

# Michigan Journal of Race and Law

---

Volume 15

---

2010

## Rawls and Reparations

Martin D. Carcieri

*San Francisco State University*

Follow this and additional works at: <https://repository.law.umich.edu/mjrl>



Part of the [Courts Commons](#), [Human Rights Law Commons](#), [Law and Philosophy Commons](#), [Law and Race Commons](#), and the [Legislation Commons](#)

---

### Recommended Citation

Martin D. Carcieri, *Rawls and Reparations*, 15 MICH. J. RACE & L. 267 (2010).

Available at: <https://repository.law.umich.edu/mjrl/vol15/iss2/1>

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

# RAWLS AND REPARATIONS

*Martin D. Carcieri\**

*In the past two years, four related events have sharpened debates on race in the U.S.: President Obama's election, the nomination of Judge Sonia Sotomayor to the Supreme Court, that Court's ruling in Ricci v. DeStefano, and the arrest of Obama's friend, Harvard professor Henry Gates. The President has spoken of a "teaching moment" arising from these events. Moreover, his writings, speeches and lawmaking efforts illustrate the contractual nature of Obama's thinking. The President (and all concerned citizens) should thus find useful an analysis of racial policy and justice in light of the work of John Rawls.*

*Rawls may be the most influential political theorist of our time. Applying his theory to questions of race policy, this Article defends the following counterintuitive thesis: while strong forms of affirmative action cannot be derived from Rawls's theory, strong forms of legislative reparations can be so derived. This Article concludes with a concrete plan for raising the resources such reparations would require.*

INTRODUCTION .....	268
I. RAWLS.....	272
II. AFFIRMATIVE ACTION .....	281
III. REPARATIONS .....	288
A. <i>In Re: African-American Slave Descendants             Litigation (2005)</i> .....	289
B. <i>Judicial v. Legislative Reparations</i> .....	292
1. Means of Reparations Available to Congress .....	293
C. <i>A Working Definition of Reparations</i> .....	295
IV. RAWLS AND REPARATIONS.....	297
A. <i>Distinguishing Affirmative Action and Reparations</i> .....	297
B. <i>Two Domains of Public Policymaking</i> .....	301
CONCLUSION .....	314

---

\* Associate Professor of Political Science, San Francisco State University. J.D., University of California, Hastings, Ph.D., University of California, Santa Barbara. I wish to thank Professors Joe Cook, Otis Stephens, Brian Krumm, John Davis, Ed Yager, Joel Kassiola, James Martel, Robert Smith, Bob Taylor, Peter Stone, and Andrew Valls for their contributions to this project.

*[C]ircumstances change, and objectives that seem unreachable today may become practical tomorrow.<sup>1</sup>*

*But race is an issue I believe this nation cannot afford to ignore right now.<sup>2</sup>*

## INTRODUCTION

In the past two years, four related events have sharpened debates on race in the U.S.: (1) President Obama's election, (2) his nomination of Sonia Sotomayor to the Supreme Court, (3) that Court's ruling in *Ricci v. DeStefano*,<sup>3</sup> and (4) the arrest of Obama's friend, Harvard professor Henry Gates.<sup>4</sup> Some have hailed Obama's election as the end of racial identity politics in the United States,<sup>5</sup> yet the fallout from Sotomayor's nomination,<sup>6</sup> the *Ricci* decision,<sup>7</sup> and Gates's

1. David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. REV. 1375, 1403-04 (2004).

2. President Barack Obama, A More Perfect Union, Address at the Constitution Center in Philadelphia, PA, in N.Y. TIMES, Mar. 18, 2008, available at <http://www.nytimes.com/2008/03/18/us/politics/18text-obama.html?ref=politics>.

3. In *Ricci*, 129 S. Ct. 2658 (2009), the Supreme Court held that the City of New Haven violated the rights of firefighters under Title VII of the 1964 Civil Rights Act when it threw out an exam on which they had scored well enough for promotion on the basis that no Blacks and only one Hispanic had done the same. In so doing, the Court overruled a lower court opinion joined by present Justice Sotomayor, adding a unique, interesting dimension to her nomination and confirmation hearings. See article cited *infra* note 7.

4. Abby Goodnough, *Harvard Professor Jailed; Officer is Accused of Bias*, N.Y. TIMES, July 21, 2009, at A13.

5. See, e.g., John H. Bunzel, *Eliminate the Civil Rights Commission*, S.F. CHRON., Jan. 25, 2009, available at [http://articles.sfgate.com/2009-01-25/opinion/17197181\\_1\\_civil-rights-commission-politics-today-s-Black-leaders](http://articles.sfgate.com/2009-01-25/opinion/17197181_1_civil-rights-commission-politics-today-s-Black-leaders); Ta-Nehisi Coates, *The Messiah Myth*, TIME, Nov. 24, 2008, at 33; Joe Klein, *Passing the Torch*, TIME, Nov. 17, 2008, at 26; Eugene Robinson, *The Irrelevance of Race*, S.F. CHRON., Apr. 3, 2009, at A17; Juan Williams, *What Obama's Victory Means for Racial Politics*, WALL ST. J., Nov. 10, 2008, at A19.

6. See, e.g., Ross Douthat, Op-Ed, *Race in 2028*, N.Y. TIMES, July 20, 2009, at A19; Editorial, *The Sotomayor Nomination*, N.Y. TIMES, July 21, 2009, at A20; Frank Rich, Op-Ed, *They Got Some 'Splainin' to Do*, N.Y. TIMES, July 19, 2009, at 10. See also Jeffrey Rosen, *The Case Against Sotomayor*, THE NEW REPUBLIC, May 4, 2009, available at <http://www.nnr.com>; Shelby Steele, Op-Ed, *Sotomayor and the Politics of Race*, WALL ST. J., June 9, 2009, at A14.

Beyond the questions Judge Sotomayor had to answer about her vote in *Ricci*, several on the Senate Judiciary Committee asked her to explain what has become known as her "wise Latina woman" remark: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." See Sonia Sotomayor, *A Latina Judge's Voice*, Address at the University of California, Berkeley, School of Law, in N.Y. TIMES, May 15, 2009, available at <http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html?ref=us>.

7. See, e.g., Editorial, *A Flawed Test Case*, S.F. CHRON., June 30, 2008, at A8; Editorial, *Court Turns a Blind Eye*, PHILA. ENQUIRER, June 30, 2009, at A10; Editorial, *Firefighter Justice*, WALL ST. J., June 30, 2009, at A14; Editorial, *The Ricci Ruling's Real Message*, CHRISTIAN SCIENCE MONITOR, June 30, 2009, at 8 ("The battling Ricci opinions show just how much

arrest<sup>8</sup> remind us that those politics remain at the forefront of the national psyche.

In *Ricci*, of course, the judges settled the matter. Yet at least on paper, the U.S. is still a republic, in which the political branches of government are the prime movers of policy change through law. Commenting on *Ricci*, the *Christian Science Monitor* observed that

America's unsettled debate over race has too often been conducted between judges writing alone in their chambers rather than in open forums by the public or their elected representatives. . . . [S]uch questions should not be only for justices to decide. . . . The emotions of race are best left to public forums and for elected bodies to resolve.<sup>9</sup>

As Jeffrey Rosen adds, *Ricci* is among recent Supreme Court rulings<sup>10</sup> that “may force Barack Obama to do what he has the unique skills but not the political incentive to do at the moment: carve out a third way in the race debate, one that rejects the extremes of conservative colorblindness and liberal racialism.”<sup>11</sup>

The President, as it happens, has thought deeply about race. An ill-chosen comment on the Gates arrest aside,<sup>12</sup> Obama's writings, speeches, and lawmaking efforts show an ability to transcend difference and to articulate a third way, or higher synthesis, on such matters. These sources also show the *contractual* nature of Obama's thinking—his deep belief that civil society and constitutional democracy depend upon a strong social contract between government and the individual as well as among racial

Americans have yet to reconcile the need to reduce achievement gaps for Blacks and Hispanics with actions that border on racial discrimination against whites, as was the case in *Ricci*.”); *Firefighters and Race*, N.Y. TIMES, July 1, 2009, at A32; Linda Greenhouse, Op-Ed, *The Court Changes the Game*, N.Y. TIMES, June 30, 2009, at A21; James Oliphant, *Race Ruling Fuels Critics of Sotomayor*, L.A. TIMES, June 30, 2009, at A11.

8. See, e.g., Peter Baker & Helene Cooper, *President Tries to Defuse Debate Over Gates Arrest*, N.Y. TIMES, July 25, 2009, at A1; Thomas Frank, *The Gates of Political Distraction*, WALL ST. J., July 29, 2009, at A13; Abby Goodnough, *Sergeant who Arrested Professor Defends Actions*, N.Y. TIMES, July 24, 2009, at A3; Glenn C. Loury, *Obama, Gates, and the American Black Man*, N.Y. TIMES, July 26, 2009, at 11; Maria Newman, *Varied Opinions on Gates Controversy Light up the Web*, N.Y. TIMES, July 24, 2009, available at <http://www.nytimes.com/2009/07/25/us/politics/25gatesblogs.html?ref=politics>; Susan Saulny & Robbie Brown, *Professor's Arrest Tests Beliefs on Racial Progress*, N.Y. TIMES, July 24, 2009, at A1.

9. Editorial, *Ricci Ruling's Real Message*, *supra* note 7.

10. Jeffrey Rosen, *Race to the Top*, THE NEW REPUBLIC, Apr. 29, 2009, at 19. The other ruling to which Rosen refers is *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009). In that case, however, the Court avoided the issue whether a key provision of the 1965 Voting Rights Act was constitutional, disposing of the dispute on narrow grounds. In another Voting Rights Act case last term, however, *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009), the Court held that only election districts in which minorities make up at least half of the voting-age population are entitled to the protections of a part of the Voting Rights Act that seeks to ensure and preserve minority voting power.

11. Rosen, *supra* note 10, at 19.

12. See Baker & Cooper, *supra* note 8, at 19.

groups.<sup>13</sup> In a 2008 speech on race in Philadelphia, Obama invoked the bedrock norm underlying the social contract: “[i]n the end, then, what is called for is nothing more, and nothing less, than what all the world’s great religions demand—that we do unto others as we would have them do unto us.”<sup>14</sup>

Given this view, Democratic majorities in Congress, and the “teaching moment”<sup>15</sup> created by Sotomayor’s ascendancy, *Rica*’s resonance and Gates’s arrest, the President should find useful an analysis of racial policy and justice in light of the work of John Rawls. Rawls may be the most influential political theorist of our time.<sup>16</sup> In his seminal work, *A Theory of*

13. For now, three examples will suffice. In his June 2009 speech at Cairo University, the President called on both the Israelis and Palestinians to acknowledge the legitimacy of each other’s suffering and right to exist. President Barack Obama, Cairo Speech (June 6, 2009), available at [www.asksam.com/ebooks/releases.Obama-Speeches.ask](http://www.asksam.com/ebooks/releases.Obama-Speeches.ask). In his January 2009 State of the Union address, Obama underscored the civic duties of: 1) the young to finish high school and find a way to contribute to society and 2) the middle aged and old not to leave the young with a crippling national debt. President Barack Obama, State of the Nation (Feb. 24, 2009), available at [www.asksam.com/ebooks/releases.Obama-Speeches.ask](http://www.asksam.com/ebooks/releases.Obama-Speeches.ask). Perhaps most relevant for our purposes, he called in both his March 2008 Philadelphia speech and his July 2009 NAACP Centennial speech for Blacks and Whites both to make genuine efforts to understand and respect each other’s claims. See Obama, *supra* note 2; President Barack Obama, Remarks by the President to the NAACP Centennial Convention (July 17, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-naacp-centennial-convention-07162009>.

14. Obama, *supra* note 2. Beyond this, as a student of FDR, Obama has an historical sense of the social contract. As FDR said in 1932, in the depths of the Great Depression and the year that Hitler came to power,

the Declaration of Independence discusses the problems of Government in terms of a contract. Government is a relation of give and take, a contract, perforce, if we would follow the thinking out of which it grew. Under such a contract, rulers were accorded power, and the people consented to that power on consideration that they be accorded certain rights. The task of statesmanship has always been the redefinition of these rights in terms of a changing and growing social order. . . . The terms of that contract are as old as the Republic, and as new as the new economic order. Every man has a right to life . . . . Every man has a right to his own property . . . [and t]he final term of the high contract was for liberty and the pursuit of happiness.

Franklin D. Roosevelt, *Commonwealth Club Address* (1932) in AMERICAN POLITICAL THOUGHT 405, 411–12 (Kenneth M. Dolbeare & Michael S. Cummings, eds., 2004) (5th ed.).

15. Baker & Cooper, *supra* note 8 (quoting the President).

16. Rawls has been called “the most distinguished moral and political philosopher of our age,” Martha Nussbaum, *The Enduring Significance of John Rawls*, THE CHRON. OF HIGHER EDUC., July 20, 2001, at B7, and his theory has been described as “the now-dominant understanding of liberalism in the academy. . . .” Peter Berkowitz, *The Ambiguities of Rawls’s Influence*, 4 PERSP. ON POL., Mar. 2006, at 121. Griffin has written that “Rawls’s theory remains the best and most relevant theory of justice available,” Stephen Griffin, *Reconstructing Rawls’s Theory of Justice: Developing a Public Values Philosophy of the Constitution*, 62 N.Y.U. L. REV. 715, 716 (1987), and as Sandel has observed, “[f]or us in late twentieth century America, [Rawls’s view of liberalism] is our vision, the theory most thoroughly embodied in the practices and institutions most central to our public life.” Michael J. San-

*Justice*,<sup>17</sup> he presented a social contract theory that he termed Justice as Fairness. For the next thirty years, Rawls refined this theory in response to a range of critics. This culminated in *Justice As Fairness: A Restatement*,<sup>18</sup> published a year before Rawls's death in 2002. Since then, his work has spawned a vast literature, including a major symposium on Rawls and the law.<sup>19</sup> Much of this literature has critiqued, defended, or elaborated upon some aspect of Rawls's theory, yet a few writers have attempted to apply his theory to concrete policy and constitutional issues.<sup>20</sup> As for the issue of race, Rawls's final statement appears in a few paragraphs of *Justice as Fairness*. Referring to *Theory of Justice*, he concludes that

[T]he serious problems arising from existing discrimination and distinctions based on . . . race are not on its agenda . . . . This is indeed an omission in *Theory*; but an omission is not as such a fault . . . . Justice as fairness, and other liberal conceptions like it, would certainly be seriously defective should they lack the resources to articulate the political values essential to

---

del, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 82 (1984). As for Rawls's major work, A THEORY OF JUSTICE,

[it] is a powerful, deep, subtle, wide-ranging, systematic work in political and moral philosophy which has not seen its like since the writings of John Stuart Mill, if then. It is a fountain of illuminating ideas, integrated together into a lovely whole. Political philosophers now must either work within Rawls's theory or explain why not.

ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 183 (Basic Books, Inc. 1974). In Solum's words, "the only other work in the history of political philosophy to be cited at a comparable rate appears to be John Locke's *Second Treatise of Government*." Lawrence B. Solum, *Situating Political Liberalism*, 69 CHI.-KENT L. REV. 549, 551 n.9 (1994). As Larmore writes, the book "changed the way the idea of social justice is understood, and provided the starting point for almost everything of note that has come afterward in political philosophy." Charles Larmore, *Behind the Veil*, THE NEW REPUBLIC, Feb. 27, 2008, available at <http://www.tnr.com/article/books/behind-the-veil>. As Talisse thus adds, Rawls's influence has been such that he literally "changed the subject." ROBERT B. TALISSE, ON RAWLS: A LIBERAL THEORY OF JUSTICE AND JUSTIFICATION 78 (Wadsworth 2001). Rawls might therefore be the Darwin, Picasso, Freud, Einstein, or Louis Armstrong of his field.

17. JOHN RAWLS, A THEORY OF JUSTICE (Harvard Univ. Press 1999) (1971) [hereinafter, THEORY].

18. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly, ed., Harvard Univ. Press 2001) [hereinafter, FAIRNESS].

19. Symposium, *Rawls and the Law*, 72 FORDHAM L. REV. 1381 (2004).

20. Within the 2004 Fordham symposium alone, scholars explored Rawls's implications for gender, judicial review, international relations, constitutionalism, torts and property law. Symposium, *supra* note 19. Many of these writers were thus working at the third of the five stages Parker identifies in "the unification of theory and practice." As he writes, "[t]he third stage is the work of philosophically inclined lawyers who begin where Rawls leaves off and discuss the application of his conception of social justice to particular problems of constitutional law." Richard B. Parker, *The Jurisprudential Uses of John Rawls*, NOMOS XX: CONSTITUTIONALISM 269, 279 (J.R. Pennock & J.W. Chapman eds., N.Y. Univ. Press 1979). I shall also be working at this third stage, applying Rawls to the particular constitutional (and legislative) problems of race policy.

justify the legal and social institutions needed to secure the equality of . . . minorities.<sup>21</sup>

Two related points emerge here. On the one hand, Rawls notes that whatever else he has done, he has never systematically applied his theory to questions of race policy. On the other, he seems optimistic that this can be done in a way that advances racial justice. This Article argues that this proposition is correct, yet the counterintuitive thesis it shall defend is as follows: While strong forms of affirmative action cannot be derived from Rawls's theory, strong forms of legislative reparations can be so derived.

This Article is thus organized as follows. Part I provides a brief overview of Rawls's theory of justice. Part II shows that this theory does not yield strong forms of affirmative action. Part III establishes a working definition of reparations for purposes of this Article. In part IV, after showing that Rawlsian legislators would distinguish between 1) affirmative action and reparations as defined and 2) two domains of public policy, this Article argues that they would reject affirmative action yet embrace reparations,<sup>22</sup> thus achieving a "third way" in federal race policy. This Article concludes by showing that with a little political courage, and the current economic crisis notwithstanding, the President and Congress could easily find the resources for reparations as defined.

## I. RAWLS

*Justice as Fairness* is well known. A brief review will thus suffice for our purposes. To begin, Wolff's sketch of the challenge the young Rawls perceived is worth quoting:

the problem with which Rawls begins is the impasse in Anglo-American ethical theory at about the beginning of the 1950's. . . . [T]he major cognitivist schools of ethical theory were utilitarianism and intuitionism. Each of these traditions has strengths, from Rawls's point of view, but each also has fatal weaknesses. Rawls revives a version of the theory of the social contract as a way of discovering a *via media* between utilitarianism and intuitionism.

