The suffering of slaves was extremely, almost unimaginably horrible, but no present-day reparations program can do anything to ease that suffering.
- Some people argue that reparations should encompass not just slavery but all the harm done to African Americans by racist practices, including legally imposed segregation, and perhaps even racist practices up to the present day.<sup>121</sup> If reparations are to have such a wide scope, proponents should make that clear and address the argument that those harms have been remedied in recent years by affirmative action and other governmental and private efforts.
- The effect of reparations for slavery will be limited. Reparations won't be a *deus ex machina* that sweeps away all, or most, of the problems faced by African Americans today.

*Are there more pressing national needs?* There are limitations on our society's resources, and in particular on the federal budget. The Congress would have to decide whether the need to spend large sums on reparation for slavery outweighs other priorities.

If reparations for slavery are to be paid to individuals, additional issues include:

*Who should be eligible?* There would be questions about the eligibility of some individuals.<sup>122</sup> Examples include:

---

121. H.R. 40 calls for a study of the possible need for reparations due to “the institution of slavery . . . the de jure and de facto discrimination against freed slaves and their descendants from the end of the Civil War to the present, including economic, political, educational, and social discrimination,” and “the lingering negative effects of the institution of slavery and . . . discrimination False” H.R. 40, 116th Congress, §§ 2(b)(1)-(3) (2019). The previous discussion suggests that Robinson and Coates believe in a wide scope for reparations.

122. To begin with, reparations for slavery would be limited to the descendants of slaves, or at least to those people plus others who suffered under Jim Crow. Recent African American immigrants to the United States—estimated to number 3.8 million—would not be included.

- 
- 
- A person whose ancestors included slaves but whose family has been considered for generations to be white. Would such a “white” person be entitled to slavery reparations if evidence, such as a DNA test, revealed some slave ancestry?
  - A person some of whose ancestors were slaves in the United States but who was born and has always lived outside the United States.
  - A person who had some ancestors who were slaves and some who were not. If we assume that six generations have passed since the end of slavery, people alive today would have 64 ancestors over that time span. Would one slave ancestor among the 64 be enough to qualify for reparations? If not, how many would be needed?

Out of tens of millions of potentially eligible individuals, people in all of these categories are bound to be included. Some Americans might object to having their taxes used to provide reparations to some of them.<sup>123</sup>

*What amount should be paid to each eligible person?* The amount could vary from a token sum to a very large figure, and could be calculated by a variety of methods:

- We can extrapolate from my very rough estimate, set forth in Part VI below, that reparations to the five million or so living African Americans who were subject to legally imposed segregation, in amounts comparable to those received by Japanese Americans who were unjustly interned during World War II, might cost more than \$100 billion. Altogether, the U.S. population now includes more than 43 million African Americans. If most of them were eligible for a comparable amount of “slavery reparations,” the total cost might approach a trillion dollars.
- In *The Case for Black Reparations*, Professor Bittker suggested that, based on the discrepancy in annual income between whites and African Americans, the yearly cost of a comprehensive “black reparations” program might total \$34 billion (or about \$196 billion in 2019 dollars), and that the program should

---

123. Duke University economics professor William Darity, Jr., has proposed that to be eligible “an individual must demonstrate that they have at least one ancestor who was enslaved in the United States [and] that for at least ten years prior to the onset of the reparations program or the formation of the study commission, whichever comes first, they self-identified as black, Negro, or African-American.” Written testimony submitted to the House Judiciary Committee at hearing, *supra* note 116.

---

---

“continue at a significant level for at least a decade or two.”<sup>124</sup>

- A reparations program aimed at eliminating the current wealth gap between white and African American households—about \$153,400 per household—would have a one-time cost of about \$2.6 trillion.<sup>125</sup>

Some people assert that African Americans are owed trillions of dollars for “lost wages” not paid to slaves. Professor Thomas Craemer has estimated the present value of U.S. slave labor in 2009 dollars to range from \$5.9 to \$14.2 trillion.<sup>126</sup>

*Would a government program that provided reparations for slavery be constitutional?* The rationale for slavery reparations is that African American slaves were deprived of wealth, and that their descendants are entitled to receive some sort of recompense for that loss. It follows that the beneficiaries of a program providing those reparations would all be African Americans. The Supreme Court has held that when governmental benefits are given to members of a specific racial group, the program in question must undergo “strict scrutiny” and “must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”<sup>127</sup> It is unclear whether a statute providing reparations to individual descendants of slaves, or to descendants of slaves as a group, would survive that kind of scrutiny, even in light of its remedial purpose.<sup>128</sup>

*Problems with group reparations.* A decision to opt, in whole or in part, for group reparations would present its own difficulties:

- *How can the benefits of reparations be limited to descendants of slaves?* The rationale for “slavery reparations” is that slavery

---

124. BITTKER, *supra* note 1, at 131.

125. The \$153,400 gap in household wealth is from U.S. Federal Reserve Board, Federal Reserve Bulletin, September 2017, “Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finance” (table showing median net worth in 2016 by race or ethnicity of respondent). The number of households (16,997,000) is from U.S. Census Bureau, Historical Households Tables, Table HH-2: Households, by Race and Hispanic Origin of the Householder, 1970 to Present (Nov. 2018).

126. Thomas Craemer, *Estimating Slavery Reparations: Present Value Comparisons of Historical Multigenerational Reparations Policies*, 96 SOC. SCI. Q. 639, 639–55 (2015).

127. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). *See also* *Fisher v. University of Texas*, 570 U.S. 297 (2013).

128. A leading civil rights advocate has noted that the Supreme Court in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), rejected the argument that a government may rely on a racial classification to “remedy the effects of ‘societal discrimination.’” Lee C. Bollinger, *What Once Was Lost Must Now Be Found: Rediscovering an Affirmative Action Jurisprudence Informed by the Reality of Race in America*, 129 HARV. L. REV. FORUM, 281 (2016). *See also* Noah Feldman, *Justifying Diversity*, THE N.Y. REV. OF BOOKS, Dec. 6, 2018 at 27.

---

---

has lingering effects on the descendants of its victims. Yet it would be hard to limit the benefits of group reparations to those persons without including others, such as the millions of African Americans who immigrated to the United States after the end of slavery and their descendants. Some proponents of group reparations have suggested that they should benefit “all African Americans.”<sup>129</sup> However, making all African Americans the beneficiaries lends credence to the argument of Professor John McWhorter and others that reparations have already been paid by means of the large sums that have been spent on the War on Poverty and expanded welfare programs.<sup>130</sup>

- *What should be the total amount of reparations?* The total would have to be very large to be meaningful, but there is no obvious basis for calculating it. Possible methods include those described in the preceding discussion of individual reparations.
- *How should the reparations be spent?* It would be hard to decide how to spend tens or hundreds of billions of dollars for the benefit of all eligible African Americans, who might include just the descendants of slaves or all of those previously subject to racial discrimination. The issues include: Should the money be disbursed to existing institutions or should new ones be created? If the former, which institutions should benefit? If the latter, what should the new institutions look like and who should run them? In either case, should reparations be used to strengthen existing efforts or to fund new ones? And, perhaps most difficult of all, who should make these decisions, and by what process?

#### IV. CAN COMPENSATION BE OBTAINED THROUGH LAWSUITS?

Some people have suggested that lawsuits might be a viable way of obtaining broad-scale compensation for slavery and/or segregation. In *The Case for Black Reparations*, Professor Bittker explored at length the possibility that reparations might be obtained under Section 1983 of Title 42 of the United States Code.<sup>131</sup> Bittker found potential obstacles to such a lawsuit, and reached no firm conclusion.<sup>132</sup>

---

129. See, e.g., Westley, *supra* note 109.

130. See McWhorter, *supra* note 120, and accompanying text.

131. See BITTKER, *supra* note 1, 30–70.

132. Today, as Professor Bittker recognized in the revised edition of his book, such lawsuits would almost certainly be barred by the applicable statute of limitations, which usually is the forum state’s personal injury statute of limitations. See *Wilson v. Garcia*, 471

A 2003 article by Harvard Law School Professor Charles Ogletree discussed lawsuits as a means of obtaining reparations, as well as other aspects of the reparations issue.<sup>133</sup> Ogletree argued that the distinction between reparations for slavery and for *de jure* segregation may be illusory from a theoretical point of view. However, he concluded that “[r]eparations suits are most likely to be successful when the broad redress sought can be presented in narrow legal claims.”<sup>134</sup>

Plaintiffs in lawsuits seeking reparations may encounter a variety of legal problems:<sup>135</sup>

- the suit may be barred by the statute of limitations;
- it may be hard to prove causation or to calculate the appropriate amount of compensation;
- there may be difficulty in specifying the parties, including a lack of directly harmed plaintiffs or the absence of living perpetrators of the alleged harm;
- the plaintiff may be found to lack standing;
- if the United States is a defendant, it may not have waived its sovereign immunity.

The latter three grounds were cited by the Court of Appeals for the Ninth Circuit in *Cato v. United States*,<sup>136</sup> in which the court denied relief to plaintiffs seeking \$100,000,000 to compensate for the effects of slavery. The court found that Cato lacked standing because she alleged only a “generalized, class-based grievance,” not a “concrete, personal injury that is not abstract and that is fairly traceable to the government conduct”; and that the United States had not waived its sovereign immunity.

