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TROUBLING “SETTLED” WATERS: THE OPPORTUNITY AND PERIL OF AFRICAN-AMERICAN REPARATIONS

ALFREDA ROBINSON*

Abstract: This Article explores the theme of “troubling settled waters,” which represents the impact of African-American reparations on the current landscape of race relations in America. The Article outlines the current and historical debate over reparations, addressing the arguments of opponents who contend that reparations dialogue and action wastes intellectual and monetary resources, unnecessarily resurrects painful memories, and creates racial division. It also takes note of contemporary reparations efforts in the courts, as well as the theories and bases for this litigation. The Article concludes that, given the continuing pervasiveness of race and race issues in modern America, reparations are a welcome and important opportunity for achieving civil rights goals.

Your high independence only reveals the immeasurable distance between us. The blessings in which you, this day, rejoice, are not enjoyed in common. The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me.

—Frederick Douglass¹

INTRODUCTION

African-American reparations has emerged as one of the pre-dominant civil rights issues of the new millennium. It is the subject of

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¹ Fredrick Douglass, Address at Rochester's Independence Day (1852), in JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 202 (8th ed. 2000).

salubrious debate. Like the affirmative action debate, the subject of reparations has created a furor. Reparations proponents demand that the government, private individuals, and corporations provide remedies to African Americans for the unlawful and horrific acts inflicted on African Americans during slavery and the Jim Crow era, and for the unjust enrichment wrongdoers obtained.² Reparations proponents argue that reparations constitute America's unpaid and long overdue debt to African Americans for involuntary servitude, wrongful death, segregation, theft, conversion, fraud, Jim Crow forced labor, false imprisonment, personal injury, inadequate medical care, familial destruction, and housing discrimination. In sum, the demand is based on denials of Due Process, Equal Protection, equal employment, and equal educational opportunity. Put another way, reparations advocates are seeking redress for unconstitutional deprivation of life, liberty, property, and the pursuit of happiness.³

In contrast, reparations opponents contend that reparations discourse and demands for reparations unnecessarily "trouble 'settled' waters." In their view, reparations discourse creates racial and ethnic strife by resurrecting painful memories that Americans would rather forget. Reparations opponents further argue that the reparations debate wastes sparse intellectual, social, political, and economic resources that African Americans should direct elsewhere, that it focuses on ancient claims, blames inappropriately present day white Americans for the sins of their deceased ancestors and racial blood group,

² See Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. 477, 502 (1998) (stating support for reparations and referring to the compelling arguments for reparations based on economic and psychological harms of slavery, Jim Crow violence and continuing institutional discrimination); Charles J. Ogletree, Jr., *Litigating the Legacy of Slavery*, N.Y. TIMES, Mar. 31, 2002, § 4, at 9 (discussing litigation targeting the government, corporations, and private institutions as a reparations strategy); Ronald Roach, *Moving Toward Reparations*, BLACK ISSUES IN HIGHER EDUC., Nov. 8, 2001, at 20, 20 (discussing how contemporary African-American intellectuals are championing the present movement for reparations). See generally RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000); *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* (Roy L. Brooks ed., 1999) [hereinafter *WHEN SORRY ISN'T ENOUGH*].

³ See, e.g., Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309 (2003); see also Plaintiffs' First Amended Complaint, *Alexander v. Governor of Oklahoma* (N.D. Okla. filed Feb. 28, 2003) (No. 03-CV-133); Plaintiffs' Complaint and Jury Trial Demand, *Farmer-Paellmann v. FleetBoston Fin. Corp.* (E.D.N.Y. filed Mar. 26, 2002) (No. 02-CV-1862).

and holds African Americans captive to an undeserved and debilitating victim's image.⁴

In sum, reparations proponents and opponents disagree sharply on two issues: 1) whether present day problems experienced by African Americans are connected to past racially motivated, unlawful, and inhumane acts, and 2) whether present day efforts to alleviate those problems should seek redress from sources connected to America's unfortunate racist history. Accordingly, African-American reparations raises a host of issues about racial progress and racial disparities in the United States.⁵

This Article examines these "troubling" issues. It concludes that the intractable racial disparities between African Americans and white Americans require drastic civil rights measures like reparations. Furthermore, notwithstanding dire predictions, African-American reparations demands will not topple the republic. History demonstrates that this great democracy was born out of, and can survive, much "troubling."⁶

I. AFRICAN-AMERICAN REPARATIONS

The African-American reparations movement has emerged as a major civil rights issue of the new millennium. The movement dominates the national debate on racial equality. The reparations debate

⁴ Robinson, *supra* note 3, at 364–65 (describing some of the reasons given for opposing reparations); see Jeff Jacoby, *The Case for Reparations to Blacks Is Profound, but It Is Wrong*, BOSTON GLOBE, Mar. 6, 2000, at A13 (presenting public policy arguments in opposition to African-American reparations); Glenn C. Loury, *Little to Gain, Much to Lose*, BLACK ISSUES IN HIGHER EDUC., Nov. 8, 2001, back cover (arguing against reparations); see also DAVID HOROWITZ, *UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY* (2002) (describing reactions to his views against reparations).