---

21. FAIRNESS, *supra* note 18, at 66.

22. As it happens, not only has House Judiciary Committee Chairman John Conyers introduced reparations bills in Congress for decades, but the past few years have seen an upsurge in interest in reparations. See, e.g., ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS (Univ. of Cal. Press 2004); JENNIFER HARVEY, WHITENESS AND MORALITY: PURSUING RACIAL JUSTICE THROUGH REPARATIONS AND SOVEREIGNTY (Dwight N. Hopkins & Linda E. Thomas eds., Palgrave Macmillan 2007); CHARLES P. HENRY, LONG OVERDUE: THE POLITICS OF RACIAL REPARATIONS (N.Y. Univ. Press 2007); REPARATIONS FOR SLAVERY: A READER (Ronald P. Salzberger & Mary C. Turck eds., Rowman & Littlefield, Inc. 2004); REPARATIONS: INTERDISCIPLINARY INQUIRIES (Jon Miller & Rahul Kumar eds., 2007); JOHN TORPEY, MAKING WHOLE WHAT HAS BEEN SMASHED: ON REPARATIONS POLITICS (Harvard Univ. Press 2006); RAYMOND A. WINBUSH, SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS (Harper Paperbacks 2003).

The principal strengths of utilitarianism are, first, its straightforward assertion of the fundamental value of human happiness and, second, its constructive character—its enunciation, that is to say, of a rule or procedure by which ethical questions are to be answered and ethical disputes resolved. A secondary merit of utilitarianism . . . is its suitability as a principle for the settling of questions of social policy. The two most obvious weaknesses of utilitarianism are its inability to explain how rationally self interested pleasure-maximizers are to be led to substitute the general happiness for their own as the object of their actions and the manifestly counterintuitive, sometimes genuinely abhorrent implications of its fundamental principle. . . .

As a moral theory, intuitionism is methodologically inferior to utilitarianism. It simply asserts, flatly and without proof, that each of us has a power of “moral intuition” called “rational” by intuitionists but exhibiting no structure of practical reasoning, whereby we can directly apprehend the obligatoriness of particular acts. . . . But while intuitionism is weak as an account of practical reasoning, it is strong in two respects that are clearly important to Rawls. First, it defines the right independently of the good, and so makes rightness a fundamental, irreducibly moral notion; second, it takes over from Kant the doctrine of the inviolability and dignity of moral personality and thereby decisively rejects the utilitarian tendency to view human beings as nothing more than pleasure-containers, to be filled or emptied like so many water jugs.<sup>23</sup>

Against this background, Rawls begins *Theory* by rejecting classical utilitarianism<sup>24</sup> and embracing Kant’s moral imperative to treat the individual person as an end in himself, not as a means to collective ends. As he writes on the first page,

each person possesses an inviolability founded on justice that even the welfare of society as a whole can not override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many.<sup>25</sup>

Under classical utilitarianism, by contrast,

. . . society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it. . . . The striking feature of the utilitarian view of justice is that it does not matter, except indirectly, how this sum of satisfactions is distributed among individuals . . . . *utilitarianism does not take seriously the distinction between persons.*<sup>26</sup>

23. ROBERT PAUL WOLFF, *UNDERSTANDING RAWLS* 11–12 (Princeton Univ. Press 1977).

24. See Samuel Freeman, *Introduction: John Rawls—An Overview*, in *THE CAMBRIDGE COMPANION TO RAWLS* 1, 1 (Samuel Freeman, ed., 2002).

25. *THEORY*, *supra* note 17, at 3. See also *id.* at 156–59, and Rawls’s rejection of the average utility principle, *id.* at 139–53. Nussbaum calls this idea “simple and profound.” See Nussbaum, *supra* note 16, at B8.

26. *THEORY*, *supra* note 17, at 20, 23–24 (emphasis added). Rawls concedes that



For Rawls, classical utilitarianism is “incompatible with the conception of social cooperation among equals for mutual advantage.”<sup>27</sup>

---

[i]t is customary to think of utilitarianism as individualistic, and certainly there are good reasons for this. The utilitarians were strong defenders of liberty and freedom of thought . . . . Yet utilitarianism is not individualistic . . . in that, by conflating all systems of desires, it applies to society the principle of choice for one man.

*Id.* at 26. As he explains elsewhere,

To regard individuals as ends in themselves in the basic design of society is to agree to forgo those gains which do not contribute to everyone's expectations. By contrast, to regard persons as means is to be prepared to impose on those already less favored still lower prospects of life for the sake of the higher expectations of others. . . . The principle of utility presumably requires some who are less fortunate to accept even lower life prospects for the sake of others.

*Id.* at 157.

Accordingly, the claim that “persons in the original position would eschew the proposition that individuals are to be treated as individuals,” Guy-Uriel E. Charles, *Affirmative Action and Colorblindness from the Original Position*, 78 TUL. L. REV. 2009, 2032 (2004), seems misguided. Derrick Bell commits this kind of error in his critique of *Parents Involved in Community Schools v. Seattle* and *Meredith v. Jefferson County Public Schools*, 127 S. Ct. 2738 (2007). As he writes,

It is hypocritical for Chief Justice John G. Roberts Jr. to assert that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” The suggestion cruelly conflates minor cures with the major disease. Were he a medical doctor, Roberts would ban the use of vaccines that are fashioned from the disease-causing virus.

Derrick Bell, *Desegregation's Demise*, THE CHRON. OF HIGHER EDUC., July 13, 2007, at 11.

Bell's mistake, I submit, is to assume a moral equivalence between the individual cells destroyed by vaccines and the individual human beings passed over due to racial preferences. In no sense do, or should, those cells have the same stature, the same level of protection, under the U.S. Constitution, as human beings. To overlook this distinction is to embrace the organicism and collectivism at the heart of 20th century fascism.

From the outset of THEORY, by contrast, we have seen that Rawls clearly takes the liberal distinction between persons quite seriously, for good reasons, as well as Kant's “doctrine of the inviolability and dignity of moral personality.” The Fourteenth Amendment, in extending equal protection to “any person,” does the same. U.S. CONST. amend. XIV, § 1. Justice Powell thus embedded and operationalized this creation of rights in each person by clarifying that racial classifications by government are subject to strict scrutiny. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978).

The legitimacy of the principle that civil rights are held by individuals was recently underscored in international law by hundreds of European Parliamentarians in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). As they wrote, “[o]ne of the principal achievements of international law in the decades following World War Two was the widespread recognition of individual rights and obligations. . . .” *Brief of Amicus Curiae, Hamdan v. Rumsfeld*, LEGAL ISSUES 69 (Ethan Katsch, ed., McGraw Hill 2008)(13th ed.).

27. THEORY, *supra* note 17, at 13. While Rawls thus rejects utilitarianism as the core of a viable theory of justice, some have argued that utilitarianism is in some ways a “natural ally” of Rawls's theory. See Samuel Scheffler, *Rawls and Utilitarianism*, in THE CAMBRIDGE COMPANION TO RAWLS 426, 453 (Samuel Freeman ed., 2003). Indeed, while Rawls consis-

Accordingly, Wolff explains, Rawls's way out of the impasse between utilitarianism and intuitionism is the adoption of a contractual model of authority, specifically a refinement of classical social contract theory.<sup>28</sup> Contracts by their nature involve a bargaining process and so, Wolff writes, Rawls's key insight involves the bargaining game he proposes:

the brilliance of Rawls's idea lies in its promise of a way out of the impasse to which Kant had brought moral theory. . . . Through the device of a bargaining game, Rawls hopes to derive substantive principles . . . . The constraint merely says, "You must be willing, once you have arrived at a satisfactory principle, to commit yourselves to it for all time, no matter what." No limits are placed on what principle shall be adopted, nor are the players required to adopt their principle for "ethical" rather than self-interested reasons.<sup>29</sup>

On this foundation, Rawls erects *Justice as Fairness*. His architectonic theory, on the scale of Plato's *Republic*, Aristotle's *Politics*, and Kant's *Critique of Pure Reason*, "is framed for a democratic society"<sup>30</sup> and consists of a cluster of related ideas. For the present, six of the most basic will suffice: the original position, the veil of ignorance, the two principles of justice, their lexical ordering, the basic structure, and the four stage sequence. Since the original position is where the "bargaining game" takes place, this Article begins there.

In Rawls's words, the original position is "a device of representation or, alternatively, a thought experiment for the purpose of public- and self-clarification."<sup>31</sup> It replaces the state of nature as the starting point for free and equal citizens seeking to establish the rules by which their society

---

tently distinguishes his theory from utilitarianism in THEORY and FAIRNESS, he defends utilitarianism elsewhere. See John Rawls, *Two Concepts of Rules*, in JOHN RAWLS: COLLECTED PAPERS 20, 21-43 (Samuel Freeman ed., Harvard Univ. Press 1999). On this point generally, see READING RAWLS xiv (Normal Daniels ed., Basic Books Inc. 1975) and TALISSE, *supra* note 16, at 24-28.

28. See, e.g., JOHN LOCKE, TWO TREATISES OF GOVERNMENT 330-49 (Peter Laslett, ed., Cambridge Univ. Press 1988)(1690); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 52-54 (Roger D. Masters, ed., St. Martin's Press 1978); IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 9-22 (Lewis Beck, ed., MacMillan 1990). By contrast to utilitarianism, which stresses the role of sympathy as the basis for social and political order, Rawls writes that parties under the contract model "would reject the principle of utility and adopt the more realistic idea of designing the social order on a principle of reciprocal advantage." THEORY, *supra* note 17, at 155. A key implication Rawls derives from the nature of contract theory is that it is the concept of "legitimate expectations," not that of moral desert, that defines a just distributive scheme. See *id.* at 273-77.

29. WOLFF, *supra* note 23, at 20.

30. FAIRNESS, *supra* note 18, at 39. More specifically, Rawls argues that property-owning democracy is the regime that best satisfies the two principle of justice. See *id.* at 138-40. See generally Joshua Cohen, *For a Democratic Society*, in THE CAMBRIDGE COMPANION TO RAWLS, *supra* note 24, at 86-138.

31. FAIRNESS, *supra* note 18, at 17. As Martin explains, it is "a hypothetical bargaining situation . . . , a framework or arena for a fair agreement." REX MARTIN, RAWLS AND RIGHTS 15-16 (Univ. Press of Kansas 1985).

will be governed.<sup>32</sup> These citizens are rational,<sup>33</sup> mutually disinterested,<sup>34</sup> and equally situated behind what Rawls terms the “veil of ignorance.”<sup>35</sup> Behind this veil, he writes,

no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities.<sup>36</sup>

Moreover, “[t]hey also do not know persons’ race and ethnic group . . . .”<sup>37</sup> At the same time, “they know the general facts about human society. They understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology.”<sup>38</sup> For Rawls, the original position is an exercise in rational choice theory.<sup>39</sup> It posits decisionmakers with a unique combination of ignorance and knowledge, designed to eliminate bias while providing the broad knowledge essential for competence in choosing the principles by which they will be governed.

32. As Rawls says, he “generalizes and carries to a higher level of abstraction the traditional conception of the social contract.” THEORY, *supra* note 17, at 3. *Justice as Fairness* is thus rooted in contract theory, the terms of cooperation being specified by agreement, not God’s law or nature’s law. See FAIRNESS, *supra* note 18, at 14–15.

33. As for rationality, this “must be interpreted as far as possible in the narrow sense, standard in economic theory, of taking the most effective means to given ends . . . . [Thus] the theory of justice is a part . . . of the theory of rational choice.” THEORY, *supra*, note 17, at 12–15.

34. Here, Rawls explains, “[those] in the original position try to acknowledge principles which advance their system of ends as far as possible. They do this by attempting to win for themselves the highest index of primary social goods, since this enables them to promote their conception of the good most effectively whatever it turns out to be. The parties do not seek to confer benefits nor to impose injuries on one another; they are not moved by affection or rancor.” *Id.* at 125.

35. See *generally id.* at 118–23.

36. *Id.* at 11. Rawls calls these the “natural and social contingencies.” With the veil of ignorance, it is worth noting, Rawls uses human ignorance as a tool or lever for accessing truth and/or justice. See *generally* Plato, *Apology*, in THE LAST DAYS OF SOCRATES 37–67 (Hugh Tredennick & Harold Tarrant, trans., Penguin 1993).

37. FAIRNESS, *supra* note 18, at 15. In this sense, their position is “ahistorical.” Freeman, *supra* note 24, at 11. By depriving rational, mutually disinterested individuals in the original position of the specifics about themselves, the veil of ignorance ensures that they are not unfairly biased in their own favor. “Rawls’ idea is that, where social justice is in question, real people should always try to choose without being biased in the direction of their own special interests.” Nussbaum, *supra* note 16, at B8. Further, it assures that they will be risk averse, choosing principles for their governance, in a sense, conservatively. Rawls illuminates the idea when he writes that “the two principles are those a person would choose for the design of a society in which his enemy is to assign him his place.” THEORY, *supra* note 17, at 132–33 (emphasis added).

38. THEORY, *supra* note 17, at 119.

39. THEORY, *supra* note 17, at 15.

In this light, Rawls asks, “what principles of justice are most appropriate to specify basic rights and liberties, and to regulate social and economic inequalities in citizens’ prospects over a complete life?”<sup>40</sup> He answers that those in the original position would choose to be governed by two fundamental principles, one securing equality where it is essential (in the political and legal spheres) and the other regulating inequality where it is inevitable (in the social and economic spheres). The first is the “equal liberty” principle, which is Rawls’s foundational constitutional norm. It provides that “[e]ach person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.”<sup>41</sup> It is not surprising that such a principle would emerge, for liberty is the goal of democracy while equality is its conception of justice.<sup>42</sup>

In final form, the second principle provides that “[s]ocial and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society . . . .”<sup>43</sup> The second principle is thus actually two sub-principles: the fair equality of opportunity (“FEO”) and difference principles, respectively.<sup>44</sup> As Rawls writes, “a love of mankind that wishes to preserve the distinction of persons, to recognize the separateness of life and experience, will use the two principles of justice to determine its aims when the many goods it cherishes are in opposition.”<sup>45</sup>

The next key idea in Rawls’s theory is that the two principles are to be “lexically ordered.” That is to say, they would have

an order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before the third, and so on. A principle does not come into play until those previous to it are fully met or do not apply. A serial ordering avoids, then, having to balance principles at all. . . . [Thus] . . . I shall propose an ordering of this kind by ranking the principle of equal liberty prior to the principle regulating social

40. FAIRNESS, *supra* note 18, at 41.

41. THEORY, *supra* note 17, at 53. As Rawls reformulates the first principle, “[e]ach person is to have the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.” FAIRNESS, *supra* note 18, at 42. It has been called a “variation[] on a venerable modern theme: the harmonization of a substantial human equality with a sweeping individual freedom.” Berkowitz, *supra* note 16, at 126.

42. See ARISTOTLE, THE POLITICS, (Trevor J. Saunders, ed., Penguin Books 1981).

43. FAIRNESS, *supra* note 18, at 42–43. On the second principle, see generally MARTIN, *supra* note 31, at 64–106. Inequality is measured via an index of primary goods. See FAIRNESS, *supra* note 18, at 168–75 (reply to Sen).

44. See FAIRNESS, *supra* note 18, at 119–34, 161–62. Let us observe here that, unlike the equal liberty principle, the FEO and difference principles are not constitutional essentials. See *id.* at 162.

45. THEORY, *supra* note 17, at 167.

and economic inequalities. This means, in effect, that the basic structure of society is to arrange the inequalities of wealth and authority in ways consistent with the equal liberties required by the preceding principle.<sup>46</sup>

In Rawls's judgment, parties in the original position would make the basic liberties lexically prior to the second principle. They are so vital, that is, so "nonnegotiable," that those behind the veil of ignorance would not rationally place them at risk.<sup>47</sup>

Next is the idea of the basic structure. Rawls calls this "the primary subject of political justice,"<sup>48</sup> and as he explains,

the basic structure of society is the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time. The political constitution with an independent judiciary, the legally recognized forms of property, and the structure of the economy (for example, as a system of competitive markets with private property in the means of production), as well as the family in some form, all belong to the basic structure . . . . The basic structure is to secure citizens' freedom and independence, and continually to moderate tendencies that lead, over time, to greater inequalities in social status and wealth, and in the ability to exert political influence and to take advantage of available opportunities.<sup>49</sup>

The idea of the basic structure is integral to Rawls's key distinction between two domains of public policy, a distinction that will enable this Article's overarching thesis.

The final stage for exploration is the four-stage sequence. Rawls calls this an "elaboration of the original position,"<sup>50</sup> and it is a device for regulating the scope of Rawlsian agents' knowledge at various stages of the lawmaking process. As he writes, "[i]n the first stage, the parties adopt the principles of justice behind a veil of ignorance. Limitations on knowledge available to the parties are progressively relaxed in the next three stages . . . ." <sup>51</sup> As he elaborates,

[A]fter the parties have adopted the principles of justice in the original position, they move to a constitutional convention. Here they are to decide upon the justice of political forms and choose a constitution: they are delegates, so to speak, to such a convention. . . . They now know the relevant general facts about their society, that is, its natural circumstances and re-

46. *Id.* at 38. See also FAIRNESS, *supra* note 18, at 43.

47. See THEORY, *supra* note 17, at 105. Analogous to the equal liberty principle's lexical priority to the second principle, the FEO principle is lexically prior to the difference principle. See *id.* at 43.

48. FAIRNESS, *supra* note 18, at 39.

49. *Id.* at 10, 159. The basic structure is related to Rawls's notion of background justice. See JOHN RAWLS, POLITICAL LIBERALISM 265-69 (Columbia Univ. Press 1993). These two ideas will be especially relevant in considering reparations from a Rawlsian perspective.

50. THEORY, *supra* note 17, at 172.

51. FAIRNESS, *supra* note 18, at 48.

sources, its level of economic advance and political culture, and so on. They are no longer limited to the information implicit in the circumstances of justice.<sup>52</sup>

These delegates must thus draft a political constitution within the guidelines of the two principles, although particularly the first principle.<sup>53</sup> Having done so, they move to the third stage of the sequence, the legislative stage. Here, the veil is lifted further, and while the agents still do not know their own identities, “the full range of social and economic facts is brought to bear.”<sup>54</sup> This knowledge enables our agents to legislate competently within the guidelines of the Constitution they ratified at the second stage. While the equal liberty principle is enacted into law at the constitutional stage, the second principle (i.e., the FEO and difference principles in lexical order) is enacted into law at the legislative stage. As Rawls writes, “social and economic policies [are to be] aimed at maximizing the long term expectations of the least advantaged under conditions of fair equality of opportunity, subject to the equal liberties being maintained.”<sup>55</sup> At the fourth stage, the veil of ignorance is completely lifted. Here, judges, administrators, and citizens apply the constitutional and legislative rules chosen at earlier stages to the particular decisions they are called on to make.<sup>56</sup>

The four-stage sequence thus regulates the scope of Rawlsian agents’ knowledge, whether they are 1) parties in the original position, 2) constitutional delegates, 3) legislators, or 4) administrators, judges, and citizens. With an eye toward race policy, our constitutional delegates will have to decide whether to incorporate an equal protection clause into the document. Yet it will be Rawlsian legislators who choose the substance of

52. THEORY, *supra* note 17, at 172–73.

53. As Rawls asserts, “[t]he first principle . . . covers the constitutional essentials.” FAIRNESS, *supra* note 18, at 47. See also THEORY, *supra* note 17, at 174–75. As he adds, “[i]n matters of constitutional essentials, as well as on questions of basic justice, we try to appeal only to principles each citizen can endorse.” FAIRNESS, *supra* note 18, at 41. These essentials, that is, are “those crucial matters about which, given the fact of pluralism, working political agreement is most urgent.” *Id.* at 46.