Similarly, in a consolidated case titled *In Re African American Slave Descendants Litigation*,<sup>137</sup> descendants of slaves sued seventeen prominent corporations, alleging that they had been unjustly enriched by slavery and the trans-Atlantic slave trade. The court denied relief on multiple grounds,

---

U.S. 261 (1985); see BITTKER, *supra* note 1, at xiv.

133. Charles J. Ogletree Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003). For other analyses of the viability of reparations lawsuits, see BITTKER, *supra* note 1; Kaimipono David Wenger, “*Too Big to Remedy?*”: *Rethinking Mass Restitution for Slavery and Jim Crow*, 44 LOYOLA L.A. L. REV. 177 (2010); Tuneen E. Chisolm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677 (1999).

134. Ogletree, *supra* note 133, at 319.

135. See BITTKER, *supra* note 1, 30–70

136. *Cato v. U.S.*, 70 F.3d 1103 (1995).

137. *In Re African American Slave Descendants Litigation*, 375 F. Supp. 2d 721 (N.D. Ill. 2005).

---

---

holding, *inter alia*, that the plaintiffs lacked standing; the case presented a political question best resolved by other branches of government; the plaintiffs didn't state a claim on which relief could be granted; and the claim was barred by the applicable statutes of limitations.

The statute of limitations may pose an obstacle not just to suits seeking reparations for slavery but also in cases where living individuals claim to have been directly harmed. In a notable example, a legal team that included Professor Ogletree and renowned litigator Johnny Cochran brought a federal lawsuit in 2003 on behalf of black survivors of the infamous 1921 Tulsa Race Riot, seeking monetary damages and declaratory and injunctive relief. Despite noting that the case presented "difficult facts" and declaring that it took "no great comfort" in its decision, the U.S. Court of Appeals for the Tenth Circuit held that the suit was barred by the Oklahoma's two-year statute of limitations.<sup>138</sup> The court denied the plaintiffs' claim that the statute of limitations should be tolled due to "extraordinary circumstances," finding that "[m]eaningful access to the courts was denied False for several decades" after the riot, but the plaintiffs were not "prohibited from accessing the courts in the 1970s, 1980s, or 1990s."<sup>139</sup>

In this connection, it's worth asking why lawsuits for injuries due to the impacts of Jim Crow laws weren't brought at earlier times, when they wouldn't have been barred by statutes of limitations. Given the possibility that courts might have tolled those statutes during the Jim Crow era, on the ground that legal remedies weren't realistically available because of plaintiffs' credible fear of retaliation, that time might have been in the 1960s or 1970s, as suggested in the Tenth Circuit opinion just cited.

One can think of several reasons why lawsuits weren't brought earlier. One is that the officials who caused the harm were acting under the authority of state and local segregation laws that had been held constitutional by the Supreme Court in the 1896 case of *Plessy v. Ferguson*. Having upset the southern applecart and caused political upheaval by holding those laws unconstitutional, the federal courts were unlikely to rub salt in the wound by holding that state and local governments were acting illegally even before the Supreme Court's 1954 decision in *Brown v. Board of Education*. More generally, Americans who believed that the Jim Crow system was wrong may have thought that, having decided that that system must end, our society should look forward, not back.<sup>140</sup> As a practical matter, civil rights lawyers

---

138. *Alexander v. Okla.*, 382 F.3d 1206, 1216-20 (10th Cir. 2004).

139. *Id.* at 1219-20.

140. Jerrold Packer, author of the 2003 book *American Nightmare: The History of Jim Crow*, has said: "When I told my friends of my plans to write a book on Jim Crow, the first question my asked me was *Why?* . . . *How come you want to write about something most people have, thank God, forgotten?*" PACKARD, *supra* note 102, at vii (St. Martins Griffin 2002).

---

---

and advocates were busy during the years before 1970 pursuing cases to abolish segregation of all kinds at the local level, helping African Americans gain the right to vote, and lobbying for the major civil rights laws of the 1960s. And it may be that the victims of legally imposed segregation didn't want to revisit an unhappy period in their lives.<sup>141</sup>

#### A. The Near-Term Outlook for “Slavery Reparations “Is Dim

The debate about reparations for slavery—and sometimes about reparations for slavery and Jim Crow and other forms of discrimination—continues. A quick search on the internet turns up dozens of references to recent or ongoing discussions of reparations. Amazon lists well over 100 books on the subject, and more are in prospect.<sup>142</sup> In 2016 PBS aired a televised “POINT/Counterpoint” debate asking: “Should the U.S. Pay Reparations to Black Americans?”<sup>143</sup>

Views on the reparations issue appear to be split along racial lines. A Marist poll conducted in May 2016 found that 58% of the African Americans polled were in favor of reparations, while 81% of whites opposed them.<sup>144</sup>

The only progress at the federal level has been that in 2008 and 2009 the House and Senate passed separate resolutions apologizing effusively for slavery and legally imposed racial segregation.<sup>145</sup> However, neither resolution opens the door to consideration of reparations; in fact, the Senate resolution states that it provides no support for “any claim against the United States.”

The foregoing discussion demonstrates why academics, lawyers, activists, and others continue to disagree as to whether reparations for slavery are practicable or morally justified. These disagreements are profound. Reading and viewing the recent arguments about the issue leaves the impression that wheels are spinning without any traction or forward motion.

When public opinion is split, proponents of action on civil rights often

---

141. It is notable that all of the efforts described in this article to obtain reparations through legislation—those concerning the Tulsa Race Riot of 1921, the Rosewood Massacre of 1923, and the internment of Japanese Americans during World War II—were launched many decades after the events at issue. And the preceding explanation why lawsuits weren't brought earlier suggests why there were no calls for legislation authorizing broad-scale reparations for Jim Crow segregation.

142. See, e.g., *For Reparations: A Conversation with William A. Darity Jr.*, NEXT SYSTEM PROJECT (Mar. 10, 2017), <https://thenextsystem.org/for-reparations>.

143. POINT TAKEN: SHOULD THE US PAY REPARATIONS TO BLACK AMERICANS?, <http://www.pbs.org/wgbh/point-taken/should-us-pay-reparations-black-americans/#watch> (last visited Jan. 31, 2020).

144. See Marist Poll, *5/10: Reparations for Slavery in the United States?*, (May 10, 2016), <http://maristpoll.marist.edu/510-reparations-for-slavery-in-the-united-states/>. The poll found stronger support for reparations from Millennials than from older generations.

145. H.R. Res. 194, 110th Cong. (2008); S. Con. Res. 26, 111th Cong. (2009).

---

---

have looked to the courts. However, the lack of success to date suggests that the chance of obtaining broad-scale reparations for slavery or for legally imposed segregation through litigation is very small.

Legislation might be a route to reparations for slavery. However, the serious disagreements about the need for slavery reparations, and the fact that polls indicate that a substantial majority of Americans reject the idea, suggest that it would be impossible in the near term to assemble the congressional majorities necessary to pass a law authorizing meaningful reparations for slavery. It's hard to imagine a catalyst that would galvanize the public to support a law granting slavery reparations in the near future. The repeated failure to obtain a congressional hearing for H.R. 40, which would require only a study of reparations for slavery and other forms of discrimination, confirms that pessimistic outlook.

### **B. The Advantages of a Law Authorizing Compensation for Legally Imposed Segregation**

A major purpose of this article is to explore ways of providing justice for victims of legally imposed segregation. In light of the practical and political obstacles to gaining reparations for slavery, it appears that Professor Bittker was correct when he asserted, in a passage quoted more fully above, that “[t]he preoccupation with slavery . . . has stultified the discussion . . . by implying that the only issue is correction of an ancient injustice.”<sup>146</sup>

The history of reparation lawsuits recounted above strongly suggests that there is little chance of obtaining meaningful, broad-scale reparations for the victims of legally imposed segregation, much less for the descendants of slaves, through lawsuits. Hence, it seems clear that the most promising and effective way of obtaining redress for the victims of legally imposed segregation is through enactment of a federal law.

Moreover, it appears that use of the word “reparations” is likely to obscure the purpose of the statute proposed here. To many people, “reparations” connotes a sweeping atonement for past sins. As noted previously, the Congress has already acknowledged the injustice of and apologized for *de jure* racial segregation. The aim of the statute proposed here is simply to provide *compensation*, in the form of monetary payments, for the injuries suffered due to that injustice. Accordingly, the term “compensation” will be used in the discussion that follows.

A federal statute authorizing compensation for legally imposed segregation would have many advantages. It would be immune from most of the objections raised against reparation for slavery:

---

146. BITTKER, *supra* note 1, at 9.

- 
- 
- There are living people who could testify to the harm they suffered due to legally imposed segregation.
  - The occurrence and nature of the harm for which people are being compensated would be relatively easy to prove.
  - The governmental entities responsible for legally imposed segregation are readily identifiable.
  - As discussed in Part V below, there is a strong argument that compensation should be paid by the United States Government, not by state and local governments.
  - The task of determining who should be eligible for compensation, while not free of difficulty, would be much easier. That issue is discussed in Part VI below.