⁵ See Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. THIRD WORLD L.J. 429, 436 (1998). Professor Westley contends that the discourse alone will have a positive and liberating affect on American society, even if reparations do not succeed. *Id.*

⁶ The United States was born out of conflict and has survived conflict. It came into existence because the American colonies declared their independence from Great Britain. America has survived the Civil War, the Viet Nam protests, the modern Civil Rights protests, white supremacy resistance, and the Watergate scandal. See generally AFRICANA: THE ENCYCLOPEDIA OF THE AFRICAN AND AFRICAN AMERICAN EXPERIENCE 1099 (Kwame Anthony Appiah & Henry Louis Gates, Jr. eds., 1999) [hereinafter AFRICANA] (discussing the Civil Rights protests); THE COLUMBIA HISTORY OF THE WORLD 753–63, 1130–32 (John A. Garraty & Peter Gay eds., 1981) (discussing the American Revolution and the Viet Nam War); FRANKLIN & MOSS, *supra* note 1, at 286–91 (discussing resistance to white supremacy); DAVID McCULLOUGH, JOHN ADAMS 17–29, 167–285 (2001) (discussing the colonies' fight for independence from England).

has yielded enormously profound and provocative scholarship,⁷ has produced significant media coverage,⁸ has resulted in litigation,⁹ and has generated an abundance of controversy.¹⁰ In terms of prominence, the movement for African-American reparations has shared center stage with the movement for enhanced corporate social responsibility. As I have argued elsewhere:

The movement for African American Reparations and the movement for corporate social responsibility have a point of intersection. At that point, the two generate a profound, salubrious, and comprehensive discourse on two of the most powerful forces in American life—race and the corporation. These two subjects, taken together, define, prescribe, or legitimize every aspect of our society and economy, and play critical roles in the formulation of our social, economic, and political agendas.¹¹

Thus, it is not surprising that the African-American reparations movement has gained traction in the last few years. Nevertheless, the focus on corporate social responsibility is only part of the explanation

⁷ See, e.g., ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* (2000) (discussing restitution remedies to compensate victims or their descendants for acts of inhumanity); BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (2003) (setting forth the legal arguments for and against African-American reparations); Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497 (2003) (discussing conceptual problems, constitutionality of reparations, and appropriate remedies when victims are no longer alive); W. Burlette Carter, *True Reparations*, 68 GEO. WASH. L. REV. 1021 (2000) (arguing for divestiture instead of reparations); Tuneen E. Chisolm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677 (1999) (arguing that African-American reparations is a prerequisite to improved race relations).

⁸ See, e.g., *Brown Bros.: Loans Gave Planters Cash to Buy Slaves*, USA TODAY, Feb. 21, 2002, at 9A; James Cox, *Aetna, CSX, FleetBoston Face Slave Reparations Lawsuit*, USA TODAY, Mar. 25, 2002, at 1B [hereinafter Cox, *Aetna*]; *FleetBoston: Traced to Slave-Trading Merchant*, USA TODAY, Feb. 21, 2002, at 9A; *Lehman Bros.: 1 Brother Owned 7 Slaves in 1860*, USA TODAY, Feb. 21, 2002, at 9A; Frank J. Murray, *3 Large Companies Cited for Slavery Reparations*, WASH. TIMES, Mar. 27, 2002, at A1; *Several Media Companies Own Newspapers That Were Essential to Slave Economy*, USA TODAY, Feb. 21, 2002, at 9A.

⁹ See, e.g., Plaintiffs' First Amended Complaint, *Alexander* (No. 03-CV-133); Plaintiffs' Complaint and Jury Trial Demand, *Farmer-Paellmann* (No. 02-CV-1862).

¹⁰ There are few "middle-of-the-road" viewpoints on the issue of African-American reparations; Americans hold strong opinions on the matter. See, e.g., Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2537 (2001) (addressing the issue of white backlash and the reparations debate, Professor Hopkins writes of a disturbing e-mail he received that was entitled: "You forgot to credit us white folks for our downpayment on reparations").