54. THEORY, *supra* note 17, at 175.

55. *Id.*

56. THEORY, *supra* note 17, at 174–75 (emphasis added). As Fullinwider explains,

what is striking about the theory is the division of labor it embraces. Its very broadest principles of liberty and equality are themselves unable to single out proper micro-allocations of social benefits and burdens. This is not a defect; it is their nature. What they can do is structure roles and institutions which then create the social and legal machinery for assigning benefits and burdens.

the civil rights laws and allocate public funds.<sup>57</sup> The bulk of the analysis in Part IV will thus focus on the third stage of the sequence, where the veil has been lifted twice and legislation addressing social and economic inequalities in light of Rawls's second principle is enacted.

At the same time, an able president can sometimes spur a legislature to action. It is therefore now useful to observe why President Obama would likely find much of Rawls's theory persuasive. The President is a lawyer, to begin with, steeped in the law of contracts. His view of a vibrant social contract as the essential foundation for political rights and obligations in a just society is thus not surprising. While the strengths of utilitarianism and intuitionism are plain for Obama to see, he can also easily grasp their fatal limitations as overarching principles of justice. Given his command of the sources and structure of American law—the relationship among foundational principles, a constitution, statutory law and judicial decision making—he would find the four stage sequence and lexical ordering of the principles of justice valuable tools that invite and enable application of those principles to concrete legal problems. As a Democrat on the moderate political left, President Obama embraces principles of equal liberty and fair equality of opportunity, rejecting conservative and libertarian claims that mere *formal* equality of opportunity yields a just and stable social order. As for the difference principle, not only do Obama's speeches, writings and lawmaking efforts evince a genuine concern for the least advantaged of all races, but also his middle class upbringing exemplifies the fact, stressed by Rawls, that wealth and income, not race, determine least advantaged status.

Other aspects of *Justice as Fairness* will be considered later in the Article, but this overview will suffice for now. We shall now turn to consider the forms of race policy that can be derived from Rawls's theory. Accordingly, two basic forms of race policy—affirmative action and reparations—are considered in the following sections.

---

57. Under Rawls, reparations as defined would be administered by the distributive branch, one of four background institutions he describes. See *THEORY*, *supra* note 17, at 242–47.

## II. AFFIRMATIVE ACTION

Affirmative action is a perennially divisive issue.<sup>58</sup> Compelling interests and principles exist on all sides of the question. In its constitutional domain alone, it has split the Supreme Court down the middle for decades in such cases as *UC Regents v. Bakke*,<sup>59</sup> *Richmond v. J.A. Croson*,<sup>60</sup> *Adarand Constructors v. Peña*,<sup>61</sup> *Grutter v. Bollinger*,<sup>62</sup> and most recently, *Parents Involved* and *Meredith*.<sup>63</sup> As these cases illustrate, challenges to affirmative action programs under the U.S. Constitution are generally brought under the equal protection clause of the Fourteenth Amendment. Approaching affirmative action from a Rawlsian perspective, the first question is whether constitutional delegates would include an equal protection clause among their “constitutional essentials.”<sup>64</sup> There seems little doubt they would. As Rawls writes, “[s]ome of the ends of a political society may be stated in a [constitution’s] preamble—to establish

---

58. See generally THE AFFIRMATIVE ACTION DEBATE (George E. Curry, ed., Addison-Wesley Publishing 1996); M. ALI RAZA, A. JANELL ANDERSON, & GLYNN CUSTRED, THE UPS AND DOWNS OF AFFIRMATIVE ACTION (Praeger 1999); HOWARD BALL, THE BAKKE CASE: RACE, EDUCATION, AND AFFIRMATIVE ACTION (Univ. Press of Kansas 2000); CARL COHEN & JAMES P. STERBA, AFFIRMATIVE ACTION AND RACIAL PREFERENCE: A DEBATE (Oxford Univ. Press 2003); W. ROBERT GRAY, THE FOUR FACES OF AFFIRMATIVE ACTION (Greenwood Press, 2001); J. EDWARD KELLOUGH, UNDERSTANDING AFFIRMATIVE ACTION: POLITICS, DISCRIMINATION, AND THE SEARCH FOR JUSTICE (Georgetown Univ. Press 2006); PHILIP F. RUBIO, A HISTORY OF AFFIRMATIVE ACTION, 1619–2000 (Univ. Press of Miss. 2001); Peter Schuck, *Affirmative Action: Past, Present and Future*, 20 YALE L. & POL’Y REV. 1 (2002); GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION (New York Univ. Press 2000).

59. 438 U.S. 265 (1978).

60. 488 U.S. 469 (1988).

61. 515 U.S. 200 (1995).

62. 539 U.S. 306 (2003).

63. 127 S. Ct. 2738 (2007). The Court consolidated these cases and heard them together.

64. Rawls writes that:

constitutional essentials . . . are of two kinds: fundamental principles that specify the general structure of government and the political process: the powers of the legislature, executive and the judiciary; the scope of majority rule; and equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law.

JOHN RAWLS, POLITICAL LIBERALISM 227 (Columbia Univ. Press 1993) [hereinafter LIBERALISM]. See also FAIRNESS, *supra* note 18, at 28; Lawrence G. Sager, *The Constitutional Essentials of Political Liberalism: The Why of Constitutional Essentials*, 72 FORDHAM L. REV. 1421, 1430 (2004).

While our delegates would likely establish basic structural features like separation of powers, federalism, and checks and balances, as well as Bill of Rights guarantees like the political liberties and criminal procedure protections, an equal protection clause is a distinct matter.



justice and to promote the general welfare—and certain constraints are found in a bill of rights or implied in a framework of government—due process of law and equal protection of the laws.”<sup>65</sup>

Therefore, not only would a Rawlsian constitution include an equal protection clause, but it would also, like the Fourteenth Amendment, expressly locate that right in the individual person.<sup>66</sup> Rawlsian legislators, in turn, contemplating racial categories in the law, could scarcely resist the language of the 1964 Civil Rights Act—making it unlawful to discriminate against “any person” based on race, ethnicity, gender, or national origin.<sup>67</sup> As Freeman explains, “Rawls did not regard preferential treatment as compatible with fair equality of opportunity. It does not fit with the emphasis on individuals and individual rights, rather than groups or group rights, that is central to liberalism.”<sup>68</sup> Thomas Nagel refers to “the deviation from equality of opportunity represented by affirmative action . . . . That kind of reversal of priority between equality of opportunity and equality of results would represent

65. LIBERALISM, *supra* note 64, at 232 (emphasis added). On equal protection, *see also id.* at 238.

The question arises whether constitutional delegates would favor a more detailed provision, like California’s Proposition 209 or Michigan’s Proposition 2, which are ballot initiatives that have been enacted into State constitutions. *See* Tamar Lewin, *Michigan Rejects Affirmative Action, and Backers Sue*, N.Y. TIMES, Nov. 9, 2006, at 16; *see also* Peter Slevin, *Court Battle Likely on Affirmative Action; Michigan Voters Approved Ban, but Opponents of the Measure Persist*, WASH. POST, Nov. 18, 2006, at A2. The key language is: “the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” CAL. CONST. Art. I, § 31. Since Rawls says little about federalism, he may not fully have factored the role of State constitutions as a source of law into his theory. Some of these documents are over 100 pages long, “partak[ing] of the prolixity of a legal code.” *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). Laws like Proposition 209 are thus hybrids—more specific than an equal protection clause but less specific than a sweeping statutory scheme like the 1964 Civil Rights Act.

This is an interesting question, yet I shall not pursue it here. Rather, I shall simply move on to the legislative stage, where Rawlsian agents are charged with translating the FEO and difference principles into law. Indeed, given the capacity of well drafted legislation to articulate general rules embodying rational policy, it is clear that the legislative stage is where the questions of affirmative action and reparations under Rawls must be engaged, rendering any consideration of a hybrid law like Proposition 209 unnecessary for our purposes.

66. “[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

67. *See* 42 U.S.C. § 2000 (2009). This answers Shiffrin’s legitimate concern about an express antidiscrimination principle in Rawls’s scheme. *See* Seana Valentine Shiffrin, *Race, Labor and the Fair Equality of Opportunity Principle*, 72 FORDHAM L. REV. 1643, 1645 (2004). She asks why the principle does not emerge in the original position, but overlooks the fact that it would arise only at the constitutional and legislative stages.

68. SAMUEL FREEMAN, *RAWLS* (London: Routledge 2007) at 90–91. For a reluctant admission that Kant (from whom, we have seen, Rawls derives much of his theory, including the sanctity of the individual and the priority of the right over the good), would not support affirmative action, *see* Stanley Fish, *Revisiting Affirmative Action, With Help From Kant*, N.Y. TIMES, Jan. 14, 2007.

a more radically egalitarian position than Rawls's, and also one that was in a sense more anti-individualistic.<sup>69</sup>

Freeman and Nagel are on solid ground. Behind the veil of ignorance, Rawlsian legislators know that race (or gender) preferences in the law could place their and their family's FEO at grave risk, perhaps permanently. Beyond this, even assuming they enact the language of the 1964 Civil Rights Act into law, they know that power corrupts, even in a reasonably just society. Since even such a society needs a criminal justice system,<sup>70</sup> it follows that "antidiscrimination laws would presumably be violated occasionally and would therefore need to be enforced."<sup>71</sup> Beyond FEO, Rawls is clear that a person's race alone does not determine whether he is among the "least advantaged" for purposes of the difference principle.<sup>72</sup> Even if the FEO principle were not lexically prior to the difference principle, the latter would still yield no basis for strong forms of affirmative action.

While Freeman and Nagel thus provide support for the premise that Rawlsian legislators would reject racial preferences and quotas, "affirmative action" is a broad term. It is a complex policy, legal, and constitutional phenomenon. It consists of a range of means, ends, contexts, and favored groups,<sup>73</sup> and it is not clear Rawls would reject them all.

Robert Allen, for example, argues that Rawls would allow weak forms of affirmative action like aggressive recruiting,<sup>74</sup> but would reject strong forms of affirmative action like quotas.<sup>75</sup> More recently, Taylor has

69. Thomas Nagel, *Rawls and Liberalism*, in *THE CAMBRIDGE COMPANION TO RAWLS* (Freeman, ed., 2003).

70. "It is clear from the preceding remarks that we need an account of penal sanctions however limited even for ideal theory." *THEORY*, *supra* note 17, at 212.

71. See Robert Taylor, *Rawlsian Affirmative Action*, 119 *ETHICS* 476, 480 (2009).

72. As Rawls writes, "[i]n a well ordered society where all citizens' equal basic rights and liberties and fair opportunities are secure, *the least advantaged are those belonging to the income class with the lowest expectations*. . . . Note here that in the simplest form of the difference principle the individuals who belong to the least advantaged group are not identifiable apart from, or independently of, their income and wealth. The least advantaged are never identifiable as men or women, say, or as whites or as Blacks, or Indians or British." *FAIRNESS*, *supra* note 18, at 59, n.26 (emphasis added). See also *FAIRNESS*, *supra* note 18, at 65.

Rawls later supplemented this definition of the least advantaged with the three social contingencies. See *FAIRNESS*, *supra* note 18, at 55; see also Roy C. Weatherford, *Discussions Defining the Least Advantaged*, in *EQUALITY AND LIBERTY: ANALYZING RAWLS AND NOZICK* 37-45 (J. Angelo Corlett ed., St. Martin's Press 1991). While Rawls thus refined this aspect of his theory, he never qualified his claim that least advantaged status is no function of a person's race in a reasonably just society.

73. See Schuck, *supra* note 58.

74. Robert Allen, *Rawlsian Affirmative Action: Compensatory Justice as Seen from the Original Position*, available at [www.bu.edu/wcp/Papers/Soci/SociAlle.htm](http://www.bu.edu/wcp/Papers/Soci/SociAlle.htm), at 2.

75. *Id.* at 6-7.

echoed such a moderate reading.<sup>76</sup> Using Nagel's five point taxonomy of forms of affirmative action,<sup>77</sup> Taylor argues first that categories one and two, the weakest forms, can be derived from Rawls's theory.<sup>78</sup> This point is well taken, for categories one and two amount to strict enforcement of the nondiscrimination rule that Rawlsian legislators would enact into their civil rights laws. Taylor argues further that categories four and five, the strongest forms of affirmative action, can almost never be derived from Rawls.<sup>79</sup> Again, he is on solid ground, for Rawlsian legislators, still behind the veil of ignorance, would not rationally subject themselves to a lifetime of the risks posed by the preferences and quotas of these categories. As for category three interventions—"compensating support"—Taylor argues that these can be justified, at least under nonideal theory.<sup>80</sup> Even assuming he applies the distinction between ideal and nonideal theory in a convincing way,<sup>81</sup> however, category three interventions as Taylor describes them have no direct link to race (or gender).<sup>82</sup> They do

76. Taylor, *supra* note 71.

77. *See id.* at 478-79.

78. *See id.* at 480-81.

79. *See id.* at 502.

80. *See id.*

81. The progress in U.S. race relations since the 1950's aside, Taylor simply assumes that the U.S. in 2010 is not even a reasonably just society regarding race (such that Rawlsian affirmative action must be assessed under nonideal theory). Yet there are at least two problems here. First, Taylor uses neither of the two methods Rawls provided for determining the realm of nonideal theory, i.e., the category approach (*see* THEORY, *supra* note 17, at 8) or the rule/exception approach (*see* FAIRNESS, *supra* note 18, at 13), and thus leaves a key premise unsupported. Second, even assuming *arguendo* that affirmative action under Rawls must be analyzed under nonideal theory, Taylor provides no concrete guidance to Rawlsian legislators on how to vary or distort their application of the two principles of justice as a result of being restricted to nonideal theory. Until such problems are addressed, we can legitimately apply Rawls's two principles of justice, designed as they are for the reasonably just society, to matters of race policy. For a full reply to Taylor and others on this issue, *see* M. Carcieri, *Rawls, Race, and Ideal Theory* (2009) (unpublished manuscript on file with author).

82. When he first references category three interventions, Taylor writes that they are "designed to compensate for color or gender based disadvantages." Taylor, *supra* note 68, at 478. In his conclusion, similarly, he refers to these interventions as "supplementary gender and race-based training, mentoring and funding." *Id.* at 506. When he goes into some detail on category three interventions in the body of his article, however, Taylor shows no clear connection between them and one's race or gender. As he describes category three interventions:

1. Training: to counterbalance the effects of poor schools through SAT preparation classes, co-op programs, etc.
2. Mentoring: to counteract the results of unsupportive or ill-informed parents, neighbors, and peers through Big Brother/Big Sister-style programs, vocational counseling, etc.
3. Funding: to compensate for financial disabilities through scholarships and fellowships, grants for professional wardrobes, etc.

*Id.* at 492.

not conflict with the rule of nondiscrimination, and so are unobjectionable.<sup>83</sup>

Where Taylor uses his category three to analyze the boundary of permissible forms of affirmative action under Rawls, Allen does so with his discussion of the tiebreaker, the weakest form of preference. As he writes, a tiebreaker preference “dictates that a member of a disadvantaged group be given a sought after position *in the event that she is as qualified for it as other aspirants.*”<sup>84</sup> Concluding that Rawls would allow the tiebreaker, Allen writes, “the scoring of candidates must be based on publicly known, objective criteria and subject to review. Ties should neither be manufactured nor ignored. The potential for abuse must be acknowledged. But it warrants safeguards and vigilance, not abandoning the policy.”<sup>85</sup>

This argument seems persuasive. If admissions or hiring decisions at public universities, for example, were “subject to review” by an independent body (to ensure that ties are “neither manufactured nor ignored”), our legislators might reasonably conclude that a non-minority passed over due to a racial tiebreaker nonetheless had received FEO. Yet our legislators know that tenured faculty and administrators are certain to lose the Rawlsian perspective ensured by the veil of ignorance.<sup>86</sup> History tells them that those secure in their position or income stream will use preferences against others to which they would never consent if they were seeking, rather than secure in, that position or income stream. They know that without the veil of ignorance to insure that policymakers maintain the priority of the right over the good, those with security of employment will pull up the ladder behind them, suddenly privileging theories of the good like utility or diversity over the principle of individual rights to which they justifiably clung when they were on the market. Our legislators thus recognize that even the tiebreaker uses some passed-over applicants as means rather than ends based solely on race, thus violating a fundamental Kantian norm embraced by Rawls.<sup>87</sup>

---

On a fair reading, category three is based on social and economic class, which are no mere functions of race or gender. See FAIRNESS, *supra* note 18, at 59, n.26. At the same time, poor schools and unsupportive or ill informed adults and peers are often characteristic of the least advantaged communities, and so reparations as defined in this Article, channeled in a reasonably efficient manner, could ameliorate many of these effects.

83. Furthermore, these interventions are supported by taxation. They thus diffuse the burden of race policy over the entire taxpaying public rather than concentrating them on a few shoulders. See discussion *infra* note 139.

84. Robert Allen, *supra* note 74, at 2 (emphasis added).

85. *Id.* at 6 (emphasis added).

86. It may be asked how Rawlsian judges and administrators can be trusted to act justly since the veil has been completely lifted for them as well. An answer would be that these agents have many other checks on their work, including adversarial litigants with rights to each other's evidence, the publicity of disputes that go to trial, and a losing party's right to appeal an administrator's or trial judge's judgment to a higher tribunal.

87. As Allen notes, moreover, affirmative action cannot be justified under Rawls on the basis that a diverse student body is a *good* outcome. See *id.* at 6. Not only is race no

Admittedly, Allen recognizes, the tiebreaker is a close call under Rawls. Yet even if Allen is right on this point, it seems likely that Rawlsian legislators would couple the tiebreaker with a requirement of judicial oversight over the officials who administer the admissions or hiring process at prominent, public institutions.<sup>88</sup> Since antidiscrimination laws must be enforced even in a reasonably just society, those like Allen, who support a good faith application of the tiebreaker, will have no objection to such oversight.

Based on the foregoing, although some critiques still suggest otherwise,<sup>89</sup> Rawlsian legislators would reject strong forms of affirmative action

synonym for diversity, *Bakke*, 438 U.S. at 314, but the *right* in Rawls's theory (i.e., justice to the individual) is prior to the *good*.

It is noteworthy that under the FEO principle, Rawlsian legislators would also forbid legacy preferences in university admissions, i.e., those for children of alumni. While they would not try to end inequality, our legislators would not consent to the compounding of such inequality, and thus the reinforcement of a virtual hereditary aristocracy, as legacy preferences enable.

Preferences for the children of wealthy donors, however, might be a different story. While private universities would remain subject to Title VII, such a donor might condition a sufficiently large financial pledge to such an institution on his child's admission that the university could rationally judge it to be in its economic interest to forego public financial assistance, and thus remove itself from the restrictions of Title VI.