A statute authorizing compensation for legally imposed segregation would sweep away many of the impediments cited by the courts in ruling against plaintiffs seeking reparations via lawsuits. The Congress could render irrelevant questions of standing, statutes of limitations, and sovereign immunity. It could define who is entitled to compensation, how much each eligible person should receive, and who is obliged to pay.

Two important precedents, described in more detail in Part VII below, bolster the conclusion that legislation is the most promising approach:

- The most notable instance in which compensation was paid to individual African Americans for a racial injustice, the payments made by the State of Florida to the victims of the 1923 Rosewood Massacre, resulted from a law passed by the Florida Legislature in 1994.
- The leading example of compensation at the federal level, the \$20,000 paid to each living Japanese American who had been unjustly interned during World War II, resulted from congressional enactment of the Civil Liberties Act of 1988.

The key question is whether a federal law authorizing compensation for legally imposed segregation can, like the Civil Liberties Act of 1988, command a majority in each house of Congress. The answer to that question depends on whether a majority of Americans, or a large, sufficiently influential minority, can be persuaded to back it.

From the perspective of gaining support from the public and politicians, the statute proposed here—a law that would authorize compensation for the harm caused by legally imposed segregation—has the major appeal that it would provide justice in accord with traditional American legal doctrines and

---

---

what most people see as common sense. Our legal system emphasizes the principle that those who have been wrongly injured are entitled to receive compensation for that injury if four conditions are satisfied: (1) the party causing the injury has a duty to the plaintiff, (2) the party causing the injury has breached that duty, (3) the breach of duty caused the injury, and (4) the injury has resulted in actual damages to the plaintiff, including economic loss or emotional distress.<sup>147</sup> This is sometimes called the “tort model.” An archetypal example is the case of a driver who is texting behind the wheel, doesn’t see a pedestrian in a crosswalk, strikes the pedestrian, and causes serious injuries.

Compensation for the harm done to African Americans by legally imposed segregation generally fits this model. The latter two elements—causation and injury causing damages—are present. It’s true that the first element, a duty to the injured person, is problematic because the government officials who created and administered the machinery of legally imposed segregation owed no contemporaneous legal duty to the African Americans they injured. However, the Congress can provide the missing link by declaring, as it did with respect to the internment of Japanese Americans, that legally imposed segregation constituted a “grave injustice” that caused great harm to its victims and thus warrants compensation for that harm.<sup>148</sup>

Some commentators have criticized the tort law model. For example, San Diego Law School professor Roy L. Brooks believes that the tort model suffers from a “moral deficiency.” He favors an “atonement” model that would be “about apology *first and foremost*” and has racial reconciliation as its main purpose.<sup>149</sup>

While a compensation law based on the tort model may be open to theoretical objections, it accords with most Americans’ idea of justice for those who have been injured by the actions of others. It is also likely to appeal to Members of Congress. The Civil Liberties Act of 1988 that provided compensation to members of a racial minority—in that case Japanese Americans who were wrongly injured by the actions of government officials—had the same basic appeal to Americans’ sense of fairness. Grayce Uyehara, the coordinator of the lobbying campaign that obtained Japanese American reparations, put it well when she said: “When you come down to simple justice . . . in this country, when you have been wronged . . . , then

---

147. See, e.g., Ronald B. Stadler, *Elements of Torts in the USA* (2011), available at <http://www.rbs2.com/torts.pdf>.

148. See Civil Liberties Act of 1988 § 2(a), *supra* note 7. Both the House and the Senate have already passed resolutions acknowledging “the fundamental injustice, cruelty, brutality, and inhumanity of . . . Jim Crow . . .” H.R. Res. 194, 110th Cong. (2008); S. Con. Res. 26, 111th Cong. (2009).

149. See ROY L. BROOKS, *ATONEMENT AND FORGIVENESS* 142 (U. of Cal. Press 2004).

---

---

there is payment. That's the way our system works."<sup>150</sup>

The example of the Civil Liberties Act of 1988 also demonstrates that this kind of compensation regime would be feasible and constitutional. There are remaining issues, some of which are discussed in Part VI below, but they can be resolved by a study commission or in the course of congressional hearings and debates.<sup>151</sup>

It's important to note that a federal law authorizing compensation for African Americans who were subjected to legally imposed segregation would not preclude reparations for slavery. In fact, the debate about compensation for segregation might increase the likelihood of slavery reparations in the future. One is reminded of the adage that "the best is the enemy of the good."

### C. Compensation for Legally Imposed Segregation Should Be a National Priority

The United States has many important priorities. To win passage, the law suggested here must rank high among those goals. There is a powerful reason why it deserves to do so: **Our nation, by imposing racial segregation as a matter of law, intentionally did great harm to African Americans, many of whom are still living. The physical, economic, and psychological effects of that experience diminish their quality of life to this day. There is a moral imperative to remove this blot on our national character by providing compensation for this injury to our fellow citizens.**

A similar moral imperative was recognized in 1988, when the U.S. Congress passed and President Reagan signed legislation requiring payment of \$20,000 to each living Japanese American who was compelled by the Federal Government to live in internment camps during World War II because of a mistaken belief that Japanese Americans weren't loyal to the United States. The Civil Liberties Act of 1988<sup>152</sup> stated that "a grave injustice was done" by the internment and entitled each living former internee to a Presidential apology and a payment of \$20,000.

The foregoing makes it abundantly clear that, as in the case of Japanese American internees, a grave, racially inspired injustice was done to African

---

150. LESLIE T. HATAMIYA, *RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988* 152 (Stan. U. Press 1993).

151. Despite the advantages of the kind of federal reparations statute proposed here, the author has found only one clear endorsement of that approach, by sociologist and Professor of Social Work Katherine S. van Wormer. See Katherine S. van Wormer, *Reparations for African American Survivors of Jim Crow?*, PSYCHOL. TODAY (Nov. 17, 2017), <https://www.psychologytoday.com/blog/crimes-violence/201406/reparations-AfricanAmerican-survivors-jim-crow>.

152. Civ. Liberties Act of 1988 § 2(a), *supra* note 7.

---

---

Americans who were forced until the 1950s, the 1960s, or even the 1970s<sup>153</sup> to live under legally imposed segregation regimes. Like the Japanese American internees, those African Americans “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.”<sup>154</sup> Like the Japanese American internees, these African Americans deserve compensation. To treat African Americans who suffered because of unjust, racially motivated, legally imposed segregation, less generously than Japanese Americans who suffered because of unjust, racially motivated, legally imposed internment, would be to treat them as second-class citizens, forgotten victims of a horrendous wrong. African Americans have had enough of that.

## V. WHY THE UNITED STATES GOVERNMENT SHOULD PAY

With the important exceptions of the District of Columbia, the armed forces, and federal employment, segregation was directly mandated not by the Federal Government but by state and local governments. It might be argued that those states and localities should pay any compensation that is owed. However, there are powerful arguments why the Federal Government should pay.

### A. Failure to Fulfill Its Constitutional Responsibilities

The American nation as a whole, and the Federal Government in particular, was deeply implicated in legally imposed segregation. The Fourteenth Amendment forbade any state to “deny to any person within its jurisdiction the equal protection of the laws.” Its central objective was to secure equal rights for African Americans. The Fifteenth Amendment by its terms guaranteed African Americans the right to vote. Both amendments gave Congress the power to enforce them by “appropriate legislation.” Yet, with a few exceptions, all three branches of the Federal Government ignored this obligation to African Americans and failed to redeem these solemn promises until the 1950s and 1960s. Dr. Martin Luther King said in his 1963 “I Have a Dream” speech: “It is obvious today that America has defaulted on [a] promissory note, insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked ‘insufficient funds.’”

### B. Direct Role in Important Forms of Discrimination

---

153. Alexander, *supra* note 9.

154. Civ. Liberties Act of 1988 § 2(a), *supra* note 7.

In addition to its sins of neglect, the Federal Government played a direct role in important forms of racial discrimination during the Jim Crow era.

*Racial segregation in the District of Columbia.* The Federal Government was directly responsible for racial segregation in the District of Columbia, a federal territory. Much of that segregation occurred by custom, under the watchful eyes of southern Members of Congress who shaped federal policy concerning the District.<sup>155</sup> School segregation in the District was mandated by law and persisted until the Supreme Court found it unconstitutional in 1954.<sup>156</sup>

*Segregation in the federal work force.* The Federal Government is accountable for past segregation in the federal work force. After Virginia-born Woodrow Wilson became President in 1913, his Administration segregated employees by race in federal offices in Washington, D.C. There was special concern that white women not work near or be supervised by African American men.<sup>157</sup>

*Segregation in the armed forces.* The United States armed forces were segregated until 1948.<sup>158</sup> Some African American veterans who served in segregated units are still alive.

*Segregation in VA hospitals.* Veterans Administration hospitals in the South were segregated after the Supreme Court endorsed “separate but equal” treatment of African Americans in *Plessy v. Ferguson*. In 1923 a separate hospital was opened in Tuskegee, Alabama, for African American veterans. Only in 1953, as part of an initiative by the Eisenhower Administration, did the VA Administrator order hospital directors to discontinue segregation.<sup>159</sup>

*Separate, unequal practices of the Department of Agriculture.* The Southern economy during the Jim Crow era was primarily agricultural. The U.S. Department of Agriculture provided extremely important support to

---

155. For example, Mississippi Senator Theodore Bilbo, an arch-segregationist, chaired the Senate’s Committee on the District of Columbia from 1945 to 1947, and described himself as the “mayor ex officio” of the District. See JASON MORGAN WARD, *DEFENDING WHITE DEMOCRACY: THE MAKING OF A SEGREGATIONIST MOVEMENT AND THE REMAKING OF RACIAL POLITICS, 1936-1965*, 67-91 (Univ. of N.C. Press 2011).