¹¹ Robinson, *supra* note 3, at 312.

for the reemergence of the debate over African-American reparations after a relatively long hiatus from the national agenda. At the core of the explanation for the prominence of the African-American reparations issue are the continued disparities between white Americans and African Americans, and the recent success of other groups in securing reparations.¹²

Overwhelmingly, the most critical factor in the reemergence of reparations debate is the continued significance of race in American life. Race matters and has always mattered.¹³ As I have previously argued, "Race is an inescapable determinate of every aspect of American society. Consequently, there is 'a constant, if not increasing, socioeconomic disparity between the races.'"¹⁴ In this sense, Professor William J. Wilson's major thesis that race is declining in significance has proved to be premature at best, and invalid at worst.¹⁵

The movement for African-American reparations has captured the attention of African Americans in particular and of all Americans generally, regardless of their political or economic background.¹⁶ Legislators, scholars, civil rights advocates, and even senior citizens¹⁷ have focused much attention on the issue and have become strong adherents or opponents of African-American reparations.¹⁸ After a relatively

¹² *Id.* at 325. See generally BARKAN, *supra* note 7; WHEN SORRY ISN'T ENOUGH, *supra* note 2; Maria Ellinikos, *American MNCs Continue to Profit from the Use of Forced and Slave Labor Begging the Question: Should America Take a Cue from Germany?*, 35 COLUM. J.L. & SOC. PROBS. 1 (2001).

¹³ See, e.g., CORNELL WEST, RACE MATTERS (2d ed. 2001).

¹⁴ Robinson, *supra* note 3, at 314 (quoting Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1331 (1988)).

¹⁵ See generally WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE (2d ed. 1978).

¹⁶ For example, within three hours of the issuance of the California Department of Insurance's statutorily mandated report (Slavery Era Insurance Registry) "there were more than 4,400 downloads of the list of slaveholder names, and more than 4,200 downloads of the names of slaves." Sarah Lubman, *State Releases Names of Slaves Who Were Insured*, MERCURY NEWS (San Jose), May 1, 2002, at 1A; see also Slavery Era Insurance Policies Act, CAL. INS. CODE §§ 13810-13813 (West Supp. 2003).

¹⁷ For example, one sixty-eight year old African American, Harold C. Johnson, is reportedly paying close attention to the national reparations effort. He believes that African Americans are just starting to recognize slavery's economic impact: "There's a lot of interest, because people of darker visibility are realizing what their plight is A lot of our problems were because we didn't have finances." Lubman, *supra* note 16, at 1A.

¹⁸ See Hopkins, *supra* note 10, at 2537; James Cox, *Reparations Gain Legal, Academic Interest*, USA TODAY, Mar. 25, 2002, at 2B [hereinafter Cox, *Reparations*]. Boston University economist Glenn Loury opposes reparations, saying that reparations "won't solve the problems of the inner cities and will create a backlash against blacks in a rapidly changing na-

obscure existence,¹⁹ the issue of African-American reparations has ignited a firestorm and has resurrected debates about race, slavery, Jim Crow, civil rights, affirmative action, apology, and racial disparities—including the wealth disparity between white Americans and African Americans.²⁰ “The issue has critical mass.”²¹

The national Reparations Coordinating Committee (RCC) has filed a lawsuit against the Governor of Oklahoma, alleging deprivation of Equal Protection under the Fourteenth Amendment to the U.S. Constitution during the infamous Tulsa race riot, and seeking damages “for restitution and repair of the injuries sustained by [plaintiffs] or their relatives from the actions and inaction of the agents of the [s]tate of Oklahoma and the [city of Tulsa] for acts they commit-

tion. ‘Asians, South Asians, people from Latin America—this country is on the move . . . It’s being remade. It’s not black and white anymore.’” Lubman, *supra* note 16, at 1A.

¹⁹ The issue of reparations for slaves was debated immediately after the Emancipation Proclamation and the Civil War. The case for African-American reparations has been advanced since January 16, 1865, when Civil War Major-General W. Tecumseh Sherman issued Special Field Order No. 15, reserving certain southern land for black settlements and granting to each family of freed slaves “Forty Acres and a Mule.” Special Field Order No. 15: “Forty Acres and a Mule,” *reprinted in* WHEN SORRY ISN’T ENOUGH, *supra* note 2, at 365–66. Other illustrations exist in the archives of the Ohio Historical Society. The archives contain copies of the *Cleveland Gazette*, a newspaper documenting the African-American experience in Ohio from 1850–1920. In an article dated August 29, 1891, the periodical dismisses the likelihood and significance of a proposed pension for ex-slaves and states: “This country will never pension ex-slaves. It would be dealing out *justice* with a more liberal hand than it is capable of—when [sic] the Afro-American is concerned.” *No Pension for Ex-Slaves*, CLEVELAND GAZETTE, Aug. 29, 1891, at <http://dbs.ohiohistory.org/africanam/page1.cfm?ItemID=17192> (last visited Oct. 22, 2003). On the same date, the paper included a story about Frederick Douglass’s endorsement of such a bill and the allocation of \$400 million in reparations by the government. *Pension to Ex-Slaves*, CLEVELAND GAZETTE, Aug. 29, 1891, at <http://dbs.ohiohistory.org/africanam/page1.cfm?ItemID=17196> (last visited Oct. 22, 2003). On February 14, 1903, the periodical carried a story entitled *Slave Pension Bill*, which chides Senator Mark Hanna for introducing the doomed pension legislation. *Slave Pension Bill*, CLEVELAND GAZETTE, Feb. 14, 1903, at <http://dbs.ohiohistory.org/africanam/page1.cfm?ItemID=19855> (last visited Oct. 22, 2003). Finally, an article dated March 3, 1903, discusses Senator Hanna’s and Senator Thurston’s reluctant introduction of legislation in favor of pensions for former slaves and the unlikelihood of its passage. *The Ex-Slave Pension Bill*, CLEVELAND GAZETTE, Mar. 3, 1903, at <http://dbs.ohiohistory.org/africanam/page1.cfm?ItemID=19876> (last visited Oct. 22, 2003).