88. See generally Martin D. Carcieri, *The Wages of Taking Bakke Seriously: Federal Judicial Oversight of the Public University Admissions Process*, 2001 B.Y.U. ED. & L.J. 161 (2001). Even assuming they would allow the tiebreaker under these circumstances, however, our legislators would reject the use of "race as one of many factors" in university admissions. They know from the facts of cases like *Grutter* that with pressures for universities to achieve proportional representation of specific races, race becomes the dominant factor in the admissions process over time. Rawlsian legislators are thus clear that such preferences in this form deny FEO to the Barbara Grutters of the world, among whose ranks they may well find themselves. *A fortiori*, they would not remotely endorse critical mass, as Charles claims, *supra* note 26. That is, if judges can interpret the racial nondiscrimination rule of Title VI to permit race to equal a full grade point in selective admissions, as in *Grutter*, the written rule of law is a sham. Under Rawls, however, this is not an option. See THEORY, *supra* note 17, at 206–13.

89. See, e.g., THOMAS POGGE, JOHN RAWLS: HIS LIFE AND THEORY OF JUSTICE 121 (Oxford Univ. Press, 2007) [hereinafter, POGGE II]; Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405; David Resnik, *Affirmative Action in Science and Engineering*, 14 SCIENCE & ED. 75, 83–84 (2005); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1455–56, n.84 (2005); Fullinwider, *supra* note 56; Guy-Uriel E. Charles, *supra* note 26; Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683 (2004); Anita Allen, *Race and Ethnicity: Race, Face, and Rawls*, 72 FORDHAM L. REV. 1677, 1694 (2004); Garth Massey, *Thinking About Affirmative Action: Arguments Supporting Preferential Policies*, 6 REV. POL'Y RES. 783, 792–93 (2004); Laurence Thomas, *Equality and the Mantra of Diversity*, 72 U. CIN. L. REV. 931, 957–58 (2004); Aaron-Andrew P. Bruhl, *Public Reason as a Public Good*, 4 J.L. SOC'Y 217, 226 n. 26 (2003); Kenneth Deville & Loretta Kopelman, *Diversity, Trust, and Patient Care: Affirmative Action in Medical Education 25 Years after Bakke*, 28 J. MED. & PHIL. 489, 492–94 (2003); Thomas Nagel, *John Rawls and Affirmative Action*, 39 J. BLACKS IN HIGHER ED. 82, 82–83 (2003); Paul Schumaker & Marisa Kelly, *Affirmative Action, Principles of Justice, and the Evolution of Urban Theory*, 34 URB. AFF. REV. 619, 623 (1999); Cass Sunstein, *Affirmative Action*,

like preferences or quotas in any form. Milder forms, like outreach and aggressive recruiting, when conducted in an evenhanded way, are not seriously disputed under Rawls. Yet legislators would make racial nondiscrimination the essential policy of their law, and would oversee its strict enforcement.<sup>90</sup>

---

*Caste and Cultural Comparisons*, 97 MICH. L. REV. 1311 (1999); Purvi Badiani, *Affirmative Action in Education: Should Race or Socioeconomic Status be Determinative?* 5 GEO. J. FIGHTING POVERTY 89, 94–96 (1997).

90. Before moving on, the constitutional and statutory dimensions of the issue should be briefly analyzed.

At the constitutional level, the Supreme Court seems to be dismantling affirmative action with cases like *Parents Involved* and *Meredith*. If this Article's argument is sound so far, then it is the Court's conservative majority, not its liberal minority, that is in sync with Rawls on affirmative action. Rawlsian legislators, after all, would be wary of practices like the racial tiebreaker in these cases. As in *Bakke* and *Grutter*, they are focused on the realm of public education, and thus the core of civil society, not its periphery. Rationales for race preferences in the law enforcement, corrections, and military domains are thus of limited applicability. As our legislators know from cases like *Bakke* and *Grutter*, the allowance of a tiebreaker can easily lead to the use of "race as a factor," and in turn "critical mass." Moreover, they would be unimpressed by government claims that school districts "voluntarily" implemented these practices, for this will make no difference to them at all if they turn out to be among those individuals burdened by them.

While the conservatives prevailed in *Parents Involved* and *Grutter*, Justice Kennedy wrote a thoughtful concurrence clearly distancing himself from the plurality opinion. As he suggests, *Parents Involved* and *Meredith* present a stronger case in Rawlsian terms for the use of race than did *Grutter*.

For one thing, the plaintiffs in *Parents Involved* and *Meredith* were children in elementary and high school, not adults in law school. As a prominent conservative judge thus wrote in support of the Seattle plan, "[i]t is difficult to deny the importance of teaching children during their formative years, how to deal respectfully and collegially with peers of different races." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1194 (9th Cir. 2005) (Kozinski, J., concurring). Secondly, kindergartner Joshua McDonald could apply year after year for a transfer to the school of his choice, and such applications are often successful eventually. See *Parents Involved*, 426 F.3d at 29–30. As an adult in her thirties, anxious to start law school so that she can begin her career, Barbara Grutter is losing time in a way that Joshua is not. Further, if it is hard to transfer from a second tier law school to a top law school like UM after the first year, it is impossible to do so after the second year. The distinction between the facts of *Parents Involved* and *Meredith* on the one hand and *Grutter* on the other thus finds support in Rawls's observation that different stages of life have distinct legitimate claims. See FAIRNESS, *supra* note 18, at 174. Finally, as the lawyer for Seattle noted at oral argument, the use of race under these plans is "very much like the little boy in the Dutch story who put his finger in the dike because a few drops of water were coming out. He knew that it would become a flood eventually if he didn't do that. We think that is exactly the case here, that without these guidelines one student at a time could transgress them and ultimately we would have a re-segregated school system." See [http://www.supremecourt.us/oral\\_arguments/argument\\_transcripts/05-915.pdf](http://www.supremecourt.us/oral_arguments/argument_transcripts/05-915.pdf) at 46–47 (Supreme Court transcript of *Meredith*). Since he notes that racially segregated schooling and housing patterns affect each other, *id.* at 49, his claim that compelling state interests are at stake in these cases is well taken. The essential point, however, is that the Court as now constituted will very likely overturn *Grutter*, at least on means, when it can.

As for the statutory dimension, the issue, especially post-*Ricci*, is whether, beyond an express ban on intentional discrimination, or "disparate treatment," as in Title VII, Rawlsian legislators would also enact a ban on statistical discrimination, or "disparate impact" (like that announced in *Griggs v. Duke Power*, 401 U.S. 424 (1971), and codified into

As noted, however, this is only part of this Article's thesis and only a component of the race-related policy that it appears the President would support in light of Rawls. Justice as Fairness is subtle and complex, and, as Anita Allen says, there is "nothing in Rawls to rule out race-conscious programs that stand to benefit the least advantaged in society."<sup>91</sup> Affirmative action aside, the question remains whether Rawls's theory yields progressive race policy, or stated differently, substantial racial justice. The theory appears to, but to see this, two key distinctions must be made, including that between affirmative action and reparations. This, in turn, requires a working definition of reparations, which is discussed in the following section.

### III. REPARATIONS

As Dean Levmore has observed, "[r]eparations . . . is an ill defined term . . ."<sup>92</sup> Nonetheless, Americans have strong views on "reparations": a CNN/USA Today/Gallup Poll found that nine out of ten White Americans say that government should not pay reparations for slavery and segregation, while half of African-American respondents respond that it should.<sup>93</sup> Judge Charles Norgle's opinion in *In re African-American Slaves Descendants Litigation*<sup>94</sup> crystallizes much of the current debate, in both the political and legal spheres. A brief overview of this opinion, with refer-

---

legislation by the 1991 Civil Rights Act, 105 Stat. 1071). This is an interesting discussion, more complex than can be fully addressed here. I thus simply assert that Rawlsian legislators would not enact a rule of disparate impact for at least three reasons.

First, as Taylor explains, disparate impact's essential focus on equality of result is inconsistent with Rawls's emphasis on pure procedural justice. See Taylor, *supra* note 71, at 493, and THEORY, *supra* note 17, at 73–78. Second, two such inconsistent directives as disparate treatment and disparate impact are confusing to employers, lawyers and judges, thus undermining the rule of law and requiring intricate yet inevitably not fully satisfactory interpretive guidance from the Supreme Court. See *Rici*, 129 S. Ct. at 2658, 2674. Third, a rule of disparate impact is inconsistent with the equal protection clause within which our legislators are working, as it involves government requiring third parties (employers) to engage in racial discrimination. See *id.* (Scalia, J., concurring).

Some have claimed that determined administrators will simply find a way to use race whether or not it is legal or constitutional. See Joe Klein, *There's More Than One Way to Diversity*, TIME, Dec. 18, 2006, at 29; see also Jeffrey Rosen, *Can a Law Change a Society?*, N.Y. TIMES, July 1, 2007, available at [www.nytimes.com/2007/07/01/weekinreview/01rosen](http://www.nytimes.com/2007/07/01/weekinreview/01rosen). Upholding the use of race on such a basis, however, simply defers to and rewards lawlessness, a practice inconsistent with Rawls and constitutional government.

91. Allen, *supra* note 89, at 1695.

92. Saul Levmore, *The Jurisprudence of Slavery Reparations: Privatizing Reparations*, 84 B.U. L. REV. 1291, 1294 (2004).

93. Darryl Fears, *Seeking More Than Apologies for Slavery: Activists Hope Firms' Disclosure of Ties Will Lead to Reparations*, WASH. POST, June 20, 2005, at A1. See also James J. Hackney, Jr., *Ideological Conflict, African-American Reparations, Tort Causation and the Case for Social Welfare Transformation*, 84 B.U. L. REV. 1193, 1203, n.43 (2004).

94. 375 F.Supp.2d 721 (N.D. Ill. 2005).

ences to Chief Judge Posner's opinion affirming "the greater part of"<sup>95</sup> Norgle's judgment on behalf of the Seventh Circuit, is thus in order. It will both flesh out the conceptual terrain of reparations and enable the development of a working definition of reparations for purposes of Rawlsian analysis.<sup>96</sup>

#### A. *In Re: African-American Slave Descendants Litigation (2005)*

*In re African-American Slaves* is not the first attempt to use private law remedies to redress American slavery and segregation.<sup>97</sup> After several such lawsuits were consolidated in Judge Norgle's court,<sup>98</sup> *In re African-American Slaves* became the first class action attempt to do use private law remedies.<sup>99</sup> The defendants were private entities FleetBoston, New York Life Insurance Company, Norfolk Southern Railway Company, Canadian Railway Company, Lloyds of London and Aetna. Plaintiffs were African-Americans who sought "to hold [these] corporate defendants liable for the commercial activities of their alleged predecessors before, during and after the Civil War in America."<sup>100</sup> Judge Norgle granted defendants' Motion to Dismiss, rejecting the suit on threshold procedural grounds without reaching the substantive merits of the claims.<sup>101</sup>

In a well-crafted opinion, Norgle presented an overview of slavery in America and summarized the arguments for and against reparations.<sup>102</sup>

95. *In re African Am. Slave Descendants Litig.*, 471 F.3d 754, 762 (7th Cir. 2006) [hereinafter *In re African Am. Slaves II*].

96. For historical and analytical overviews of reparations beyond that in *In re African Am. Slaves*, 375 F. Supp. 2d at 726–31, see generally TORPEY, *supra* note 22, at 8–41; HENRY, *supra* note 22, at 9–32; REPARATIONS FOR SLAVERY, *supra* note 22, at 59–96; BROOKS, *supra* note 22, at 4–19; DERRICK BELL, RACE, RACISM AND AMERICAN LAW 51–56 (5th ed. 2004) [hereinafter BELL II]; Symposium, *The Jurisprudence of Slavery Reparations*, 84 B.U. L. REV. 1135 (2004); WINBUSH, *supra* note 22, at Part I: History and Reparations; Posner & Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 694–99; Charles J. Ogletree, *Litigating the Legacy of Slavery*, N.Y. TIMES, March 31, 2002, at 9; RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS (2000).

97. See, e.g., *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995); *Abdullah v. United States*, No. 3:02cv1030(JBA), 2003 U.S. Dist. LEXIS 5129 (D. Conn. Mar. 25, 2003); *Bell v. United States*, No. 3:01-CV-0338-D, 2001 U.S. Dist. LEXIS 14812 (N.D. Tex. July 10, 2001).

98. See *Complaint, Porter v. Lloyds of London*, No. 02-CV-6180, 2002 WL 32602457 (N.D. Ill. Aug. 29, 2002); *Complaint, Farmer-Paellman v. FleetBoston Fin. Corp.*, No. 2002cv01862 (E.D.N.Y. Mar. 26, 2002); *Johnson v. Aetna Life Ins. Co.*, No. 02-CV-9180 (E.D. La. Sept. 3, 2002).

99. For critiques of the filing of these suits, see Robert F. Worth, *Companies are Sued for Slave Reparations*, N.Y. TIMES, Mar. 27, 2002, at B2; Editorial, *The Great Reparations Hoax*, WASH. TIMES, Mar. 29, 2002, at A16.

100. *In re African Am. Slaves*, 375 F. Supp. 2d at 726.

101. *Id.* at 726, 780–81.

102. See *id.* at 726–34; Glenn C. Loury, *It's Futile to Put a Price on Slavery*, N.Y. TIMES, May 29, 2000, at A15; Tom Bray, *Repetitive Reparations Motion*, WASH. TIMES, Sept. 26, 2000,



After outlining previous attempts at reparations<sup>103</sup> and describing Mr. Conyers's efforts,<sup>104</sup> he discussed a range of procedural and substantive problems, both statutory and constitutional, with seeking reparations from courts.<sup>105</sup> The procedural obstacles include identification of parties and the doctrines of standing, statute of limitations, and political question.

---

at A19; Jeffrey Hart, 'Reparations' in the Political Spectrum, WASH. TIMES, Sept. 16, 2001, at B4. See generally the following pieces in REPARATIONS FOR SLAVERY, *supra* note 22, and WINBUSH, *supra* note 22; David Horowitz, *Ten Reasons Why Reparations for Blacks is a Bad Idea for Blacks—and Racist Too*, in REPARATIONS FOR SLAVERY at 127–29; Ernest Allen & Robert Chrisman, *Ten Reasons: A Response to David Horowitz*, in REPARATIONS FOR SLAVERY, at 130–39; Robert K. Fullinwider, *The Case for Reparations*, in REPARATIONS FOR SLAVERY, at 141–51; Stephen Kershner, *The Case Against Reparations*, in REPARATIONS FOR SLAVERY, at 151–161; Harper's Magazine, *Forum: Making the Case for Racial Reparations*, in REPARATIONS FOR SLAVERY, at 263–287; Martha Minow, *Between Vengeance and Forgiveness*, in REPARATIONS FOR SLAVERY, at 303–337; John Conyers & Jo Ann Nichols Watson, *Reparations: An Idea Whose Time Has Come*, in WINBUSH, at 14–21; Armstrong Williams, *Presumed Victims*, in WINBUSH, at 165–71; Christopher Hitchens, *Debt of Honor in WINBUSH*, at 172–79; John McWhorter, *Against Reparations in WINBUSH*, at 180–96; Shelby Steele, . . . Or a Childish Illusion of Justice?: *Reparations Enshrine Victimhood, Dishonoring Our Ancestors in WINBUSH*, at 197–99; Jewel Crawford, Wade W. Nobles, & Joy DeGruy Leary, *Reparations and Health Care for African-Americans: Repairing the Damage from the Legacy of Slavery in WINBUSH*, at 251–81; Molly Secours, *Riding the Reparations Bandwagon in WINBUSH*, at 286–98.

103. These date to the end of the Civil War, beginning with the proposal to provide all newly freed slaves "forty acres and a mule." Since World War II, the reparations movement has grown. The U.S. government, for example, has paid reparations to Native American groups based on treaty obligations and more prominently, in 1988, to Japanese Americans it forced into internment camps during World War II. At the state level, reparations have been paid to the African-American victims of the 1923 massacre in Rosewood, Florida and the 1921 race riots in Tulsa, Oklahoma. In the international realm, Austria, Germany, and Swiss banks have compensated Jewish victims for their roles in the Holocaust, and Japan reached a settlement with Korean "comfort women" it forced into sexual slavery for Japanese soldiers during World War II. See generally CHARLES P. HENRY, *supra* note 22, at Chapter 3; BROOKS, *supra* note 22, at Xiii; BELL II, *supra* note 96, at 51–56; Rick Montgomery, *The Civil Rights Battle of the 21<sup>st</sup> Century: Drive for Slavery Reparations Gaining Momentum Across the United States*, THE BUFFALO NEWS, at 1H; OGLETREE, *supra* note 96, at 9; WINBUSH, *supra* note 22, at 14–21; Tamar Lewin, *Calls For Slavery Restitution Getting Louder*, N.Y. TIMES, June 4, 2001, at A15; Greg Wright, *Decision Near on Reparations for Tulsa Race Riot*, THE TIMES UNION, Jan. 30, 2000, at A12; Diane Cardwell, *Seeking Out a Just Way To Make Amends for Slavery: The Idea of Reparations for Blacks Is Gaining in Urgency, But a Knot of Questions Remain, Like: Which Blacks?*, N.Y. TIMES, Aug. 12, 2000, at B7; Leslie Casimir, *Koreans Raise Painful Issue: Woman Wants Justice for Japan's WWII Sex Slaves*, N.Y. DAILY NEWS, Nov. 2, 2000, at 2; Lena Williams, *Blacks Press the Case for Reparations for Slavery*, N.Y. TIMES, July 21, 1994, at B10; Tracie Reddick, *Conyers Asks Study of Slave Reparations*, N.Y. TIMES, Dec. 8, 1989, at A1.

104. See *In re African Am. Slaves*, 375 F. Supp. 2d at 734–35, 766.

105. "Courts of law . . . are constrained by judicial doctrine and precedent . . ." *In re African Am. Slaves*, 375 F. Supp. 2d at 736. See also Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African-American Claims*, 40 B.C. L. REV. 477, 491 (1998) (listing five general obstacles to African-American reparations claims: statute of limitations, absence of directly harmed individuals, absence of individual perpetrators, lack of direct causation, and the indeterminacy of compensation amounts). But see Charles Ogletree, *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 Harv. C.R.-C.L. L. REV. 279, 298–308 (2003).

Regarding the identification of parties, courts are equipped to deal with claims by well-identified wrongdoers<sup>106</sup> and against well-identified victims.<sup>107</sup> With regard to the latter, Norgle ruled against the plaintiffs partly due to their lack of standing. As he wrote,

when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue . . . .

Plaintiffs cannot satisfy the first and most basic requirement of constitutional standing—a concrete and particularized personal injury. . . . To the extent that Plaintiffs are attempting to assert the legal rights of their ancestors, Plaintiffs cannot do so because they themselves have failed to establish that they have personally suffered some injury-in-fact adequate to satisfy Article III's case-or-controversy requirement.<sup>108</sup>

Beyond the need for well-identified parties, a judicial forum requires proof that defendants' actions were the actual and proximate cause of plaintiffs' injuries.<sup>109</sup> As time passes, such proof becomes increasingly difficult, leading to the statute of limitations problem. As Professor Epstein explains, "a statute of limitations has two major purposes. The first purpose is to make sure that the cause of action is brought when the evidence is fresh so that a trial can conclude with tolerable accuracy."<sup>110</sup> Since the actions complained of in *In re African-American Slaves* occurred generations ago, Norgle's statute of limitations ruling was no surprise.<sup>111</sup>

---

106. See *In re African Am. Slaves*, 375 F. Supp. 2d at 735. If government is among the defendants, the doctrine of sovereign immunity may bar the suit. This problem vanishes if defendants are private firms, as in *In re African Am. Slaves*, but the fact remains that slavery was legal when these firms entered the contracts at issue. In any case, only state and national government, and not municipalities, are protected under the sovereign immunity doctrine. See Ogletree, *supra* note 105, at 306.

107. See Hanoch Dagan, *The Jurisprudence of Slavery Reparations: Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U. L. REV. 1139, 1141 (2004). Unlike payments to victims of the Holocaust and the Japanese American internment camps, reparations for African-American slavery and, in most cases, legally enforced segregation, would not be awarded to surviving victims.

108. *In re African Am. Slaves*, 375 F. Supp. 2d at 753–54 (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968)). Once again, the Seventh Circuit affirmed Norgle centrally on the basis of standing. See *SDL II*, 471 F.3d 754, 762.

109. See *In re African Am. Slaves II*, 471 F.3d at 759; Forde-Mazrui, *supra* note 89, at 727–37; Hackney, *supra* note 93, at 1195–97.

110. Richard Epstein, *The Jurisprudence of Slavery Reparations: The Case Against Black Reparations*, 84 B.U. L. REV. 1177, 1183 (2004). See also Keith Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209, 1212 (2004). On this issue, Ogletree notes instances in which the statute of limitations may be tolled, waived, or inapplicable. See Ogletree, *supra* note 105, at 299–305.

111. See *In re African Am. Slaves II*, 471 F.3d at 759. But see BROOKS, *supra* note 22, at Chapter 3.

B. *Judicial v. Legislative Reparations*

Finally, Norgle based his decision on political question grounds. Under this doctrine, also rooted in Article III's case or controversy principle, a federal court is powerless to hear a dispute where 1) the text of the Constitution clearly commits the issue to another branch of government, 2) judicially manageable standards by which a court could resolve the dispute are lacking, or 3) there is present any of several other factors making judicial determination of the matter politically imprudent.<sup>112</sup> In view of such problems, Judge Norgle argued that legislatures, especially Congress, are best suited for providing reparations like those sought in SDL.<sup>113</sup> They have flexibility that courts lack, after all, both in the remedies they can provide and in their need to respond only to political limitations, not legal doctrine and precedent.<sup>114</sup> While state legislatures can provide reparations, as in the *Rosewood* and *Tulsa* cases,<sup>115</sup> only Congress can act for the nation. Given Judge Norgle's argument and Mr. Conyers's efforts, when reparations

112. See *Baker v. Carr*, 369 U.S. 186, 217 (1962). See also *In re African Am. Slaves II*, 471 F.3d at 758-59. Judge Posner finessed the political question issue, ruling that it would not necessarily bar this lawsuit if several conditions were met.

Beyond these procedural hurdles to judicial reparations is an array of remedial and substantive problems. An example of the former is that a party seeking money damages must show that those damages are measurable with reasonable precision. Among the rules courts take seriously, in other words, is that the word "remedy" has a precise rather than vague meaning, at least in a judicial forum, as Justice Powell has made clear. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978). Where plaintiffs' alleged damages cannot be proven with reasonable precision, a court is powerless to award them.

As for substance, claims for reparations in tort are for wrongful injury and conversion while those in contract are for unjust enrichment and restitution. On restitution, see *In re African Am. Slaves II*, 471 F.3d at 760. See generally Brooks, *supra* note 22, at Chapter 4; Lyons, *supra* note 1, at 1382-84; Omari L. Winbush, *Reflections on Homer Plessy and Reparations in WINBUSH*, *supra* note 22, at 150, 152-53; Dennis Klimchuk, *Unjust Enrichment and Reparations for Slavery*, 84 B.U. L. REV. 1257 (2004); Anthony Sebok, *Two Concepts of Injustice in Restitution for Slavery*, 84 B.U. L. REV. 1405 (2004); Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. REV. 1443 (2004); Andrew Kull, *Restitution in Favor of Former Slaves*, 84 B.U. L. REV. 1277 (2004).

Substantive constitutional bases for reparations that have been suggested or attempted include the Equal Protection, Due Process, and Takings clauses. For equal protection, see *Obadele v. United States*, 52 Fed. Cl. 432 (2002), which unsuccessfully claimed a denial of equal protection when Japanese Americans were awarded reparations by the U.S. government but African-Americans were not. As for due process, Richard F. Scruggs has suggested "a Fourteenth and Fifth Amendment lawsuit against the federal government for either failure to enact sufficient laws to ensure due process or for passing laws that perpetuated the injustice[.]" Harper's Forum, in *REPARATIONS FOR SLAVERY*, *supra* note 22, at 278. For takings, see, e.g., Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U.L. REV. 191 (2003); Yanessa L. Barnard, *Better Late Than Never: A Takings Clause Solution to Reparations*, 12 WASH. & LEE R.E.A.L.J. 109 (2005).

113. See *In re African Am. Slaves*, 375 F.Supp. 2d at 735-36.

114. Notwithstanding this basic institutional distinction, some writers fail to distinguish judicial from legislative reparations, thus weakening the force of their arguments. See, e.g., HOWARD MCGARY, *RACE AND SOCIAL JUSTICE* 57-58 (Blackwell Pub. 1999).

115. See discussion, *supra* note 103.

are discussed in the remainder of this Article, they shall refer to those that Congress can provide.

With Congress as the source of reparations, a host of problems disappear. Not the least of these is that the party that is to pay reparations—the U.S. government—has now been established. Even limiting ourselves to Congress, however, problems remain; some of these are parallel to those in the judicial forum, and some are not.

The first problem is political obstacles. Congress is limited only by political considerations, yet that which liberates, imprisons. Unlike federal judges, members of Congress must stand for reelection, and polls show great public disfavor for reparations.<sup>116</sup> These polls are said to reflect the judgment that reparations would be divisive by creating resentment and thus exacerbating rather than healing race relations.<sup>117</sup>

Second, and related, are economic considerations. Assuming that reparations would be drawn from general U.S. tax revenues, where would the dollars, presumably in the billions, come from, in an age of economic crisis, two wars, massive federal deficits, and the looming costs of retiring baby boomers, to provide such reparations? While the details are beyond the scope of this Article, with a little political imagination and courage, this is not necessarily an insurmountable obstacle.<sup>118</sup>

Third, although we now know who is to pay reparations, it is not clear who should receive them. The answer to this partly depends on the form reparations take, so a brief overview of the means at Congress's disposal in providing reparations is useful.

### 1. Means of Reparations Available to Congress

The means available to Congress for providing reparations range from the weaker and more symbolic to the stronger and less symbolic.<sup>119</sup> Perhaps the most symbolic form of reparations is official apologies,<sup>120</sup> which can be issued by the government, as in the 1988 Civil Liberties Act,<sup>121</sup> or by private

116. See Fears, *supra* note 93 and accompanying text.

117. See *In re African Am. Slaves*, 375 F. Supp. 2d at 732–33; Bray, *supra* note 102, at A19; GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 131–32 (Harvard Univ. Press 2002); Jonathan Capehart, *Contribution for America's Curse*, WASH. POST, Apr. 12, 2007, at A27.

118. See *infra* note 212.

119. See TORPEY, *supra* note 22, at Chapter 2; BROOKS, *supra* note 22, at 155–63.

120. See POSNER & VERMEULE, *supra* note 96, at 729–33; Minow, *supra* note 102, at 310–14; Omari Winbush in WINBUSH, *supra* note 22, at 151.

121. Besides the U.S. government, “[s]everal states, such as Virginia, North Carolina and Maryland, have already approved . . . apologies, and others, like Alabama and Florida, are considering it.” Frank Lombardi, *Council Weighing Slavery Apology*, N.Y. DAILY NEWS, Apr. 24, 2007, at 20. See also Lynn Bonner, *North Carolina Senate OKs Slavery Apology*, THE STAR-LEDGER, Apr. 6, 2007, at 49; Capehart, *supra* note 117.

defendants.<sup>122</sup> Apologies cost nothing, although they can lay the foundation for other forms of reparations in the future.<sup>123</sup>

Less purely symbolic are gestures like establishing monuments,<sup>124</sup> official holidays,<sup>125</sup> and commissions like those Mr. Conyers proposed.<sup>126</sup> Less symbolic still are mandatory disclosure and data collection laws,<sup>127</sup> and least symbolic (and thus strongest of all) is the provision of financial resources in some form. These include college scholarships, waivers from federal taxation,<sup>128</sup> and cash payments.<sup>129</sup> Regarding the last option, Norgle writes,

Most commonly . . . the term "reparations" simply means some sort of financial compensation for descendants of slaves. Some . . . have proposed that reparations take the form of a "trust . . . established for the benefit of all Black Americans." This trust "should be financed by funds drawn annually from the general revenue of the United States," and the funds would "be expendable on any project or pursuit aimed at the educational and economic empowerment" of African-Americans. Specifically, advocates of reparations assert that trust funds should be used to finance the creation of special schools for Black children found to be "at risk in unhealthy family and neighborhood environments."<sup>130</sup>

122. Aetna and Wachovia have issued apologies. See Lewin, *supra* note 65, and Fears, *supra* note 93.

123. See Posner & Vermeule, *supra* note 92, at 730.

124. See Henry, *supra* note 22, at ch. 6.

125. See Montgomery, *supra* note 103, at 1H; Minow, *supra* note 102, at 315–318.

126. As to the effects of such commissions, Ogletree speaks of a "new reckoning," Ogletree, *supra* note 96, at 9, and of education of the public. See Ogletree, *supra* note 105, at 306. As he continues, "the underlying goals of both slavery and non-slavery lawsuits are the same. Both seek to end a tradition of denying the consequences of slavery and Jim Crow era segregation, and both seek to force the nation to engage in an informed debate about race and racism in America." *Id.* at 319. The word "dialogue" also shows up, suggesting in a broad way the function of the South African truth and reconciliation commission (although that exact model would likely not be the form we would expect since the original perpetrators of African-American slavery, and even segregation, are long gone). See Fears, *supra* note 93, at 2; see also Minow, *supra* note 102, at 305–310, 319.

127. See Fears, *supra* note 93, at A01; Montgomery, *supra* note 103; Tamar Lewin, *Calls for Slavery Restitution Getting Louder*, N.Y. TIMES, June 4, 2001, at 15; Ogletree, *supra* note 105, at 319. These are state laws, however, and this Article focuses on Congress.

128. See Williams, *supra* note 102, at B10. While these proposals are not without merit, we shall see that they cannot be derived from Rawls's difference principle since they are not targeted at the "least advantaged."

129. Given the range of means at Congress's disposal for providing reparations, Judge Norgle observes that "the following definition of slave "reparations" . . . emerges. Reparations mean truth commissions that document the history of racial crimes and the current liability for those crimes, apologies that acknowledge liability, and payments to settle that account." *In re African Am. Slaves*, 375 F. Supp. 2d at 734.

130. *In re African Am. Slaves*, 375 F. Supp. 2d at 733 (citations omitted).

### C. A Working Definition of Reparations

Three aspects of this passage yield points of departure for a working definition of reparations for purposes of this Article. First, Norgle notes that “reparations” are most commonly understood as financial resources. Therefore, beyond apologies, monuments, commissions, and holidays, my working definition of reparations will include appropriations by Congress. At the same time, the financial resources to be identified in this Article in no way consist of cash payments to individuals.<sup>131</sup> They will instead be resources targeted at the community level.<sup>132</sup>

Second, Norgle identifies African-Americans as the presumptive beneficiaries of reparations. While this piece argues that some African-American communities are appropriate targets of Rawlsian reparations, we shall see that, where Rawlsian justice is the goal, African-Americans as a group are both overinclusive and underinclusive as a policy target.

Third, many have opined on the appropriate content of the “project[s] or pursuit[s]” mentioned by Norgle. Robinson argues that reparations should be paid to private institutions whose mission is to provide educational and other benefits to impoverished Blacks.<sup>133</sup> Ogletree speaks of “broad ranging educational, housing, and health care initiatives,”<sup>134</sup> and Hackney writes that “if reparations are to be granted, they should be in the form of social welfare programs delivered by the federal government.”<sup>135</sup> Lyons provides one of the more complete descriptions of what might be involved, speaking of “the material component [as] a

131. Reparations as cash payments are not usually sought for individuals, but instead to finance social and economic programs for minorities. See, e.g., Omari Winbush, in WINBUSH, *supra* note 22, at 152; Montgomery, *supra* note 103, at 1H. In her critique of reparations, Forde-Mazrui assumes that they would take the form of lump sum cash payments to individuals. See Forde-Mazrui, *supra* note 89, at 751. This assumption renders her critique partly irrelevant for our purposes. While cash payments to individuals are a basic feature of judicial reparations, legislatures can provide them as well, as in the 1988 Civil Liberties Act, which paid \$1.2 billion to 60,000 survivors of the Japanese American internment camps. This Article’s definition is distinct from both.

132. This may seem an inappropriate use of the term “reparations,” but we must distinguish reparative from compensatory justifications for the legislative appropriation of public resources. In one sense, “compensation” means “that which is necessary to restore an injured party to his former position.” BLACK’S LAW DICTIONARY, 256 (5th ed. 1979). In this sense, to compensate is to pay back an individual or group one has wronged, a meaning that rests on notions of culpability and fault. In a broader sense, however, “compensation” simply means “making whole.” *Id.* In this sense, it means to repair, where repairs are needed, regardless of fault. This seems, for example, to be how Daniels uses the phrase “compensatory measures.” Norman Daniels, *Rawls’s Complex Egalitarianism*, in Freeman, *supra* note 24, at 250. This Article uses “reparations” in this second sense, to reference the provision of resources in a reparative but not narrowly compensatory way. This Article thus dissociates itself from Norgle’s use of the word “compensation” in the phrase “financial compensation.”

133. See ROBINSON, *supra* note 96, at 244–46.

134. Ogletree, *supra* note 105, at 307.

135. Hackney, *supra* note 93, at 1194.

comprehensive program under familiar categories such as health, nutrition, housing, family life, education, and community conditions . . . .”<sup>136</sup> A common theme of these writers is that reparations should be provided in trust to community-based organizations.<sup>137</sup> For purposes of Rawlsian analysis, therefore, this Article’s working definition of reparations will be:

Appropriations by Congress from general revenues for comprehensive community based programs directed at the health, education and welfare of children in communities that are both 1) among the poorest and 2) predominantly African-American, Native American, and/or any other group Congress is willing to include.<sup>138</sup>

Several points are now in order. First, while perfect accountability is not to be expected even in a reasonably just society, a Rawlsian Congress would conduct strict oversight of the use of reparations as defined in this Article. Second, the phrase “any other groups Congress is willing to include” is included to allow the legislative flexibility legitimately needed in defining which communities are “least advantaged” for Rawlsian purposes. Third, it is worth underscoring again how this definition differs from the popular conception of reparations. As this Article defines them, reparations are not a judicial remedy, and they are not cash payments to individuals, nor are they “compensatory” in a sense that assigns guilt or liability for the conditions of the targeted communities. Instead, they are directed at geographical communities, though not racial communities per

136. Lyons, *supra* note 1, at 1400. Focused on the needs of children, Lyons’s definition includes prenatal care, postnatal care, nutritious school breakfasts and lunches, affordable, well maintained housing, well tended, environmentally safe neighborhoods, small class sizes in school, and adequate day care and time with their parents (such that parents need jobs requiring no more than one shift to live in reasonable comfort). *See id.* at 1400–01 and DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 13, 189–92 (The New Press 1999).

As Forde-Mazrui adds, “remedial programs should be designed to provide educational and economic opportunities, and to strengthen familial and community institutions that foster self-respect and personal responsibility. [What is needed are] sensibly designed antipoverty, school improvement, job training, health care, and crime prevention efforts supported by sufficient resources.” Forde-Mazrui, *supra* note 89, at 748.

137. Programs along these lines, like the Model Cities and Community Action Programs, were tried in the 1960’s. *See* Kara Lamb, *Revitalization from the Inside Out: The Attempts to Move Towards an Urban Renaissance in the Cities of the United States and the United Kingdom*, 19 *CONN. J. INT’L. L.* 159, 167 (2003); William E. Forbath, *Constitutional Welfare Rights: A History, Critique, and Reconstruction*, 69 *FORDHAM L. REV.* 1821, 1842–45 (2001); Audrey G. MacFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 *SAN DIEGO L. REV.* 295, 317–18 (1999). These programs had their problems, but support in Rawls was not one of them.

138. The reasons for the distinctions and qualifications in this definition will begin to emerge once we begin to apply his theory to our subject matter. For now, “poorest” will be understood in terms of average combined wealth and income. Moreover, this Article does not dispute that Rawlsian legislators would approve Levmore’s proposal for the allowance of voluntary *private* appropriations. *See* Levmore, *supra* note 92. This Article’s focus is on the use of public revenue, which is directly implicated under Rawls’s theory, especially his second principle of justice.

se, and they are reparative: the point is to repair, not to perfection, but in accord with Rawls's principles of justice.

Finally, this Article does not underestimate the political and economic obstacles to providing reparations as defined. For now, it appears this definition will appeal to Rawlsian agents because it ensures that the burdens of race conscious policy are collectively borne and the benefits of that policy are broadly distributed to the least advantaged communities.

#### IV. RAWLS AND REPARATIONS

##### A. *Distinguishing Affirmative Action and Reparations*

To take stock, it appears that Rawlsian legislators would reject strong forms of affirmative action, and a working definition of reparations has been developed. As our legislators begin to contemplate the possibility of reparations, it appears that they would quickly notice a stark difference between affirmative action and reparations as defined. While racial preferences and quotas concentrate the burden of race policy on a few applicants for university admission or employment, reparations diffuse that burden over the entire taxpaying public. As Posner and Vermeule observe,

(T)he proximate costs of (affirmative action) are borne not by general taxpayers, as with cash reparations, but by marginal candidates from non-preferred groups. . . .

In affirmative action schemes, the costs of remediation are typically concentrated on a small group of identified or identifiable individuals: the nonblack applicants who would have obtained a job, admissions slot, or contract in the absence of the governmental affirmative action scheme. . . .

[T]he costs of affirmative action fall upon a largely notional group—marginal nonpreferred candidates, who may often not know whether the preference was dispositive in denying them relevant goods or opportunities, and who are unlikely to be able to organize for effective political action. . . .