156. *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), in which the Court relied on the Due Process Clause of the Fifth Amendment because the Equal Protection Clause of the Fourteenth Amendment doesn’t apply to the District of Columbia and other territories.

157. See ERIC S. YELLIN, *RACISM IN THE NATION’S SERVICE*, 80–172 (U. of N. C. Press 2013).

158. President Truman desegregated the U.S. armed forces in 1948 by issuing Executive Order 9981. MORRIS J. MACGREGOR, JR., *INTEGRATION OF THE ARMED FORCES 1940-1965*, 291 (Cent. of Mil. Hist., U.S. Army 2001).

159. See U.S. Veterans Admin., *End of Racial Segregation in VA Hospitals*, (Mar. 27, 2017), <https://www.pittsburgh.va.gov/about/va-history/end-of-racial-segregation.asp>.

---

---

Southern farmers through the Cooperative Extension Service, administered through land-grant colleges; the Farmers Home Administration, which provided loans to farmers; the Soil Conservation Service; and the Agricultural Stabilization and Conservation Service (ASCS), which administered acreage allotments and price supports for farmers who grew the South's most important crops—cotton, tobacco, and peanuts.

These USDA programs were extensive and highly influential. All of them operated at the county level, so that *in toto* they constituted the most significant federal presence in the rural South. A commentator stated in 1962 that “in many areas county government operations are dwarfed by ASC[S] programs as measured in dollar expenditures or impact on residents or both.”<sup>160</sup>

A 1965 report by the U.S. Commission on Civil Rights found that in the South all of these programs were riddled with discrimination against African Americans.<sup>161</sup> At that time, eleven years after the Supreme Court's decision in *Brown v. Board of Education*, all of the programs were administered on a racially segregated and unequal basis. African Americans generally received inferior services administered by numerically inadequate African American staffs operating out of racially separate offices. In several states, agricultural extension services to African Americans were provided by a “Negro Extension Service” administered through the state's African American land-grant college. The ASCS had no permanent African American employees in the South. African Americans seldom if ever were appointed or elected to committees that made key decisions in USDA programs at the county and conservation district levels.

The Civil Rights Commission concluded:

For decades the general economic, social, and cultural position of the southern Negro farmer and rural resident in relation to his white neighbor has steadily worsened. . . . [T]he gap between Negro and white rural residents in the South has increased during the very period when the programs of the Department were helping thousands of rural white families to achieve substantial gains in income, housing, and education. As the group most depressed economically, most deprived educationally, and most oppressed socially, Negroes have been consistently denied access to many services, provided with inferior services when served, and

---

160. U.S. COMMISSION ON CIV. RTS, ED068206, EQUAL OPPORTUNITY IN FARM PROGRAMS: AN APPRAISAL OF SERVICES RENDERED BY AGENCIES OF THE UNITED STATES DEPARTMENT OF AGRICULTURE (1965).

161. *Id.* at 105–08. See also PETE DANIEL, DISPOSSESSION: DISCRIMINATION AGAINST AFRICAN AMERICAN FARMERS IN THE AGE OF CIVIL RIGHTS (U. of N.C. Press 2013).

---

---

segregated in federally financed agricultural programs whose very task was to raise their standard of living.<sup>162</sup>

Racial discrimination by the USDA didn't end when Jim Crow laws ceased to operate. In the class actions known as the *Pigford Cases*, which were initiated in the 1990s, African American farmers alleged that they had received unequal treatment when they sought USDA farm loans or assistance from local county committees, which had decision-making power and on which African Americans were grossly underrepresented.<sup>163</sup> The number of claimants in the original *Pigford* case unexpectedly ballooned to more than 22,000, and Congress in 1998 tolled the statute of limitations to allow recovery for USDA actions dating back to 1981.<sup>164</sup> Eventually, more than \$1 billion was paid by the Government under the so-called *Pigford I* settlement approved in 1999.<sup>165</sup> The so-called *Pigford II* settlement that was approved in 2011 allowed tens of thousands more claimants to file.<sup>166</sup> They eventually received an additional \$1.25 billion.<sup>167</sup>

*Federal promotion of segregation in housing.* The Federal Housing Administration and Veterans Administration played a very important part in promoting segregation in residential housing through policies that denied federally insured mortgages to prospective homeowners in racially mixed neighborhoods. The FHA's 1935 *Underwriting Manual*, which had a huge influence on private lending practices, recommended higher ratings for properties that "continue to be occupied by the same social and racial classes." Later editions used the euphemism "compatibility among the neighborhood occupants."<sup>168</sup>

### C. Practical Reasons Why the Federal Government Should Pay

Neglect of its constitutional duties and its direct responsibility for

---

162. U.S. Commission on Civ. Rts, *supra* note 160, at 99–100.

163. See Tadlock Cowan and Jody Feder, Cong. Research Serv., RS20430, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers* (2013).

164. Pub. L. No. 105-277, 105th Congress, § 741, 112 Stat. 2681 (codified at 7 U.S.C. § 2297, Notes).

165. *Pigford v. Glickman*, 185 F.R.D. 92 (D. D.C. 1999). See also Johnson, *infra* note 167.

166. *In re Black Farmers Discrimination Litigation*, No. 08-0511 (D. D.C. filed October 27, 2011).

167. Carrie Johnson, "U.S. approves settlement for black farmers," WASH. POST, (Feb. 19, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/18/AR2010021805893.html?hpid=moreheadlines>".

168. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 65-76 (Liveright 2017). See also Coates, *supra* note 115.

---

---

important forms of discrimination are powerful reasons why the Federal Government should provide compensation for legally imposed segregation. There are also strong practical arguments. A federal law authorizing such compensation not only would acknowledge national responsibility for the harm done by legally imposed segregation, it also would avoid the political and legal thickets, and the inevitable inequities, that would ensue if compensation was left to lower levels of government.

Leaving payment of compensation to states, and perhaps even localities in some cases, would be a real-world nightmare. There might be huge variations in rules governing eligibility, the amount of compensation, and even the basic right to receive compensation. Some eligible people would have moved among different Southern jurisdictions during the Jim Crow era, making the assignment of responsibility for payments exceedingly difficult. State and local budgetary constraints would come into play. These obstacles would render impossible a meaningful compensation program that reaches all the victims of legally imposed segregation.

## VI. OTHER ISSUES

### A. Would Compensation for Legally Imposed Segregation be Misguided?

As noted in Part II above, some people contend that reparations for wrongs done to African Americans are unnecessary or even counterproductive. However, it's unclear whether these objections would apply to reparations for legally imposed segregation. One of the loudest critics, David Horowitz, has distinguished slavery reparations from "payments to Jewish survivors of the Holocaust, Japanese Americans and African American victims of racial experiments in Tuskegee, or racial outrages in Rosewood and Oklahoma City [one assumes he meant Tulsa]," because "the recipients of reparations were the direct victims of the injustice or their immediate families."<sup>169</sup> Of course, those precedents would *support* compensation for African Americans who were harmed by legally imposed segregation.

Critics still might argue that victims of legally imposed segregation have effectively received reparations in the form of affirmative action efforts and federal anti-poverty programs. But those "reparations" were not intended to remedy the injuries suffered by identifiable individuals due to legally imposed segregation. The argument for compensating to those individuals is simple: they themselves were victims of a harmful injustice, and they deserve

---

169. 'Reparations' Move Deplored by Rustin, *supra* note 117.

---

---

recompense. That they at some point may have benefited from an affirmative action program intended to remedy other forms of discrimination is irrelevant. In *The Case for Black Reparations*, Professor Bittker observed that “a program of black reparations . . . is a remedy for injustice, not a poverty program, and its objectives would not be met by increasing public assistance or welfare benefits for everyone at the bottom of the economic ladder.”<sup>170</sup>

Professor John McWhorter has suggested that if the goal is to benefit the African American community as a whole, there are better methods than the compensation proposed here.<sup>171</sup> Others have made the same point. Once again, the rebuttal is simple: *the statute proposed here is not intended to benefit the African American community as a whole but to right a wrong done to identifiable individuals*. The supporters of the Civil Liberties Act of 1988 didn’t ask whether the reparations provided by that Act were the best way to advance the interests of all Japanese Americans. They sought to compensate individual Japanese Americans for harm caused by wrongful actions of the United States Government.

### **B. Should Compensation Be Limited to Living Persons?**

Even though the statute proposed here wouldn’t provide compensation merely because one’s ancestors were slaves, there remains the question whether compensation should extend to persons whose ancestors were subjected to legally enforced segregation. It seems pretty clear that most of these descendants suffered economic harm due to their ancestors’ experience. However, the question whether they deserve compensation involves some of the same issues of immediacy and emotional appeal that were discussed above in the context of reparations for slavery.

This issue deserves attention by a study commission, if one is created, and in congressional hearings. It should be noted that reparations for Japanese Americans were limited to those who were living on the day the reparations law was signed, whereas Florida’s Rosewood Compensation Act made some provision for descendants of survivors, in the form of scholarships, and for those who could prove that they lost property as a result of the Rosewood Massacre.

### **C. Is There a Need for a Study by a Commission?**

As noted previously, H.R. 40, the bill now sponsored by Rep. Sheila Jackson Lee, would establish a Commission to Study and Develop

---

170. BITTKER, *supra* note 1, at 134.

171. McWhorter, *supra* note 120.

---

---

Reparations Proposals for African Americans. The legislation proposed here might be the subject of study by a more narrowly focused commission which would examine the issue of compensation for legally imposed segregation.

As described in Part VII below, the successful legislative efforts to obtain compensation for unjustly interned, Japanese Americans and the African American victims of Florida's Rosewood Massacre, as well as largely unsuccessful effort to get justice for the victims of the 1921 Tulsa Race Riot, all were preceded by studies by commissions authorized by legislatures. Those studies provided an objective account of the facts and in some cases suggested what type of legislative remedy would be appropriate.

A study by a commission might serve similar purposes with respect to compensation for legally imposed segregation. If the commission held hearings, they would provide a valuable forum for victims of Jim Crow laws to describe the injuries they suffered during the Jim Crow era and later. The commission's hearings and report would educate the public and Congress about the harm inflicted by Jim Crow laws. Hence, there is much to be said for beginning the effort to enact a statute providing compensation with a commission study.<sup>172</sup>

If a study commission is established, there is a danger that it will become bogged down in contentious discussions of reparations for slavery and issues like housing discrimination and ignore the much less controversial issue of compensation for legally imposed segregation. It would be desirable for the commission to consider and report on the compensation issue separately and on an expedited schedule, especially in view of the advanced age of many of those who would be eligible for compensation.

In its report on the compensation issue, the commission should identify the jurisdictions that imposed racial segregation by law, the time periods for which those segregation regimes were in effect, and the approximate number of people who might be eligible for compensation. Witnesses at commission hearings could attest to the economic and nonmaterial costs imposed by legally enforced segregation. The commission could recommend whether compensation should be paid to individuals or in group form and, if payments are made to individuals, who should be eligible, how much each eligible person should receive, and what conditions should attach to accepting compensation (e.g., foregoing the right to sue).

#### **D. Should Compensation Be Paid to Individuals or to a Group?**

Some people, such as Professor Robert Westley, have argued for group

---

172. Professor Bittker suggested in the revised edition of *The Case for Black Reparations* that a "remedial commission" might play a useful role in crafting legislation. BITTKER, *supra* note 1, at xiv-xv.

---

---

reparations to atone for slavery and Jim Crow.<sup>173</sup> The difficulties with such an approach were described in Part II above.

In the case of compensation for legally imposed segregation, there are powerful reasons why it should be paid to individuals. First, it is possible to identify victims who are still alive. Second, it would be very difficult to devise a scheme under which the benefits of group reparations would be enjoyed only by those who experienced legally imposed segregation, without spilling over to others. Third, paying sums to individuals would make it unnecessary to decide which existing institutions should receive group reparations, or whether to create new institutions if existing ones are deemed inadequate, a process that could take many years. Since the population of eligible individuals is relatively old and is shrinking steadily, this is a strong argument. Fourth, the program of individual compensation for Japanese American internees has proved to be effective and administrable.

### **E. Would an Apology Be Sufficient?**

Some may argue the victims of legally imposed segregation should receive only an apology, not any kind of material recompense. Since the House and Senate have passed apologetic resolutions, nothing more would need to be done.

This “solution” would leave millions of American citizens without adequate redress for their material losses and psychological trauma. There is ample evidence that legally imposed segregation inflicted huge economic and other costs on African Americans. If applicable statutes of limitations were tolled, African American claimants could surely prove damages—economic and emotional—caused by legally imposed segregation that would total tens or hundreds of billions of dollars. No court would consider an apology to be an adequate remedy for these injuries.

Hearings conducted by a study commission, and/or congressional hearings on a bill to authorize compensation would allow African Americans to present evidence, through powerful testimony, of the harm suffered by themselves and others. Like the courts, the Congress would be hard-pressed to conclude that an apology would be sufficient compensation.

Grayce Uyehara, who coordinated the lobbying campaign that won compensation for Japanese Americans unjustly interned during World War II, stated well the reason why an apology would be inadequate:

When you come down to simple justice, to say ‘I’m sorry’ places [Japanese Americans] back in second-class citizenship status

---

173. See Westley, *supra* note 109.

---

---

because in this country, when you have been wronged and you have lost your possessions and everything else when you are falsely imprisoned, then there is payment. That's the way our system works.<sup>174</sup>

Our Nation has harmed a group of our fellow citizens. The case for providing them with material compensation, not just an apology, is convincing. Japanese Americans didn't have to settle for an apology. Neither should African Americans.

### **F. Identifying Eligible Individuals**

The problem of identifying those who would be eligible for compensation because they lived under legally imposed segregation seems manageable. As in the case of interned Japanese Americans, federal authorities should use governmental and other records to identify eligible individuals. People who claim to be eligible should be invited to submit claims, together with supporting information, such as addresses and times of residence in jurisdictions that imposed segregation by law, and whatever proofs of residence they may possess. Census data and other governmental records, together with known information about when various states and localities imposed segregation by law, would assist in the process. When appropriate, there could be an administrative hearing.

In some cases, it may be necessary to determine whether a person who lived in a relevant jurisdiction was considered to be an "African American."<sup>175</sup> When the person lived in a community that enforced residential or school segregation, census data, real estate records, and school-related information will help resolve this question. Affidavits from friends or relatives may provide the necessary evidence. The Civil Liberties Act of 1988 assigned to the Attorney General the task of determining eligibility and provided the funds necessary to do so. It stipulated that in close cases, the benefit of the doubt should be given to the person claiming to be eligible.<sup>176</sup>

### **G. Would a Compensation Statute Be Constitutional?**

The courts have rightly looked with suspicion on laws that distinguish among people on the basis of race. However, the statute proposed here

---

174. HATAMIYA, *supra* note 150, at 151.

175. In *The Case for Black Reparations*, Professor Bittker implies that this challenge might be insurmountable. See Bittker, *supra* note 1, at 87-90. With respect to Professor Bittker, the task seems manageable.

176. Civ. Liberties Act of 1988, *supra* note 7, at § 105.

---

---

would benefit African Americans who suffered harm because they lived in jurisdictions that imposed segregation as a matter of law. The law currently is uncertain concerning the constitutionality of affirmative action. But the courts consistently have upheld race-conscious remedies for racially motivated governmental discrimination against identifiable individuals. Those cases include the seminal decision in *Brown v. Board of Education*, which led to hundreds of court-issued desegregation orders that took race into account.

The statute proposed here would be highly analogous to the Civil Liberties Act of 1988,<sup>177</sup> which provided monetary compensation to formerly interned Japanese Americans. The constitutionality of that law as an exercise of congressional power to remedy a past wrong based on racial discrimination has never been seriously challenged.

It might be alleged that the statute proposed here would be unconstitutional because, unlike the 1988 law, it would provide a remedy for race-based discrimination by state and local governments. Yet the Fourteenth Amendment commanded those governments to ensure the "equal protection of the laws." The decision in *Brown v. Board*, and subsequent remedial actions by federal courts, were based on the Equal Protection Clause. Moreover, Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." If enacted by Congress in the exercise of that constitutional power, the statute proposed here would enjoy a very strong presumption of constitutionality.

Members of other minority groups, such as Mexican Americans and Native Americans, sometimes have been subjected to legally imposed segregation based on their race.<sup>178</sup> They may argue that they should be included in the compensation program. That question should be explored by a study commission if one is established, and in congressional hearings, and individuals from those groups should be included if they are found to qualify.<sup>179</sup>

#### H. Determining the Amount of Compensation for Each Eligible

---

177. Civ. Liberties Act of 1988, *supra* note 7.

178. Some states operated separate schools for Native Americans. *See* Miss. Code § 6632 (1942); N.C. Code § 115-2 (1943). In 1970, federal courts held that Mexican Americans were illegally segregated in the schools of Corpus Christi, Texas. *Cisneros v. Corpus Christi Independent Sch. Dist.*, 324 F. Supp. 599 (S.D. Tex. 1970). *See also* *Gong Lum v. Rice*, *supra* note 31, in which a girl of Chinese descent was compelled to attend a "colored" school.

179. In *Jacobs v. Barr*, 959 F.2d 313 (D.C. Cir. 1992), a federal appeals court upheld the constitutionality of the Civil Liberties Act of 1988 against a challenge from a German American who had been interned during World War II, finding that Congress had considered the situation of German Americans and was justified in excluding them.

---

---

## Person

There is room for debate in the Congress about the amount of compensation to which eligible individuals should be entitled. In theory, an administrator or tribunal might be instructed to calculate separate “damages” for each affected individual, as was done with respect to the victims of the 9/11 attacks and the 2010 oil spill in the Gulf of Mexico. However, in this instance there may be more than five million eligible individuals, the events in question were varied and occurred decades ago, and time is of the essence. So that approach is likely to be too cumbersome and take too long.