Broadening the class of payers increases the probability that victims will receive reparations while spreading the cost widely. . . . Prudential considerations suggest that the cost should be borne generally, not just by marginal workers. The prudential argument on the other side—that it is politically, and possibly administratively, easier to assign the costs to marginal workers—is morally unattractive.<sup>139</sup>

---

139. Posner & Vermeule, *supra* note 96, at 689, 712, 718, 729, 738. See also MARTIN, *supra* note 31, at 78. Minow echoes this general idea in the restitution context when she observes that “taxing a larger group, even the entire society, . . . would spread the burden more fairly.” Minow, *supra* note 102, at 309. Indeed, even Forde-Mazrui concedes the problem. As she writes, “[w]e indeed should consider who is most acutely burdened by remedial programs, but that should not preclude such programs if the cost to individuals can be adequately minimized or spread among many people.” Forde-Mazrui, *supra* note 89, at 725.



These views are echoed in Amdur's "equal sacrifice" principle: "When it is not possible to assign the costs of compensation either to the perpetrators or to the beneficiaries of injustice, those costs should be distributed evenly among the entire community."<sup>140</sup> He then argues that this principle can be supported on Rawlsian grounds:

From a Rawlsian perspective, the case for equal sacrifice is . . . compelling. . . . It is, of course, one of his major contentions that the features of the original position force the hypothetical contractees to choose conservatively . . . . When the parties in the original position meet to choose non-ideal principles, each will seek to avoid the risk of having to pay a disproportionate share of the costs of compensation. This should lead to a unanimous preference for equal sacrifice over any principle that assigns larger costs to fewer people. . . .

The programs that satisfy the third principle most easily are programs involving monetary compensation, paid for through taxation."<sup>141</sup>

Under affirmative action, far fewer individuals bear the burden of race-based policy than under reparations as defined, as Rawlsian legislators would realize.<sup>142</sup> Yet they would notice more than this. Although far fewer individuals bear the burden of race-based policy under affirmative action, the magnitude of the burden they must shoulder is far greater under affirmative action than under reparations as defined. While millions of taxpayers are assessed a few cents or dollars more to support reparations,<sup>143</sup>

140. Robert Amdur, *Compensatory Justice: The Question of Costs*, 7 POL. THEO. 229, 234 (1979).

141. *Id.* at 236, 240 (emphasis added).

142. Our legislators would thus reject statements like:

we should be aware that efforts to achieve a morally good society for a time may bring about disharmony and social unrest. A morally decent society, in my judgment is willing to pay these costs. . . . If nothing can be done to assure that all who are capable and willing receive (employment) positions, then this unhappiness should fall on everyone, not just on those who have historically been disadvantaged.

MCGARY, *supra* note 114, at 91, 107. Rawlsian legislators know, that is, that under affirmative action as generally understood, it is emphatically not "society" that pays the costs, and it is not "everyone" who bears the "unhappiness" that inevitably flows from living in a world of scarcity. It is rather a few individuals in the non-preferred races that bear the entire burden.

143. Rawls offers the following on applying the difference principle through taxation:

[S]ince the difference principle applies to institutions as public systems of rules, their requirements are foreseeable. They do not involve any more continuous or regular interference with individuals' plans and actions than do, say, familiar forms of taxation. Since the effects of those rules are foreseen, they are taken into account when citizens draw up their plans in the first place. Citizens understand that when they take part in social cooperation, their property and wealth, and their share of what they help to produce, are subject to the taxes, say, which background institutions are known to impose. Moreover, the difference principle (as well as the first principle and the first

those burdened by race preferences in selective university admissions, for example, are denied what rational agents behind the veil of ignorance would recognize as a major, life enhancing opportunity—admission to the most prominent educational program possible.<sup>144</sup> When race preferences are thereafter used in the labor market, the burden is magnified. Having had to attend lower ranked schools due to their race, for example, those in Barbara Grutter's position must thereafter compete for jobs, perhaps time and again, not only against minorities whose race earns them a preference for those jobs, but whose race was decisive in their admission to programs that give them an edge in the labor market, even apart from their race.

It is thus not simply that reparations as defined greatly spread out and diminish the burdens of race policy while strong forms of affirmative action concentrate and increase them. The difference between the burdens imposed by the two policies is one of *kind*, not just *degree*. This not only cuts sharply against the leveling thrust of the difference principle, but it also deeply offends the FEO principle. As Rawls writes,

Fair equality of opportunity is said to require not merely that public offices and social positions be open in the formal sense, but that all should have a fair chance to attain them. To specify the idea of a fair chance we say: supposing that there is a distribution of native endowments, *those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of their social class of origin*, the class

---

part of the second principle) respects legitimate expectations based on the publicly recognized rules and the entitlements earned by individuals.

FAIRNESS, *supra* note 18, at 51–52. Reparations as defined would thus not upset the legitimate expectations of the least advantaged, or anyone else. See THEORY, *supra* note 17, at 72–77.

As Amdur adds, “[u]nder the principle of equal sacrifice, every individual need not contribute the same amount. When money payments are at issue, equality of sacrifice is likely to require progressive taxation.” Amdur, *supra* note 140, at 243 n.8. Even assuming a progressive tax scheme, the burdens under reparations as defined are far less unequal than under affirmative action as defined.

144. As Rawls observes:

It hardly seems likely that persons who view themselves as equals, entitled to press their claims upon one another, would agree to a principle which may require lesser life prospects for some simply for the sake of a greater sum of advantages enjoyed by others. . . . In the absence of strong and lasting benevolent impulses, a rational man would not accept a basic structure merely because it maximized the algebraic sum of advantages irrespective of its permanent effects on his own basic rights and interests.

THEORY, *supra* note 17, at 13. As Loury adds,

the plain fact is that access to elite higher education dramatically enhances one's chances to acquire influence in our putatively meritocratic society. Competition for a relatively few seats at the table of power is keen, and many chafe at the idea of their child's place being taken by someone “undeserving.” So the process of selecting those who will enter the prestigious colleges and universities is a visible, high stakes civic exercise.

LOURY, *supra* note 117, at 131–32 (emphasis added).

into which they are born and develop until the age of reason. In all parts of society there are to be roughly the same prospects of culture and achievement for those similarly motivated and endowed.<sup>145</sup>

Given this definition of FEO, as well as affirmative action's compounding of injuries based on race,<sup>146</sup> our legislators would firmly distinguish affirmative action from reparations as defined. Many writers, however, overlook and even obscure this distinction. Posner and Vermeule use reparations to include affirmative action,<sup>147</sup> for example, and Levmore speaks of affirmative action as a substitute for reparations.<sup>148</sup> Shiffrin blends the two together when she claims that "many of the pressing issues regarding race, such as reparations and affirmative action, are intimately connected with redress for and reconstruction in the face of public failures and wrongs toward people of color."<sup>149</sup> In addition, many scholars implicitly fail to distinguish affirmative action and reparations when they

145. FAIRNESS, *supra* note 18, at 43–44 (emphasis added); *see also id.* at 46. As Rawls notes, "the principle of open positions . . . expresses the conviction that if some places were not open on a basis fair to all, those kept out would be right in feeling unjustly treated even though they benefited from the greater efforts of those who were allowed to hold them." THEORY, *supra* note 17, at 73. Along these lines, Justice Powell observed that

[A]LL state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin.

*Bakke*, 438 U.S. at 294, n.34 (emphasis in original).

146. Rawls thus refers to "injustice if those already disadvantaged are also arbitrarily treated in particular cases when the rules would give them some security." THEORY, *supra* note 17, at 51. "The rules" here are those mandating racial nondiscrimination.

147. *See e.g.*, Posner & Vermeule, *supra* note 96, at 727–29.

148. *See* Levmore, *supra* note 92, at 1688–89.

149. Shiffrin, *supra* note 67, at 1654. In McGary's words, "[p]roviding African-Americans only with money . . . will not suffice. There must be other things involved in the reparation. For African-Americans, power to make decisions that affect their lives is paramount. Preferential hiring and educational programs might serve to give African-Americans this power." MCGARY, *supra* note 114, at 99. *See also id.* at 100–04, 130–31, where he also blurs the distinction. As for Forde-Mazrui, she refers more than once to "reparations and other remedial policies," Forde-Mazrui, *supra* note 89, at 739, and "affirmative action or other remedial measures," *id.* at 747. After arguing at length, moreover, for precise remedial policies that sound like reparations as defined in this Article, she lapses in her conclusion into several references to affirmative action. Whether or not she achieves her goal of responding to conservatives, she fails to speak to the implications of liberal theory as embodied in Rawls. *See id.* at 748–51.

claim in various ways that “affirmative action” alone can “remedy,”<sup>150</sup> “correct,”<sup>151</sup> or “redress”<sup>152</sup> racial inequality.<sup>153</sup>

Nonetheless, for the reasons given, Rawlsian legislators would distinguish affirmative action from reparations as defined, and reject strong forms of the former. As they now contemplate the latter, two further premises become relevant and must be made clear. The first is that Rawls firmly distinguishes between the principles governing two domains of public policy. The second is that although he was clear that “least advantaged” is no synonym for racial group membership, Rawls nonetheless left race on the table as a potential category of public policy. After establishing these two premises, this Article argues that given their unique combination of knowledge and ignorance, and tasked with enacting the difference<sup>154</sup> and FEO principles into law, our legislators would support reparations as defined.<sup>155</sup>

### B. Two Domains of Public Policymaking

Let us begin with the distinction between the principles governing two domains of public policy. We have seen that “[t]he basic structure is to secure citizens’ freedom and independence, and continually to moderate tendencies that lead, over time, to greater inequalities in social status and

150. As Badiani writes, “affirmative action is needed to remedy the disadvantages faced by individuals on the basis of their socioeconomic and racial status.” Purvi Badiani, *Affirmative Action in Education: Should Race or Socioeconomic Status be Determinative?*, 5 GEO. J. FIGHTING POVERTY 89, 96 (1997).

151. Feinberg writes that “[f]or Rawls it is critical that positions are open and that assignment to them not be dependent on accidental characteristics such as race, gender, etc. Whenever patterns of disadvantage develop as a result of such discrimination, it is important to correct them.” Walter Feinberg, *Justice and Affirmative Action: A Response to Howe*, 18 STUDIES IN PHILOSOPHY AND EDUC. 277, 284 (1999).

152. Rosado speaks of affirmative action as necessary under the principle of “redress.” Caleb Rosado, *Affirmative Action: A Time for Change?*, Research Room: EdChange Multicultural Pavilion, Mar. 3, 1997, available at <http://edchange.org/multicultural/papers/caleb/aff-action.html>. See also, e.g., Scott Cummings, *Affirmative Action and the Rhetoric of Individual Rights: Reclaiming Liberalism as a “Color-Conscious” Theory*, 13 HARV. BLACKLETTER J. 183 (1997) (arguing that a liberal theory can include “racial redress” without distinguishing reparations and affirmative action).

153. Judge Norgle observes that reparations advocates propose that race-based policy take the form, *inter alia*, of “affirmative action programs.” *In re African Am. Slaves*, 375 F. Supp. 2d at 733. The fact that some reparations supporters advocate “affirmative action” does not make reparations and affirmative action synonyms.

154. “We are to proceed by selecting a few instruments, as we may call them, that can be adjusted so as to meet the difference principle. . . .” FAIRNESS, *supra* note 18, at 161.

155. Although du Plessis works within the problematic international context, I share his general view that “the liberal theory of justice advanced by John Rawls would arguably also support a claim for reparation.” Max du Plessis, *Reparations and International Law: How are Reparations to be Determined (Past Wrongs or Current Effects), Against Whom, and What Form Should they Take?* 22 WINDSOR Y.B. ACCESS JUST. 41, 52 n.43 (2003).

wealth, and in the ability to exert political influence and to take advantage of available opportunities.”<sup>156</sup> Accordingly, Rawls writes, what is needed

is a division of labor between two kinds of principles, each kind suitably specified: first, those that regulate the basic structure over time and are designed to preserve background justice from one generation to the next; and second, those that apply directly to the separate and free transactions between individuals and associations. Defects in either kind of principle can result in a serious failure of the conception of justice as a whole.<sup>157</sup>

Just as the distinction between affirmative action and reparations opened up previously unseen prospects, this “division of labor” opens up the possibility of reparations as defined. This is because it enables our legislators to give both the individualist and collectivist principles their due—in different domains of public policy. To secure *individual* justice (at the micro level) in separate and free transactions between individuals and associations (for example, employment and admissions applications), legislators would enact provisions like Titles II, VI and VII of the 1964 Civil Rights Act, thus making racial nondiscrimination against “any person” the basic policy of their civil rights laws. To advance broad *collective* goals (at the macro level) like “moderat[ing] tendencies that lead, over time, to greater inequalities in social status and wealth,” and thus preserving background justice, they would be prepared to use “race as a factor” in some areas of public policy, even those allocating public resources.<sup>158</sup> For Rawls, the difference principle acts as a counterweight to the equal liberty and FEO principles. In a similar way, public policy aimed at collective goals like preserving background intergenerational justice functions as a just counterweight to the individualized focus governing separate and free transactions under Rawls’s theory.<sup>159</sup> While our legislators would reject

156. FAIRNESS, *supra* note 18, at 159.

157. *Id.* at 53–54. See also LIBERALISM, *supra* note 64, at 268, where Rawls elaborates a bit further on this distinction. Rawls, it should be noted, includes universities among “associations.” See FAIRNESS, *supra* note 18, at 93.

158. Since they are both collectively borne and distributed, legislative means like reparations as defined are not only an appropriate tool for advancing collective goals, but as Amdur suggests, they are consistent with the risk aversion Rawls attributes to all decision makers, even legislators, behind the veil. See Amdur, *supra* note 140, at 236.

159. Two things are noteworthy here. First, as Talisse writes, “Rawls stipulates that the difference principle is to evaluate distributions among what he calls ‘representative persons,’ which are perhaps best understood as socio-economic classes rather than as individual persons.” TALISSE, *supra* note 16, at 44 (quoting THEORY, *supra* note 17, at 56). Second, we saw that Rawls argues that property owning democracy is the regime most likely to realize the two principles of justice. See FAIRNESS, *supra* note 18, at 136–40.

[T]he background institutions of property-owning democracy work to disperse the ownership of wealth and capital. . . . [They] ensur[e] the widespread ownership of productive assets and human capital (that is, education and trained skills) at the beginning of each period . . . . The intent is . . . to put all citizens in a position to manage their own affairs.

racial preferences and quotas, this division of labor creates the possibility of race conscious policy by Rawlsian legislators.

To see this more clearly, consider the following:

Why are distinctions of *race* . . . not explicitly included among the three contingencies (social class of origin, native endowments, and the chance to develop those endowments) . . . ? The answer is that we are mainly concerned with ideal theory: the account of the well-ordered society of justice as fairness. Within that account we need to distinguish . . . what contingencies tend to generate troubling inequalities even in a well ordered society and thus prompt us, *along with other considerations*, to take the *basic structure* as the primary subject of justice . . . .<sup>160</sup>

Since race “tends to generate troubling inequalities,” Rawls suggests it can be taken into account “along with other considerations,” but only where legislators are focused on background justice at the level of the basic structure. Rawls wrote, “[t]here are questions which we feel sure must be answered in a certain way. For example, we are confident that religious intolerance and racial discrimination are unjust.”<sup>161</sup> Yet it has been demonstrated that reparations as defined are not racial discrimination in the ordinary legal sense. They neither impose the burdens of public policy, nor confer its benefits, based on the race of the individual receiving the burden or benefit in question.

Rawlsian legislators would operate under four key premises as they contemplate reparations as defined. These are:

- 1) affirmative action and reparations as defined are distinct;
- 2) Rawlsian legislators have rejected affirmative action as defined;
- 3) principles appropriate to the law of separate and free transactions are distinct from those relevant to background justice; and
- 4) Rawls allows legislative race consciousness BUT ONLY

---

I submit that “disperse” and “widespread” are the key words here, referencing a constant push of power outward away from the most powerful, in whose hands it naturally concentrates, toward the least powerful. Daniels adds that “rather than supporting a “trickle down” of gains from inequality, the difference principle mitigates the effects of the social and natural lottery by requiring a maximal flow outward,” Daniels, *supra* note 132, at 251. As Madison noted in Federalist 48, we saw, “it will not be denied, that power is of an encroaching nature.” James Madison, *Federalist No. 48*, in *THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS* 237 (David Wootton ed., Hackett Publishing, 2003). Accordingly, he argued, institutions and practices must be established which regularly counteract this tendency. Just as animal life requires the constant circulation of blood away from the heart to the extremities, power must constantly be circulated away from the center to the periphery, to those communities with the least power and wealth. Public education is one example of this, but reparations toward the communities to be identified in this Article are a more specific, targeted means for doing so.

160. FAIRNESS, *supra* note 18, at 64–65 (parenthetical and emphasis added).

161. THEORY, *supra* note 17, at 17.

- a) along with other more basic considerations, like wealth and income, which define least advantaged status under the difference principle; and
- b) where legislators act to preserve background justice.

In view of these premises, this Article argues that given their unique combination of knowledge and ignorance, and tasked with translating the difference and FEO principles into statutory law, Rawlsian legislators would make ample provision for reparations as defined.

To begin, the veil has been lifted far enough to provide our legislators the knowledge to legislate competently. While they do not know who they will be, it is clear that they have access to “the full range of general economic and social facts.”<sup>162</sup> Accordingly, they have a general understanding of the human condition and a sense of the array of advantages and disadvantages into which humans are born. They know, for example, that some people, through no fault of their own, are seriously physically disabled. By definition, of course, our legislators have no direct experience of being, for example, blind or wheelchair-bound. Yet the burden such conditions impose, by contrast to that borne by the majority lucky enough to take sight and mobility for granted, is plain for them to see. Rawlsian legislators would thus rationally consider someone who is both poor and seriously disabled to be among those we can fairly call the *truly* least advantaged. Such a person is one of a minority in society who bear the burden of not just one major disadvantageous social or natural contingency, but two. Accordingly, our legislators would consider persons who are both poor and seriously disabled to be among those whose disadvantage they are most urgently duty-bound to relieve under the difference principle.<sup>163</sup> What would such relief consist of? In elucidating the FEO principle, Rawls provides some guidance: “[m]edical care . . . falls under the general means necessary to underwrite fair equality of opportunity and our capacity to take advantage of our basic rights and liberties, and thus to be normal and fully cooperating members of society over a complete life.”<sup>164</sup>

Enabling everyone to “take advantage of (their) basic rights and liberties and thus . . . be normal and fully cooperating members of society over a complete life” seems to be both a means and an end for Rawls.

162. *Id.* at 175. Shiffrin overlooks the four stage sequence and thus misleads when she writes that “properly addressing specific issues about reparations and affirmative action requires sensitivity to contemporary circumstances and historical facts. This requires access to information that is unavailable behind the veil at the stage at which the theory of justice is articulated.” Shiffrin, *supra* note 67, at 1654.