It would be desirable to have relatively simple rules that make the amount of compensation easy to calculate and minimize the need to examine individual circumstances. One approach might be to entitle every African American to receive a fixed sum, such as \$2,000, for each year during which he or she lived in a jurisdiction that imposed segregation by law. Another approach would be to pay a specific amount to each African American who ever resided in a jurisdiction that imposed segregation by law (perhaps with an exception for those who lived there for a very short time). As noted previously, the 1988 law authorizing compensation to Japanese Americans entitled each former internee to receive \$20,000. However, the Congress might choose to award a great or lesser amount to each eligible person.

### I. The Total Cost of Compensation

A nonexpert can offer only a rough approximation of the total cost of compensation for legally imposed segregation, assuming that compensation is paid in fixed sums to individuals. But an educated guess is better than nothing.

The following data and calculations provide a very rough estimate of the number of African Americans now alive who were once subject to legally imposed segregation:

- A 1966 report based on census data estimated that in 1960 there were 11,311,607 African Americans living in jurisdictions (southern and border states and the District of Columbia) that were then imposing or had recently imposed segregation by law. They constituted 62.0% of the total U.S. African American population of 18,871,631.<sup>180</sup>
- The Census Bureau estimates that in July 2018, there were

---

180. KARL E. TAEUBER & ALMA F. TAEUBER, *The Negro Population in the United States*, Table I, in *THE AMERICAN NEGRO REFERENCE BOOK* 106–07 (John F. Davis ed., Prentice-Hall 1966), available at <http://www.eric.ed.gov/ED015962>.

---

---

8,050,919 African Americans who were aged 59 and above, and therefore were alive in 1960.<sup>181</sup> Applying to this figure the percentage of African Americans who were living under segregation in 1960 yields a very rough estimate of *4,991,570 African American who were alive in mid-2016 and once lived under legally imposed segregation.*<sup>182</sup>

If we assume that each living African American who was formerly subject to legally imposed segregation should be entitled to receive \$20,000, the amount paid to each Japanese American who spent time in an internment camp, we come up with a very rough estimate that the costs of reparations for legally imposed segregation would total approximately \$99 billion. (As was noted previously, there could be various ways of determining the amount to be paid to each eligible person. If, for example, the compensation for each eligible person was set at \$10,000, the total cost would be halved. Basing compensation on the length of a person's residence in a segregated jurisdiction likewise would change the total.)

Whatever method is used to calculate the amount of compensation, the total will amount to a large sum.<sup>183</sup> So it's worthwhile to place this kind of compensation program in a wider context. It has been widely publicized that there is a large wealth gap between African Americans and whites. The U.S. Federal Reserve estimates that the median net worth of a white U.S. household in 2016 was \$171,000, while that of an African American household was only \$17,600.<sup>184</sup> That wealth gap is due in part to the harm done by legally imposed segregation and other forms of racial discrimination.

This huge disparity in wealth suggests that the average recipient of compensation for legally imposed segregation won't be wealthy, that the compensation payment would make a significant difference in his or her life,

---

181. U.S. Bureau of the Census, Annual Estimates of the Resident Population by Sex, Single Year of Age, Race Alone or in Combination, and Hispanic Origin for the United States: April 1, 2010 to July 1, 2018: 2018 Population Estimates, *available at* <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk#>.

182. This is a *very* rough estimate because it takes no account of the facts that: (1) it is based on the presence of state segregation laws, and some *localities* imposed segregation by law in states where there were no statewide laws; (2) some jurisdictions abandoned legally imposed segregation before 1960 and some afterward; (3) some African Americans who are now alive were born in or moved into segregated jurisdictions after 1960; (4) the African American population aged 59 and above in 2018 included some people who came to this country after 1960; and (5) some African Americans who were over 57 in 2017 have since died.

183. That sum may not seem quite so large in light of the fact that the U.S. Government has paid \$3.25 billion in damages to African American farmers because of post-Jim Crow discrimination by just one federal department, the Department of Agriculture. *See* Part V.

184. U.S. Fed. Res. Bd., *supra* note 123.

and that the payment would reduce a racial wealth gap that makes many Americans uncomfortable.<sup>185</sup>

## VII. WHAT IT WILL TAKE TO GET A LAW ENACTED

### A. Instructive Precedents

Compensation awarded to survivors of the Rosewood Massacre.<sup>186</sup> In 1923, Florida authorities stood by while groups of whites, incensed by a rumor that an African American had assaulted a white woman, engaged in a week-long rampage in which they lynched an African American man, killed other African Americans, and burned to the ground a small, mainly African American community in east central Florida called Rosewood. All of the remaining African American residents fled, and they were so terrorized that they never dared to return.

After many decades of silence, news stories in the 1980s inspired the remaining Rosewood survivors, with *pro bono* assistance from a high-powered Miami law firm, to lobby the Florida Legislature for compensation via a “claims bill.” In this effort, they sought and received support from the influential Cuban-American caucus in the Florida House. After an initial claims bill died due to late filing, the Legislature, with support from Governor Lawton Chiles and the Speaker of the Florida House, directed the Florida Board of Regents to appoint a study commission, which submitted its fact-finding report to the Board in December 1993.<sup>187</sup>

Pursuant to Florida law, a second claims bill—patterned after the Civil Liberties Act of 1988 that provided compensation to unjustly interned Japanese Americans—was referred to special masters who held hearings, found state responsibility, and rejected the state’s objections by citing its “moral responsibility.” After further discussion, committee votes, and pressure on the Governor from the Legislature’s Black Caucus, the Legislature passed and Governor Chiles signed the Rosewood Compensation Act.<sup>188</sup> The Act awarded \$150,000 to each of the nine living survivors; set

---

185. It also should be noted that money paid to African Americans who receive reparations will not disappear from the U.S. economy. Like other governmental transfer payments, it will be spent or saved.

186. For accounts of this incident, see MICHAEL D’ORSO, *LIKE JUDGMENT DAY: THE RUIN AND REDEMPTION OF A TOWN CALLED ROSEWOOD* (Boulevard Books 1996); HENRY, *supra* note 118, at 69–92.

187. Maxine D. Jones et al., *Documented History of the Incident which Occurred at Rosewood, Florida, in January 1923* (Dec. 22, 1993), <http://edocs.dlis.state.fl.us/fldocs/regents/rosewood.pdf>.

188. Fla. Sess. Law Serv. Ch. 94–359 (C.S.H.B. 591). See generally, D’ORSO, *supra*

aside \$500,000 to compensate descendants who could prove that their ancestors owned property in Rosewood; and established a scholarship fund with preference for Rosewood descendants.

Failure to obtain compensation for survivors of the Tulsa Race Riot. The Tulsa Race Riot began at the end of May 1921.<sup>189</sup> A young black man was arrested for the alleged rape of a white woman. Fearing that he would be lynched, armed African Americans went to the police station to protect him. They confronted a white crowd; shots were fired; people on both sides were killed; and white mobs mobilized. Thousands of whites stormed through Greenwood, Tulsa's African American community. Greenwood was then the wealthiest African American community in the country, popularly known as the "Black Wall Street."

Local and state authorities not only failed to stop the violence but abetted it: local officials deputized members of the mob, who continued their violent acts; officials provided firearms only to whites; and the Oklahoma National Guard arrested and detained almost all the residents of Greenwood.<sup>190</sup> When the two-day spasm of violence ended, Greenwood was no more. Thirty-five square blocks were burned to the ground; an estimated 300 people were dead; about 10,000 African Americans were homeless; and property damage totaled about \$1.5 million in real estate and \$750,000 in personal property (some \$173 million in 2019 dollars). In the wake of the riot, no one was convicted of a crime, and African American claims for damages were rejected.

After many decades of silence and inaction, the Oklahoma Legislature in 1996, the 75th anniversary of the riot, created the Oklahoma Commission to Study the Tulsa Race Riot of 1921. Unfortunately, the work of the Commission, whose members included activists and state legislators as well as historians, was characterized by a split along racial lines and sharp

---

note 186; C. Jeanne Bassett, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 FLA. ST. U. L. REV. 503 (Winter 1994).

189. The history of the riot is set forth in the Report by the Oklahoma Commission to Study the Tulsa Race Riot of 1921. See TULSA RACE RIOT- LEGISLATIVE FINDINGS AND INTENT, Okla. Statute § 74-8000.1 (2017), and GREENWOOD AREA REDEVELOPMENT AUTHORITY- BOARD OF TRUSTEES, Okla. Statutes § §74-8223 *et seq.* (2018), and TULSA RACE RIOT MEMORIAL OF RECONCILIATION DESIGN COMMITTEE- MEMBERSHIP AND DUTIES, Okla. Statutes § § 74-8201.1 *et seq.* (2016).

The history of the riot is set forth in 74 OKLA. Statutes § § 74-8000.1 (2017), 74-8201.1 (2014), & 74-8223 (2018).

190. In addition, Buck C. Franklin, an African American lawyer in Tulsa at the time of the riot (and father of famed historian John Hope Franklin), wrote that he saw planes firebombing buildings in Greenwood. Allison Keyes, *A Long-Lost Manuscript Contains a Searing Eyewitness Account of the Tulsa Race Massacre of 1921*, SMITHSONIAN MAG. (May 27, 2016), <http://www.smithsonianmag.com/smithsonian-institution/long-lost-manuscript-contains-searing-eyewitness-account-tulsa-race-massacre-1921-180959251>.

disagreements within the Commission and in the media about the appropriateness of payments to survivors.<sup>191</sup> In February 2000 the Commission issued an interim report that recommended “restitution to the historic Greenwood Community” in the form of:

- (1) Direct payment of reparations to survivors.
- (2) Direct payment of reparations to descendants of survivors.
- (3) A scholarship fund available to students affected by the riot.
- (4) Establishment of an economic development enterprise zone in the Greenwood historic area.
- (5) A memorial for the reburial of any human remains found in unmarked graves.<sup>192</sup>

Several commissioners dissented from the recommendation of direct payments to survivors.

The Commission’s final report, submitted in February 2001, stated that a “majority of Commissioners continue to support [the] recommendations [contained in the interim report].”<sup>193</sup> However, the proposed compensation for survivors received a chilly reception from the Oklahoma Legislature and Governor Frank Keating. Some legislators not only rejected individual payments but opposed the idea that public funds might be spent to implement any of the Commission’s recommendations.<sup>194</sup> In May 2001, the Legislature passed the 1921 Tulsa Race Riot Reconciliation Act of 2001, which didn’t include any individual payments (the riot survivors did receive gold-plated medals). The Act, signed by Governor Keating on June 1, 2001, absolved African Americans of responsibility for the riot; acknowledged the culpability of some local officials (but not state officials); approved state-funded scholarships with preference given to descendants of survivors; created a Greenwood Area Redevelopment Authority to spur economic development; and authorized construction of a 1921 Tulsa Race Riot Memorial of Reconciliation.<sup>195</sup>

The eminent historian John Hope Franklin, an 86-year-old native of Oklahoma who served as a consultant to the Commission, was among those

---

191. See JAMES S. HIRSCH, *RIOT AND REMEMBRANCE: THE TULSA RACE WAR AND ITS LEGACY* 256-74 (Houghton Mifflin Harcourt 2002). *The Daily Oklahoman* called the idea of individual reparations “ridiculous.” *Id.* at 270.

192. OKLA. COMM’N, *supra* note 189, at 21.

193. *Id.*

194. See HIRSCH, *supra* note 191, at 324–28. In the same session, the fiscally conscious Legislature repealed Oklahoma’s vehicle inspection law because the inspection cost vehicle owners \$5.00 a year. *Id.* at 324.

195. Okla. Statute § 74-8000.1 (2017), Okla. Statutes § 74-8223 *et seq.* (2018), and Okla. Statutes § 74-8201.1 *et seq.* (2016), *supra* note 189.

---

---

who were disappointed by the failure to compensate survivors. He said: "It's scandalous. Look at what they did for the Japanese and for Rosewood. [Oklahoma] is just waiting for the survivors to die False."<sup>196</sup>

Several reasons can be cited for this failure:

- There wasn't a sophisticated lobbying effort of the kind that made a difference in the cases of Rosewood compensation and the Japanese American reparations campaign described below.
- The study commission included people who started with strong opinions on both sides of the issue.
- The issue came to be seen through a racial lens, not as an even-handed attempt to provide justice.
- The Commission's report didn't include a clear-cut finding of culpability on the part of the State of Oklahoma, which would have had to pay.
- The Oklahoma Legislature was extremely averse to spending public moneys.

Compensation for Japanese Americans Interned during World War II.

In 1942, not long after the Japanese attack on Pearl Harbor, the United States Government expelled more than 110,000 Japanese Americans, most of whom were U.S. citizens, from their homes on the West Coast and forcibly confined them for several years in ten camps located in the interior of the country. The reason for these actions, which were authorized by President Franklin Roosevelt's Executive Order 9066, was a belief on the part of military and civilian officials that all Japanese and Japanese Americans were potentially disloyal and might collaborate with the Empire of Japan.

In 1944 the Supreme Court in *Korematsu v. United States* upheld the "exclusion order" that compelled Japanese and Japanese Americans to leave the West Coast, declining to second-guess the judgment of military authorities, the President, and the Congress.<sup>197</sup> However, in the companion case of *Ex Parte Endo*, the Court held that the Government could not detain the evacuees after they were found to be loyal to the United States.<sup>198</sup>

The backdrop to the World War II internment was a long history of systematic discrimination against people of Japanese descent, especially in California and other West Coast states where most Japanese and Japanese

---

196. HIRSCH, *supra* note 191, at 328. As described previously, an effort to gain reparations for riot survivors via a lawsuit also failed. See *Race and Voting in the Segregated South*, *supra* note 44.

197. Toyosaburo *Korematsu v. U.S.*, 323 U.S. 214 (1944) (Roberts, Murphy, and Jackson, JJ, dissenting).

198. *Ex Parte Mitsuye Endo*, 323 U.S. 283 (1944).

---

---

Americans on the mainland lived.<sup>199</sup> At the time of the World War II internment:

- Japanese immigrants could not become U.S. citizens, regardless of how long they had lived in the United States.<sup>200</sup>
- All of the Pacific Coast states had “alien land laws” that prohibited Japanese immigrants from owning land.
- Since 1924, Japanese had been forbidden to immigrate to the United States.<sup>201</sup>
- California laws prohibited marriages between whites and people of Japanese descent.<sup>202</sup>

This racial prejudice infected the decision-making process that led to the internment of Japanese Americans. Authorities claimed that the internment was justified by “military necessity” due to the potential disloyalty of all people of Japanese descent, but the Commission on Wartime Relocation and Internment of Civilians later found that “not a single documented act of espionage, sabotage, or fifth column activity was committed by an American of Japanese ancestry or by a resident Japanese alien on the West Coast” and that “Official actions against enemy aliens of other nationalities [Germans and Italians] were much more individualized and selective than those imposed on the ethnic Japanese.”<sup>203</sup>

---

199. For a history of that discrimination up to 1924, see ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* (U. of Cal. Press 1999).

200. The original U.S. naturalization law, passed in 1790, 1 Stat. 103, limited naturalization to “free white person[s].” The Naturalization Act of 1870, 16 Stat. 254, allowed naturalization of “aliens of African nativity and . . . persons of African descent,” but still excluded Asian immigrants. *See Takeo Ozawa v. United States*, 260 U.S. 178 (1922) (holding that a Japanese was not a “white person”). The Fourteenth Amendment conferred citizenship on “[a]ll persons born . . . in the United States,” but it took a Supreme Court decision to make clear that people of Asian descent were included. *See United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (Fuller and Harlan, JJ, dissenting). Japanese immigrants were finally allowed to be naturalized by passage of the Immigration and Nationality Act of 1952, § 311, 66 Stat. 163.

201. Section 13(c) of the Immigration Act of 1924, 43 Stat. 153, provided that “[n]o alien ineligible to citizenship shall be admitted to the United States”; as noted above, Japanese immigrants were ineligible to become citizens. This provision was aimed mainly at Japanese, since Chinese immigration had previously been forbidden. It was supported by California-based organization like the Asiatic Exclusion League (originally called the Japanese and Korean Exclusion League).

202. Sections 60 and 69 of the California Civil Code provided that “All marriages of white persons with Negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void” and that “no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race.”

203. *COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 3* (U. of Wash. Press 1997).

Despite the lack of evidence of any real danger, American icons like President Franklin Roosevelt, Secretary of War Henry Stimson, and California Attorney General Earl Warren authorized or supported the internment of more than 110,000 people, including children and the elderly, most of whom were U.S. citizens, based solely on their ethnicity. As noted above, the Supreme Court declined to hold that this action was unconstitutional.

Eventually, doubts emerged. In 1976, President Ford issued a proclamation rescinding the Executive Order that authorized the internments, declaring: “We now know what we should have known then—not only was that evacuation wrong, but Japanese Americans were and are loyal Americans.”<sup>204</sup>

Japanese Americans began a campaign for reparations.<sup>205</sup> In July 1980, the Congress passed, and President Carter signed a law establishing the Commission on Wartime Relocation and Internment of Civilians, with nine members appointed equally by the House, the Senate, and the President. The Commission held 20 days of hearings in nine cities and heard from 750 witnesses.

In 1982 and 1983, the Commission issued a two-part report. In the first part, issued in 1982, the Commission concluded:

Executive Order 9066 [authorizing the internment] was not justified by military necessity, and the decisions that followed from it—exclusion, detention, the ending of detention and the ending of exclusion—were not founded upon military considerations. The broad historical causes that shaped these decisions were race prejudice, war hysteria and a failure of political leadership. Widespread ignorance about Americans of Japanese descent contributed to a policy conceived in haste and executed in an atmosphere of fear and anger at Japan. A grave personal injustice was done to the American citizens and resident aliens of Japanese ancestry who, without individual review or any

---

204. Proclamation 4417, Feb. 19, 1976, rescinding Executive Order 9066.

205. The best account of that campaign, as well as other aspects of the internment, is that in HATAMIYA, *supra* note 150. See also ALBERT MARRIN, UPROOTED: THE JAPANESE AMERICAN EXPERIENCE DURING WORLD WAR II (Alfred A. Knopf 2016). Two other attempts to obtain reparations fell by the wayside. In 1979, Congressman Mike Lowry, with support from Japanese Americans in his Seattle district, introduced H.R. 5977, calling for monetary compensation for individual internees. The bill died because most Japanese Americans preferred at that time to support a bill establishing a study commission. HATAMIYA, *supra* note 150, at 86-87. In 1983, William Hohri and other members of the National Council for Japanese American Redress, a group of impatient Japanese American activists, filed a class action lawsuit on behalf of all former internees, seeking a total of \$27 billion in monetary damages. The lawsuit moved slowly through the courts and eventually was dismissed on procedural grounds in 1988. See Hohri v. U.S., 847 F.2d 779 (Fed. Cir. 1988).