163. [I]t seems impossible to avoid a certain arbitrariness in actually identifying the least favored group. . . . Yet we are entitled at some point to plead practical considerations, for sooner or later the capacity of philosophical or other arguments to make finer discriminations must run out. I assume that the persons in the original position understand these matters, and that they assess the difference principle in comparison with the other alternatives accordingly. THEORY, *supra* note 17, at 84.

164. FAIRNESS, *supra* note 18, at 174.

Insofar as it is an end with regard to the disabled poor, our legislators would clearly provide means like wheelchair ramps and Braille signs, where essential, in public spaces like subway stations, public libraries and public universities. Yet they would not stop there. Since basic familiarity with the human condition discloses that early structured intervention in life is crucial, and since our legislators know that they may be channeling resources that could make all the difference in their own lives, they would also provide for adequate health care and special education for poor disabled children. They would know that this would be necessary, if not sufficient, for these children to become “normal and fully cooperating members of society over a complete life,” i.e., citizens with the motivation and ability to be in places like libraries and universities.

Against this backdrop, and with a key shift in focus from the individual to the community level that is appropriate for the domain of background justice, our legislators would similarly view children in the poorest of predominantly Black or Native American communities to be among the truly least advantaged, and thus among the primary targets of the difference principle.<sup>165</sup> No serious reader will interpret this statement to equate race with disability. The point is that from the viewpoint of Rawlsian legislators, knowledgeable about society yet still behind the veil of ignorance, children in the communities identified are, like poor disabled children, among the *truly* least advantaged.<sup>166</sup> This in turn yields a powerful duty on these legislators, under the difference principle, in balance with other pressing obligations, to provide for these children as they would provide for themselves.

To illustrate, while our legislators are not experts, they know the basic history of American race relations and race law. They are well aware of broad current social and economic facts partly traceable to that history. These include the highly disproportionate overlap between poverty and race—more specifically, between poverty and 1) urban Black<sup>167</sup> and

165. In identifying these communities as primary targets of legislative reparations, this Article does not assert that the least advantaged individuals—for example, those with serious physical disabilities—regardless of socioeconomic class or geographic community of residence, would not also be targeted for assistance under the difference principle.

166. As Weatherford notes, those who are “poor through no fault of their own . . . are . . . not just poor, but deserving poor.” Weatherford, *supra* note 72, at 43 (emphasis omitted).

167. As Lyons observes, “[p]overty in the United States is most concentrated in the Black urban ghetto.” Lyons, *supra* note 1, at 1395. As Robinson adds, “blacks are heavily overrepresented among the ranks of American’s desperately poor.” ROBINSON, *supra* note 92, at 78–79. Loury refers to “the vast disparities in economic advantage which separate the inner-city black poor from the rest of the nation” and “the historical experiences which link . . . the current urban underclass to our long, painful legacy of racial trauma.” Glenn C. Loury, *Achieving the ‘Dream’: A Challenge to Liberals and Conservatives in the Spirit of Martin Luther King, Jr.*, in AMERICAN POLITICAL THOUGHT 495, 495–97 (Kenneth M. Dolbear & Michael S. Cummings eds., CQ Press, 2004) [hereinafter, *Loury II*]. See generally Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 563–64 (2002); William E. Forbath, *Constitutional Welfare Rights: A*



2) rural Native American<sup>168</sup> communities. Just as they can see that there is no less advantaged *individual* than someone both poor and disabled, they would agree that there are no less advantaged *communities* than these ones. They combine the densest poverty with a majority of persons in groups that have been most oppressed in the U.S. based on race or ethnicity.<sup>169</sup>

---

*History, Critique, and Reconstruction*, 69 FORDHAM L. REV. 1821, 1842–45 (2001) (the urban Black underclass was the target of the 1964 Civil Rights Act); Lamb, *supra* note 137, at 167, and MacFarlane, *supra* note 137, at 317–18 (the urban Black underclass was also the target of the Model Cities and Community Action Programs).

Although Conley speaks solely in terms of the comparative wealth of racial groups, he underscores important race/class links that our legislators, focused on background justice, would take into account. See DALTON CONLEY, *Wealth Matters*, in REPARATIONS FOR SLAVERY, *supra* note 22, at 290–98. In addition, although preferences for several groups are routinely justified solely by reference to the situation of African-Americans, Conley's sole focus on Blacks and Whites is no obstacle to reparations as defined, since the facts he cites would be relevant for, and only for, reparations for impoverished Black communities.

McGary, recognizes that it is not Black communities, but rather poor Black communities, toward which there is a compelling moral obligation. See MCGARY, *supra* note 114, at 62–78.

168. Native Americans have the lowest per capita income among any ethnic group in the country. As the American Indian Relief Council reports,

Approximately half of the nation's 2,500,000 Native Americans live on reservations throughout the United States, "living in conditions that are four to five decades behind the majority of Americans." "More than 40% of families on the reservations live below the 1999 federal poverty line." The scarce number of jobs available on reservations and lack of economic opportunity fuel unemployment rates that often exceed 85%.

www.airc.org/livingconditions (citations omitted). As one commentator thus observes, "Native people are the poorest of the poor, having the highest rates of unemployment, cancer, infant mortality, accidental death, suicide, and homelessness in America." Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U.L. REV. 379, 420 (1998).

Those Native American communities with large casino revenues would, of course, be an exception to this rule. Since they are not among the poorest communities, they are not, under Rawls, among the least advantaged, and so would not be candidates for reparations as defined.

169. To borrow an old, apt phrase, such communities would be among the most "discrete and insular" of all. See *U.S. v. Carolene Prods.*, 304 U.S. 144, 152–53, n.4 (1938).

As a matter of language, 'discrete' means separate or distinct and 'insular' means isolated or detached. . . . Social commentators note that poor . . . people are often confined to inner city areas in which high concentrations of poverty exist, which further isolates them from mainstream society. In addition, government policies have increased the physical isolation of the poor over the past twenty years through tax abatements, exclusionary zoning policies, and subsidies that confine poor people within an invisible wall.

Jennifer E. Watson, *When No Place is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501, 516–17 (2003) (citations omitted).

While the poor are among the least advantaged for purposes of the difference principle, the Black middle and upper classes are not. While the latter are usually discrete, they are not insular. For the reasons indicated, however, our legislators could rationally decide

Our legislators would know the statistics on these communities, for example, the chances of being born out of wedlock, receiving little formal education, ending up in prison, or dying young.<sup>170</sup> Moreover, one of the major social contingencies Rawls considers in focusing on the basic structure is “good or ill fortune, or good or bad luck, over the course of life . . . .”<sup>171</sup> This idea firmly links the idea of “least advantaged” with the communities identified above.<sup>172</sup> Quite simply, regardless of where fault may lie for the social pathologies of these communities, self-interested legislators behind the veil of ignorance would rationally regard it very poor luck to be born into one of them, rather than, for example, born into the Black middle class. Knowing that they neither can, nor are expected to, end human inequality, yet are duty-bound to preserve

---

that impoverished communities with a majority of Blacks or Native Americans must be among the starting points for appropriations designed to carry the difference principle into effect.

170. See, e.g., DEDRICK MUHAMMAD ET AL., *THE STATE OF THE DREAM: ENDURING DISPARITIES IN BLACK AND WHITE* 4-9 (United for a Fair Economy Jan. 15 2004); LOURY, *supra* note 117, at 175-204; *Loury II*, *supra* note 167, at 494, 496; Forde-Mazrui, *supra* note 89, at 705, 727-37; Nobles, Crawford, & Leary, *Reparations and Health Care for African-Americans*, in WINBUSH, *supra* note 22, at 251-81. As Greenberg writes,

High concentrations of urban poverty are inextricably linked with a host of social problems, which have come to characterize urban black America. The odds of dropping out of high school and the odds of teenage birth rise in lock step with the age of low status workers in a neighborhood. Douglas S. Massey has written that poverty and racial concentration are “mutually reinforcing and cumulative, leading directly to the creation of underclass communities typified by high rates of family disruption, welfare dependence, crime, mortality and educational failure.” Living in a poor neighborhood increases the likelihood of pregnancy among black adolescent girls and lowers the age of first sexual intercourse. A 1993 study detected “reasonably powerful neighborhood effects . . . on childhood IQ, teenage births, and school-leaving, even after the differences in the socioeconomic characteristics of families are adjusted for.

Greenberg, *supra* note 167, at 565 (citations omitted).

171. FAIRNESS, *supra* note 18, at 55.

172. Again, many nonminorities fare poorly with regard to the social contingencies. This Article simply asserts that, subject to their detailed legislative findings, Rawlsian agents could rationally and justly begin with the most impoverished Black and Native American communities. Lines will have to be drawn, and Rawls would not require that every impoverished community and every minority community can or should receive reparations as defined. Legislators, however, must draw lines all the time. One could thus imagine, for example, our legislators drawing one line at impoverished Hispanic communities, not only because the American Hispanic population is so large and growing so quickly, but also because the Spanish, like the English and unlike African-Americans and Native Americans, are and were a European colonial power. Indeed, the Spanish on some accounts treated Native Americans as brutally as did the English. See PETER NABOKOV, *NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT* 19 (Penguin Books 1992). It is thus perhaps Spain rather than the U.S. that should pay reparations to impoverished Hispanic American communities.

background intergenerational justice, our legislators would include such communities among their starting points in this endeavor.<sup>173</sup>

The idea of luck brings us back, once again, to the FEO principle. As Rawls writes,

[F]air equality of opportunity is said to require not merely that public offices and social positions be open in the formal sense, but that all should have a fair chance to attain them. To specify the idea of a fair chance we say: supposing that there is a distribution of native endowments, those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of their social class of origin, the class into which they are born and develop until the age of reason. In all parts of society there are to be roughly the same prospects of culture and achievement for those similarly motivated and endowed.<sup>174</sup>

Assuming equal motivation and endowment, all are to have roughly the same life prospects, regardless of social class of origin. If that is the goal, however, what are the means for achieving it? Once again, “medical care . . . falls under the general means necessary to underwrite fair equality of opportunity and our capacity to take advantage of our basic rights and

---

173. My conclusion is reinforced by an analogy Rawls uses to anchor the difference principle:

The draft rule in a professional sport such as basketball ranks teams in the opposite order from their standing in the league at the end of the season: championship teams go last in the draft of new players. This rule provides for regular and periodic changes in the roster of teams and is designed to ensure that teams in the league are more or less evenly matched from year to year, so that in any give season each team can give any other team a decent game. These changes of players are necessary to achieve the aims and attractions of the sport and not foreign to its purpose.

FAIRNESS, *supra* note 18, at 51.

If we substitute communities for teams, the communities identified in this Article are like teams that finish a season with the lowest standing. As the least advantaged, the difference principle puts them first in line for new resources, in order be the healthy, competitive, productive units they would be with adequate resources. Again, programs like those identified in this Article were tried with mixed success in the 1960s, yet this changes neither whether they find support in Rawls nor whether they would do better with adequate funding.

It might be thought that the draft analogy supports racial preferences and quotas, but it does not. While the draft rule requires that weaker teams be given first chance at the best players, those players have no legitimate long-term expectations upset by the draft rule. They will all play in the big leagues, just not necessarily for the team they would have chosen without the draft rule. In the affirmative action context, by contrast, it is clear that not all universities (or jobs, even assuming everyone obtains one) are in the same league.

It would be a poor civic vision, of course, to see the various races as competing like in a professional sports league. Rawls's draft analogy is introduced only for its support of reparations as defined.

174. *Id.* at 43–44 (emphasis added).

liberties, and thus to be normal and fully cooperating members of society over a complete life.”<sup>175</sup>

This brief passage sums up so much so well that little more is needed to derive reparations as defined from the FEO principle. Adult citizens must be in reasonably good physical and mental health to be free to take advantage of the political liberties and FEO provided by the constitution and civil rights laws. Yet humans are such, as our legislators know, that the prerequisite for that necessary condition is the healthy upbringing of children into adults capable of self-government. As Nagel observes,

The obligation of an affluent society to ensure access to education through the university level to all who are willing and able to benefit from it and some obligation to see that children receive adequate nourishment and medical care, however poor their parents may be, are accepted by most segments of the political spectrum in broadly liberal societies.<sup>176</sup>

Reparations as defined, targeted at the health<sup>177</sup> and educational<sup>178</sup> needs of children in the communities identified above, thus go to the root of what is essential to make FEO a reality.<sup>179</sup> They are necessary, if not

175. *Id.* at 174.

176. Nagel, *supra* note 69, at 69. As DuBois wrote at a time when Blacks in the U.S. were completely segregated and mostly poor, “while it is a great truth to say that the Negro must strive and strive mightily to help himself, it is equally true that unless his striving be not simply seconded, but rather aroused and encouraged, by the initiative of the richer and wiser environing group, he cannot hope for great success.” W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 93–94 (Signet Classics 1994).

177. As Kopelman and Palumbo write, “a society committed to a fair equality of opportunity for children should provide adequate health care. . . . Using the difference principle—maximizing benefits for the worst off—free, additional service might be provided to the poorest children, so they could compete more effectively with those from more affluent homes.” Loretta M. Kopelman & Michael G. Palumbo, *The U.S. Health Care Delivery System: Inefficient and Unfair to Children*, 23 *AM. J. L. & MED.* 319, 329–30 (1997).

178. As Rawls writes, “institutions must, from the outset, put in the hands of citizens generally, and not only of a few, sufficient productive means for them to be fully cooperating members of society on a footing of equality. Among these means is human as well as real capital, that is, knowledge and an understanding of institutions, educated abilities, and trained skills.” *FAIRNESS*, *supra* note 18, at 140. “[Children’s] education should . . . prepare them to be fully cooperating members of society and enable them to be self-supporting.” *Id.* at 156 (word added).

Reparations as defined would thus do exactly what Forde-Mazrui ultimately calls for, at least in urban Black communities:

What is needed for black children and families are long-term opportunities for self-development, opportunities to play, to learn, and to work in a cultural environment that nourishes self-esteem. Society’s responsibility is not so much to give black people fish, but to teach them how to fish and to provide meaningful access to American’s main stream.

Forde-Mazrui, *supra* note 89, at 751. *See also* *FAIRNESS*, *supra* note 18, at 148–50.

179. Speaking of roots, Rawls’s further comments on medical care are illuminating: “[T]reatment that restores persons to good health, enabling them to resume their normal lives as cooperating members of society, has great urgency—more exactly, the urgency

sufficient, to enable the children in these communities to become normal, cooperating members of society over a full life.<sup>180</sup> They are thus a just and rational policy counterweight to strict enforcement of the nondiscrimination rule at the heart of civil rights laws. Given their unique combination of knowledge and ignorance, and tasked with translating the difference and FEO principles into legislation, Rawlsian legislators would support reparations as defined.<sup>181</sup> Just as they would reject strong forms of affirmative action because they do not know their racial membership, they would

---

specified by the principle of fair equality of opportunity; whereas cosmetic medicine, say, is not offhand a need at all." FAIRNESS, *supra* note 18, at 174.

This distinction between urgent care and "cosmetic medicine" suggests yet again that affirmative action is inconsistent with fair equality of opportunity. Unlike reparations as defined, preferences by UM law school for middle class and upper middle class minorities do not go to the roots of the problems of the communities identified in this Article. Indeed, even UM's socioeconomic preferences in the undergraduate admissions program struck down in *Gratz v. Bollinger*, 539 U.S. 244 (2003), do not go to those roots. On this account, quite beyond its treatment of the individual, affirmative action is a cosmetic remedy compared to reparations as defined, and is thus inconsistent with Rawls's own account of the FEO principle. Moreover, to the extent UM Law is not really interested in diversity as articulated in *Bakke*, *supra* note 26, the diversity it does achieve is largely cosmetic. See *Grutter v. Bollinger*, 539 U.S. 306, 393 (2003) (Kennedy, J. dissenting); Brian N. Lizotte, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625 (2006).

180. I say necessary but not sufficient since legislators can provide the resources for a poor disabled child to participate in society, yet they can ultimately do little for that child if he grows up in a home that does not support and nourish him. In similar fashion, this Article does not claim that public financial resources are sufficient for children in poor Black or Native American communities to become normal, cooperating members of society. A great deal will depend on the culture in these communities, a subject that prominent minority figures, including the President, have spoken about for some time. See, e.g., President Barack Obama, Remarks by the President to the NAACP Centennial Convention (July 17, 2009); BARACK OBAMA, THE AUDACITY OF HOPE 254-55 (Crown Publishers 2006); *Loury II*, *supra* note 167, at 496-97, 500; JOHN McWHORTER, WINNING THE RACE: BEYOND THE CRISIS IN BLACK AMERICA 10-12, 376 (Gotham Books 2005); JUAN WILLIAMS, ENOUGH: THE PHONY LEADERS, DEAD-END MOVEMENTS, AND CULTURE OF FAILURE THAT ARE UNDERMINING BLACK AMERICA—AND WHAT WE CAN DO ABOUT IT (Crown Publishers 2006).

181. At the very least, under liberal democratic principles and the full publicity condition, Rawlsian legislators would allow Mr. Conyers to have his hearings and make his recommendations. See FAIRNESS, *supra* note 18, at 121-22. After all, Rawls advocates "affirm[ing] the institutions of freedom of thought and liberty of conscience; for rational inquiry and considered reflection tend over time, if anything does, to expose illusions and delusions." *Id.* at 122. Moreover, just as they would conduct oversight to ensure strict enforcement of the nondiscrimination rule they have enacted into their civil rights laws, Rawlsian legislators would carefully oversee the allocation of the reparations they have appropriated. Finally, if reparations as defined were appropriated and then challenged under the equal protection clause, they would survive that constitutional challenge. By contrast to the governmental actions at issue in *Grutter v. Bollinger* and *Parents Involved in Community Schools v. Seattle School District /Meredith v. Jefferson County Board of Education*, after all, reparations as defined treat no individual differently than he would otherwise be treated based on race. It is thus difficult to see who would even have standing to bring such a suit without reliance, for example, on the flimsy theory of taxpayer standing.

support reparations as defined in this Article because they do not know their community of origin.<sup>182</sup>

With the grounds for this Article's full thesis in view, it appears consistent with key comments by leading scholars as well as three fundamental ideas in Rawls.

To begin with, given the effects of American racism, Daniels claims that we are led to "a stronger principle" than that of "careers open to talents."<sup>183</sup> Yet he follows this with vague, noncommittal remarks about public education. This includes a passing reference to "basic inequalities between the best suburban schools, serving rich white children, and the worst rural and urban schools, serving poor minority and white children,"<sup>184</sup> as well as the following: "[e]ven if we had more equitable public schools, fair equality of opportunity *might* also require programs aimed at early educational intervention for preschool children, like Head Start, or comprehensive daycare programs of the sort that exist in some other countries."<sup>185</sup> This passage points weakly toward reparations as defined, yet Daniels does not follow the analysis through by applying Rawls's theory to derive them.

Nagel, we saw, expressly rejects "affirmative action" as inconsistent with Rawls. Yet he also writes that the "positive equality of opportunity" which *Justice as Fairness* calls for "demands much *more* state action" than the "careers open to talents" principle and the "absence of barriers to competition" that characterize "negative equality of opportunity."<sup>186</sup> This is a fair interpretation, but the incompleteness of Nagel's argument clearly emerges when he goes on to observe that people can disagree about the "degree to which inequalities of opportunity ought to be evened out," i.e., about "how much has to be done."<sup>187</sup> The problem is that such language casts the question of the remedial policies that flow from Rawls's theory in the single dimension of *degree* of state action. By thus failing to recognize distinctions of the *kind* of state action, Nagel does not seem to see that Rawls may yield strong forms of reparations, even if not strong forms of affirmative action.

---

182. This Article's thesis may be particularly strong in the aftermath of *Parents Involved in Community Schools v. Seattle School District* and *Meredith v. Jefferson County Board of Education*. If, as some have suggested, the public schools in predominantly Black urban areas become increasingly racially concentrated as a result of these cases, then the communities that are appropriate for reparations as defined become even clearer.

Beyond this, while Goodman's attempt to derive race based college scholarships from Rawls has many flaws, scholarships based on an individual's origin in one of the identified communities, rather than his race, might flow from Rawls.

183. Daniels, *supra* note 132, at 250.

184. *Id.*

185. *Id.* (emphasis added).

186. Nagel, *supra* note 69, at 68–69 (emphases added).

187. *Id.* at 69 (emphases added).

As for Loury, he opposed affirmative action in 1990 for resting on the mistaken belief that Blacks cannot compete under White standards. He also scolded the left for labeling anyone who questions affirmative action's double standards as racist.<sup>188</sup> By 2002, however, he embraced race preferences in university admissions.<sup>189</sup> There are two replies to this viewpoint.

First, Loury suggests that racial equality must be a just society's highest priority, yet he never reckons with Rawls's distinction between race and least advantaged status. He thus fails to challenge this Article's thesis, which not only incorporates this key aspect of Rawls's theory, but allows, as Loury demands, for "public purposes [to be] formulated in racial terms."<sup>190</sup> It "take[s] account of race while trying to mitigate the effects of this [racial] subordination,"<sup>191</sup> and is thus faithful to the distinction between race blindness and race indifference. As Loury writes,

Let us reserve the phrase "race-blind" to describe the practice of not using race when carrying out a policy. And let us employ a different term—"race-indifferent"—to identify the practice of not thinking about race when determining the goals and objectives on behalf of which some policy is adopted.<sup>192</sup>

While Loury concedes that "worthy racial goals can sometimes be effectively pursued with race-blind means,"<sup>193</sup> he rejects race indifference. He is on strong ground, yet this Article's thesis satisfies both strands of his nuanced position. For reasons already considered above, Rawlsian legislators would enact race blindness into the law of separate and free transactions between individuals and associations. Yet they would not be indifferent to race, for reparations as defined in this Article take account of race as a secondary factor in determining which communities will be among the prime targets for resources under the difference principle.<sup>194</sup>

Turning to Rawls, finally, the ideas of public reason,<sup>195</sup> overlapping consensus,<sup>196</sup> and legitimate expectations<sup>197</sup> mark important distinctions. As for the first two, whatever the flaws in this Article's argument, it cannot be dismissed as partisan rhetoric. I have grounded my case in principles Rawls shows would be accepted by rational, unbiased persons behind the

188. See *Loury II*, *supra* note 167, at 501–02.

189. See *LOURY*, *supra* note 117, at 133–47.

190. *Id.* at 140.

191. *Id.* at 139.

192. *Id.* at 133.

193. *Id.* at 135.

194. On this account, we can now see that this Article's thesis also satisfies Rosen's criteria, noted at the outset, of avoiding "the extremes of conservative colorblindness and liberal racialism." Rosen, *supra* note 11.

195. See *FAIRNESS*, *supra* note 18, at 212–54.

196. See *id.* at 133–72.

197. See *THEORY*, *supra* note 17, at 273–77.

veil of ignorance. Moreover, this thesis challenges both the political left and right while yielding policies favored by both sides: the left secures reparations as defined while the center and right secure strict enforcement of racial nondiscrimination in most domains of state action. As in Rawls generally, the concerns of the right and left receive their due, and some measure of overlapping consensus is thereby achieved. Many members of Congress would not find this thesis fully satisfactory.<sup>198</sup> Yet this is often true of proposals that become federal law, especially if an intelligent, popular President champions them.

Finally, it is legitimate expectations, in Rawls's view, and not moral desert, that characterize a just distributive scheme under contract theory.<sup>199</sup> Therefore, in the U.S. in 2010 a racial minority member who is *not* raised in one of the communities I have identified cannot legitimately expect a racial preference in university admissions or employment.<sup>200</sup> An honest look at his society, beginning with the race and words of his President, validates Rawls's claim that least advantaged status is no mere function of a person's race.<sup>201</sup> At the same time, when he applies for university admission or employment, he can legitimately expect vigorous enforcement of the racial nondiscrimination rule at the heart of the 1964 Civil Rights Act. Moreover, if he *has* been raised in one of the communities identified in this Article, he can legitimately expect that he will receive the benefits of reparations as defined.<sup>202</sup> From his viewpoint as a citizen in an imperfect world, he has reason to think that his society's institutions are basically just, and that they satisfy his legitimate expectations.<sup>203</sup>

---

198. See Sheryl Gay Stolberg, *Frustration at Obama's Nuanced Style on Race*, N.Y. TIMES, Feb. 9, 2010, at A14.

199. See THEORY, *supra* note 17, at 273-77.

200. Once again, we have recognized that arguments for the use of race, even in separate and free transactions between individuals and associations, are stronger in domains of public employment at the border of the Hobbesian state of nature, like law enforcement, corrections, and the military.

201. With Obama's election, it has been observed, "African-Americans have just entered the no-excuses zone." Ta-Nehisi Coates, *The Messiah Myth*, TIME, Nov. 24, 2008, at 33 (quoting Jonetta Rose Barras). Commenting on *Rica*, however, one editorial board wrote that "[i]t has only been in recent years that little black and brown boys and girls could routinely see firefighters who look like them and aspire to grow up to be a firefighter, too." Editorial, *Court Turns a Blind Eye*, PHILADELPHIA INQUIRER, June 30, 2009, at A10. In an era when those children see a Black President, the idea that they will assume they cannot be firefighters seems implausible.

202. Moreover, although reparations as defined would not be given, for example, to middle class Black communities or impoverished White communities, suggestions like Kahlenberg's for race-neutral socioeconomic integration can fill the gap. See Richard Kahlenberg, *Stay Classy*, THE NEW REPUBLIC, Dec. 18, 2006, at 13.

203. Yet not only is being White a disadvantage when racial preferences for minorities are used, but also minorities are not entitled to a preference based solely on race.



## CONCLUSION

As noted at the outset, President Obama understands that a healthy social contract is essential to a society worth living in and passing on to our children and grandchildren. He knows, with FDR, that the political branches, and not just the courts, have a constitutional role in redefining the terms of that contract for each generation. In light of Rawls and the “teaching moment” that is the year of Sotomayor, *Ricci*, and the Gates arrest, I submit that Obama would call on Congress to reaffirm the racial nondiscrimination standard of the 1964 Civil Rights act and pledge that his Justice Department welcomes Congressional oversight to ensure the enforcement of that rule. At the same time, he would support Mr. Conyers’s formation of a commission to examine and report on the justice and feasibility, in balance with other priorities, of providing reparations as defined. If the commission’s recommendations were positive, the President would call on Congress to appropriate those resources. With such actions, Obama would “use his power in ways that make both parties equally unhappy,”<sup>204</sup> while challenging them, in the exercise of public reason, to “rethink their positions,”<sup>205</sup> perhaps even moving us beyond the “racial stalemate” he has spoken of previously.<sup>206</sup> Above all, no one could plausibly accuse the President of unprincipled partisanship.

Nozick, we saw, observed that political philosophers after Rawls must either work within his theory or explain why they will not. Those who disagree with this Article’s thesis are thus invited to support their position on the terrain of Rawls’s theory or meet Nozick’s challenge to explain why they reject that theory. It may be replied that, even assuming this thesis is sound as a matter of political theory, our current economic reality is such that it would be virtually impossible for Congress and the President to find the resources, presumably billions of dollars, for reparations, as they are defined in this Article. However, this is not necessarily so, for two reasons.

First, Rawls is clear that in a world of scarcity, provisions for the least advantaged under the difference principle are always to be made in balance with other priorities.<sup>207</sup> Second, and more importantly, Rawlsian legislators would think creatively about ways to generate the resources fairly required by the difference principle, especially during an economic crisis. They would note, for example, not only that the U.S. drug war has

---

204. Nancy Gibbs, ‘*This is Our Time*’, *TIME*, Nov. 17, 2008, at 40.

205. Stephen L. Carter, *Affirmative Distraction*, *N.Y. TIMES*, July 6, 2008, at O10.

206. Since poor urban Black communities are among the prime targets of reparations as defined in this Article, such reparations would go a long way toward meeting legitimate concerns of the Congressional Black Caucus. See William Douglas, *As Black Joblessness Soars, Caucus Nudges White House to Act*, *S.F. CHRONICLE*, Dec. 10, 2009, at A16.

207. See, e.g., *THEORY*, *supra* note 17, at 251-58, for Rawls’s discussion of the just savings principle.

been critiqued from across the political spectrum for decades,<sup>208</sup> but also that support for this war, especially marijuana prohibition, has fallen

---

208. See, e.g., PIERRE CLAUDE NOLIN & COLIN KENNY, *CANNABIS: REPORT OF THE SENATE SPECIAL COMMITTEE ON ILLEGAL DRUGS* 183-204 (Univ. of Toronto Press 2003); RUDOLPH J. GERBER, *LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS* 135-53 (Praeger 2004); JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS* Chapters 1-5 (Temple Univ. Press 2001); ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES AND PLACES* (RAND STUDIES IN POLICY ANALYSIS) 356-66 (Cambridge Univ. Press 2001); JOEL MILLER, *BAD TRIP: HOW THE WAR AGAINST DRUGS IS DESTROYING AMERICA* (WND Books 2004); JEFFREY A. MIRON, *DRUG WAR CRIMES: THE CONSEQUENCES OF PROHIBITION* 59-88 (Independent Institute 2004); ERIC SCHLOSSER, *REEFER MADNESS: SEX, DRUGS AND CHEAP LABOR IN THE AMERICAN BLACK MARKET* 11-74 (Mariner Books 2003); Gary Johnson, *Stop Arresting People for Bad Choices*, 21 CATO POLICY REPORT 6 (1999); David Bank, *Counterattack: Soros, Two Rich Allies Fund a Growing War on the War on Drugs*, WALL ST. J., May 30, 2001, at A1; William F. Buckley, *The War on Drugs is a Dismal Failure*, BUFFALO NEWS, Mar. 12, 1993, at 3; Talia Buford, *Chafee: U.S. Needs to Reexamine War on Drugs*, PROVIDENCE J., Apr. 14, 2007, at A4; Timothy Egan, *Fresh Ideas for a Tired Crusade*, N.Y. TIMES, Apr. 1, 2008, at A23; Sam Enriquez, *Antidrug Efforts Fall Short*, L.A. TIMES, May 5, 2007, at A3; Scott Farwell, *Ex-Narcotics Officer Sells DVDs with Tips on Avoiding Drug Arrests*, DALLAS MORNING NEWS, Mar. 5, 2008; Milton Friedman, *An Open Letter to Bill Bennett*, WALL ST. J., Sept. 7, 1989, at 14; Ira Glasser, *How the Drug War Targets Black Americans*, TIMES-PICAYUNE, Dec. 6, 2007, at 7; Lester Grinspoon, *Creating a Sensible Marijuana Law*, THE BOSTON GLOBE, Nov. 22, 2007, at A19; Froma Harrop, Op-Ed, *Time to End Lunacy of 'War on Drugs'*, PROVIDENCE J., Nov. 25, 2007, at D07; Arianna Huffington, Op-Ed, *AWOL in the Real Drug War: The Democrats are Ignoring the Unfair Toll on African-Americans and Latinos*, L.A. TIMES, Mar. 24, 2007, at A21; Larry Keller, *Judge Questions Police Methods, Effectiveness of Drug War*, PALM BEACH POST, May 4, 2007, at 1A; Russ Kick, *World Leaders on Dope*, VILLAGE VOICE, June 5, 2001, at 36; Kristen Davis, *Mayor Bloomberg and Marijuana*, N.Y. POST, Apr. 10, 2002, at 12; Ethan Nadelmann, *An Unwinnable War on Drugs*, N.Y. TIMES, Apr. 26, 2001, at A23; Ethan Nadelmann, *Legalize it: The War on Drugs—Why it's Time to Just Say No to Prohibition*, CHI. SUN TIMES, Sept. 30, 2007, at B1; *National Association of Criminal Defense Lawyers Board Calls for an End to 'War on Drugs'*, THE CHAMPION, Dec. 2000, at 8; Manuel Roig-Franzia, *From Mexico, Drug Violence Spills into U.S.*, WASH. POST, Apr. 20, 2008, at A20; Debra J. Saunders, Op-Ed, *Arnold's Marijuana Fig Leaf*, S.F. CHRONICLE, Oct. 30, 2007, at B7; Debra J. Saunders, *Marijuana Prohibition Doesn't Work*, S.F. CHRONICLE, Apr. 23, 2006, at E7; Robert Sharpe, *The High Costs of Prohibition*, PITTSBURGH TRIBUNE REVIEW, July 27, 2007; Gerry Smith, *Former Georgia Congressman (Bob Bart) Switches Teams in Drug War*, COX NEWS SERVICES, Mar. 29, 2007; *The War on Drugs Starts Here*, N.Y. TIMES, Feb. 13, 2008, at A24; Arnold Trebach, *Fatal Alliance: The Drug War Helps Terrorists*, WASH. TIMES, Aug. 20, 2007, at A17; Cynthia Tucker, *Futile Drug War Ignores Target: Safety*, ATLANTA J.-CONSTITUTION, May 2, 2007, at 15A; KATHERINE WALKENHORST, *CITIZENS AGAINST GOV'T WASTE, WASTED IN THE WAR ON DRUGS: ONDCP'S WASTED EFFORTS* (June 26, 2006), available at [http://www.cagw.org/assets/reports/through-the-looking-glass-reports-and-issue-briefs/2006/drug\\_report.pdf](http://www.cagw.org/assets/reports/through-the-looking-glass-reports-and-issue-briefs/2006/drug_report.pdf). See also Drug Law Reform, American Civil Liberties Union, <http://www.aclu.org/drug-law-reform>; Common Sense for Drug Policy, <http://www.csdp.org>; Criminal Justice Policy Foundation, <http://www.cjpf.org>; Drug Policy Alliance, <http://www.drugpolicy.org>; the Interfaith Drug Policy Initiative, <http://www.idpi.us.org>; Judges Against the Drug War, <http://www.reconsider.org>; Law Enforcement Against Prohibition, <http://www.leap.org>; Marijuana Policy Project, <http://www.mpp.org>; the National Organization for the Reform of Marijuana Laws, <http://www.norml.org>; and Students for Sensible Drug Policy, <http://www.ssdp.org>.

dramatically in the past year.<sup>209</sup> In California, for example, 56% of respondents now favor ending marijuana prohibition, allowing the state to create a monopoly on its sales and taxation.<sup>210</sup> Beyond this, a report by Harvard economist Jeffrey Miron, signed by over 500 economists, including three Nobel laureates, concluded that if Congress allowed states to change from prohibition to regulation of marijuana, it would save \$15 billion a year.<sup>211</sup> In light of this data and public reason, Rawlsian legislators could scarcely deny that in the U.S. in 2010 such resources would be much better spent on reparations as defined here than on marijuana prohibition.<sup>212</sup> Given the pace of change in state marijuana law, it would be best for the President to call for serious reform sooner rather than later. Yet there is evidence, even in California,<sup>213</sup> that the national political climate is still such that he cannot rationally do so if he seeks reelection to a second term (and it is hard to imagine that he does not). The need for reparations as defined in this Article, however, as well as rational drug law reform, will only become more urgent with time. If Obama is reelected, these issues should be at the top of the agenda in his next term.

---

209. See, e.g., Wyatt Buchanan, *Effort to Ease Pot Laws Gets a Boost: Governor Would Welcome Debate on Legalization*, S.F. CHRONICLE, May 6, 2009, at A1; Erik Etheridge, *The Opinionator Blog: High Time*, N.Y. TIMES, Oct. 20, 2009, available at <http://opinionator.blogs.nytimes.com/2009/10/20/high-time>; *How to Stop the Drug Wars: Prohibition has Failed; Legalization is the Least Bad Solution*, ECONOMIST, Mar. 7, 2009; Joe Klein, *It's High Time*, TIME, Apr. 13, 2009, at 19; Geof Koss, *Pot Lobby Aims High New Year; Marijuana Advocates see Friendlier Congress*, ROLL CALL, Dec. 8, 2008; Nicholas D. Kristof, *Op-Ed, Drugs Won the War*, N.Y. TIMES, June 14, 2009, at 10; Jesse McKinley, *For Marijuana Advocates, Not-So-Secret Holiday Hints at Change*, N.Y. TIMES, Apr. 20, 2009, at A13; Debra J. Saunders, *A Failed Drug War's Rising Body Count*, S.F. CHRONICLE, Mar. 15, 2009, at H6; David Sirota, *Finally, A Little Honesty about America's Inept War on Drugs*, SEATTLE TIMES, Apr. 6, 2009.

210. Editorial, *See Where There's Smoke There's Revenue?* S.F. CHRONICLE, May 8, 2009, at A21. See also Marcus Wohlsen & Lisa Leff, *California Sprouts "Green Rush" from Marijuana*, S.F. CHRONICLE, July 18, 2009; Carla Marinucci, *Legal Pot Suddenly Looking Possible*, S.F. CHRONICLE, Apr. 12, 2009, at A1; Tom Ammannio, *Regulation Would Take it out of Criminals' Control*, S.F. CHRONICLE, Mar. 3, 2009, at A13; F. Aaron Smith, *California's Neglected Tax Source?* S.F. CHRONICLE, Jan. 13, 2009, at B7. The California State Board of Equalization estimates that such a policy would generate \$1.4 billion annually in revenue. See Bob Egelko, *Legal Pot a Tough Sell in Campaign*, S.F. CHRONICLE, Aug. 8, 2009, at A1.

211. JEFFREY A. MIRON, *THE BUDGETARY IMPLICATIONS OF MARIJUANA PROHIBITION* (2005), available at <http://www.prohibitioncosts.org/mironreport.html>.

212. See generally MARTIN D. CARCIERI, *OBAMA, THE CONSTITUTION, AND THE DRUG WAR: TOWARD A PRACTICE OF SOCIAL JUSTICE 2009* (pre-published manuscript on file with author).

213. See Egelko, *supra* note 210.