---

---

probative evidence against them, were excluded, removed and detained . . . The excluded people suffered enormous damages and losses, both material and intangible.<sup>206</sup>

In the second part of its report, issued in 1983, the Commission recommended a set of remedies:

- (1) A congressional joint resolution, signed by the President, recognizing that a grave injustice was done and apologizing on behalf of the nation.
- (2) Pardons for those criminally convicted.
- (3) Allowing Japanese Americans to apply for restitution of lost positions, status, or entitlements.
- (4) Establishment of a fund to support research and educational efforts concerning the internment and similar events.
- (5) “A compensatory payment of \$20,000 to each of the . . . surviving persons excluded from their places of residence pursuant to Executive Order 9066.”<sup>207</sup>

The creation of the Commission resulted from a 1979 meeting between representatives of the Japanese American community and the four Japanese American Members of Congress to discuss a lobbying campaign for Japanese American redress.<sup>208</sup> The Commission’s hearings and report had a “galvanizing” effect on the Japanese American community that “fueled the campaign for redress for the years and battles to come.”<sup>209</sup> The Commission’s report, which was sent to every congressional office, provided a key foundation for congressional action.

The redress campaign faced significant headwinds:

- The Japanese American community was small and geographically concentrated, so its ability to exert direct pressure on Members of Congress was limited.
- The campaign sought outlays from the federal Treasury at a time when the federal budget was tight.
- Some people wondered whether monetary compensation was an appropriate remedy for the harm suffered by the internees.
- Some people were reluctant to question the judgment of

---

206. COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 203, at 3.

207. *Id.*, Part III: Recommendations. One commissioner dissented from the recommendation of a compensatory payment to each survivor.

208. Author Leslie Hatamiya states that it was Senator Daniel Inouye who first suggested the idea of a commission. HATAMIYA, *supra* note 150, at 85.

209. *Id.* at 98.

---

---

wartime leaders.

The campaign also had assets:

- Few people or groups had self-interested reasons to oppose the legislation, and there was no organized lobbying against it.
- Most Americans sympathized with the unjustified suffering of the internees.
- The Democratic leadership in both the Senate and the House were supportive.
- Energetic Congressman Barney Frank was the new chairman of a key House subcommittee and was a strong proponent of reparations.

The successful lobbying campaign that overcame the obstacles included the following features:

- Strong, generally unified support from the Japanese American community, led by the respected and long-established Japanese American Citizens League.
- Wise leadership and hard work from the four highly respected Japanese American Members of Congress, two in the House and two in the Senate.
- Emotional statements by former internees about their heart-wrenching suffering, in testimony at the Commission hearings, in personal meetings with Members of Congress and their aides, and in media interviews.
- An energetic, astute, multiyear lobbying effort that put pressure on Members of Congress from all parts of the country via congressional colleagues and personal acquaintances, meetings in Washington and in-home districts, and calls, telegrams, and letters.<sup>210</sup>
- An emphasis on the personal suffering of the internees, their material and intangible losses, and the violation of their constitutional rights. The last theme appealed to conservatives as well as liberals.<sup>211</sup>
- Outreach that resulted in major endorsements of the proposed

---

210. Republican Senator Alan Simpson supported the bill in large part because he had met fellow Boy Scout and later Democratic Congressman Norman Mineta when the latter was interned in the Heart Mountain Relocation Center in Simpson's home state of Wyoming, and the two became close friends.

211. For example, Rep. Newt Gingrich was a supporter of the Act.

---

---

legislation by more than 150 national and local governmental, civic, religious, labor, and professional organizations.<sup>212</sup>

- Generally sympathetic media coverage of the Commission hearings and media stories about individual internees, which brought home the human dimensions of the issue.
- Emphasis on the heroic World War II record of the all-Japanese American 442d Regimental Combat team, the most decorated unit of its size in U.S. military history (the House of Representatives bill that became the Act was H.R. 442).

In addition to lobbying the Congress, there were efforts to inform and appeal to President Reagan and his aides, so that he would be disposed to sign redress legislation.

The result of all these efforts was that the House overwhelmingly passed its version of the Act in September 1987 (on the 200th anniversary of the signing of the U.S. Constitution) and the Senate did the same in May 1988. The two chambers passed the final version of the Act in August 1988, and President Reagan signed it on August 10 of that year.<sup>213</sup>

The preamble to the Act stated that its purpose was to “implement recommendations of the Commission on Wartime Relocation and Internment of Civilians,” and it included all of the Commission’s recommended remedies.<sup>214</sup>

Eventually, more than 82,000 former internees each received a \$20,000 compensatory payment under the Civil Liberties Act.<sup>215</sup> Each payment was accompanied by a formal apology from the first President Bush. The final payments were made in 1993.

## **B. Obtaining Passage of a Statute Authorizing Federal Compensation for Legally Imposed Segregation**

Obtaining passage of the compensation legislation proposed here won’t

---

212. A list appears in HATAMIYA, *supra* note 150, Appx. A.

213. The battle to obtain compensation for former internees nearly was lost when the first President Bush in 1989 requested only meager funding for that purpose, and found some support in the Congress. Senator Inouye used his influence to include in the appropriations bill approved in 1989 a provision that the redress program should be treated as an entitlement program not subject to the normal budget process. *See* HATAMIYA, *supra* note 150, at 181-90.

214. Civil Liberties Act of 1988, *supra* note 7. However, the recommended fund to support research and educational efforts received only meager funding. HATAMIYA, *supra* note 150, 181-90.

215. Because the number of claimants had been underestimated, the Act was amended in 1992 to add an additional \$400 million. *See* HATAMIYA, *supra* note 150, at 187-88. In total, the payments cost the Government more than \$1.6 billion.

---

---

be easy, especially in the current political climate. However, the success of the effort to obtain justice for interned Japanese Americans gives reason for hope.

Obviously, success will depend on wholehearted support from the African American community and others interested in justice, civil rights, and civil liberties, as well as support from a wide variety of other individuals and organizations. It would be presumptuous to offer detailed advice, since organizations like the Leadership Conference on Civil Rights have enormous experience in mobilizing support for federal legislation.

Above all, there is a need to act quickly. Millions of African Americans who are alive today were harmed by legally imposed segregation. They still suffer from the effects, including a diminished quality of life and a bigger wealth gap between them and their contemporaries. They deserve compensation, not just an apology, for the injuries caused by these unjust laws.

We should not allow excuses—economic costs, the alleged difficulty of identifying beneficiaries, the need to attend to today’s problems—to deny these Americans their due. We should not demonstrate once again that, in the words of Dr. Martin Luther King, “the bank of justice is bankrupt” when it comes to injuries suffered by African Americans.

That has been a consistent pattern in American history.<sup>216</sup> It is one that should not be repeated.

There is much to be said for the proposition that compensation for legally imposed segregation is long overdue. In 2003, Professor Bittker stated in the preface to the revised edition of his book *The Case for Black Reparations*:

There is an irony in suggesting that this program to redress the damages to relocated and incarcerated Japanese-Americans might supply a guidepost for a program of black reparations, rather than the other way around, given the fact that school segregation was held unconstitutional by a unanimous Supreme Court in *Brown v. Board of Education* (1954), while the Japanese-American exclusion order was upheld by the Supreme Court in 1944 (though by a divided court whose dissenting Justices are today honored for their independence). Still, as Justice Frankfurter once observed,

---

216. More than 90 years ago, Supreme Court Justice Oliver Wendell Holmes, Jr., in a letter to his friend Harold Laski, noted the then-current uproar about the prosecution of anarchists Sacco and Vanzetti and remarked: “I cannot but ask myself why this so much greater interest in red than black. A thousand-fold worse cases of negroes come up from time to time, but the world does not worry over them.” HOLMES-LASKI LETTERS, vol. 2, p. 974, letter of Aug. 24, 1927 (M. Howe ed., Harvard University Press 1953).

---

---

“Wisdom too often never comes, and so one ought not to reject it merely because it comes late.”<sup>217</sup>

Since Professor Bittker wrote those words, another sixteen years have passed without significant action. The number of people who would be eligible for compensation under the statute proposed here is dwindling year by year. If justice delayed is justice denied, we are far down the road to denial. If we are to provide justice to the survivors who remain, we should move, in the words of Dr. King, with “the fierce urgency of Now” to enact a federal law authorizing compensation for legally imposed segregation.

---

217. BITTKER, *supra* note 1, at xv. *See also* CHARLES P. HENRY, *LONG OVERDUE: THE POLITICS OF RACIAL REPARATIONS*, *supra* note 117.

\*\*\*