²⁰ See 2 AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 52–251 (Neil J. Smelser et al. eds., 2001) [hereinafter AMERICA BECOMING]; CHUCK COLLINS & FELICE YESKEL, ECONOMIC APARTHEID IN AMERICA 43–68 (2000); MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 48 (1995). Although 69% of African Americans own stock, as compared to 80% of whites, only about 10% to 15% of African Americans control 70% to 80% of black wealth. *Getting the Scoop on Investing*, BLACK ENTERPRISE, Apr. 2002, at 80, 84.

²¹ Cox, *Reparations*, *supra* note 18, at 2B (quoting activist Jesse Jackson); see also Ogletree, *supra* note 2, at 9.

ted during and in the aftermath of the Riot.”²² “Like European Jews under the genocidal Nazis reign, African Americans during the Tulsa race riot were murdered, beaten, injured, deprived of property, and evicted forcibly from their residences, businesses, and town by armed white thugs.”²³ The complaint alleges significant government malfeasance and nonfeasance in the events.²⁴

Moreover, the RCC filed *Farmer-Paellmann v. FleetBoston Financial Corporation*²⁵ as the first of many “corporate reparations” lawsuits.²⁶ The plaintiff alleges that the corporate wrongdoers should surrender what they have unjustly held for centuries.²⁷ *Farmer-Paellmann* was filed against three of the nation’s largest corporations, Aetna Insurance, CSX Railroad, and FleetBoston Financial Corporation, alleging corporate conspiracies to commit slavery and other crimes against humanity, conversion, and unjust enrichment.²⁸ This lawsuit embraces many of the theoretical bases of African-American reparations.²⁹ The complaint alleges that FleetBoston’s predecessor-in-interest, Providence Bank, benefited financially from the international slave trade.³⁰ The complaint further asserts that Providence Bank financed and profited from the slave trade by lending substantial sums to its founder, Rhode Island businessman John Brown, a notorious slave trader, and “collected custom fees due from ships transporting slaves.”³¹ The plaintiff alleges further that CSX “is a successor-in-interest to numerous predecessor railroad lines that were constructed or run, at least in part, by slave labor.”³² In addition, the lawsuit alleges that Aetna’s cor-

²² See Plaintiffs’ First Amended Complaint ¶ 2, *Alexander* (No. 03–CV–133).

²³ Robinson, *supra* note 3, at 327 n.69.

²⁴ Plaintiffs’ First Amended Complaint ¶¶ 519–564, *Alexander* (No. 03–CV–133).

²⁵ *Farmer-Paellmann v. FleetBoston Fin. Corp.*, No. 02–CV–1862 (E.D.N.Y. filed Mar. 26, 2002).

²⁶ Robinson, *supra* note 3, at 361; K. Terrell Reed, *Sins of the Past*, BLACK ENTERPRISE, June 2002, at 35.

²⁷ See Plaintiffs’ Complaint and Jury Trial Demand ¶¶ 1–20, 58–61, *Farmer-Paellmann* (No. 02–CV–1862). As I argue in *Corporate Social Responsibility and African American Reparations: Jubilee*, the claims may be based on events from slavery to the present. See Robinson, *supra* note 3, at 358–61.

²⁸ Plaintiffs’ Complaint and Jury Trial Demand ¶¶ 50–70, *Farmer-Paellmann* (No. 02–CV–1862).

²⁹ See Robinson, *supra* note 3, at 361; Cox, *Aetna*, *supra* note 8, at 1B; Cox, *Reparations*, *supra* note 18, at 2B; Ogletree, *supra* note 2, at 9.

³⁰ Plaintiffs’ Complaint and Jury Trial Demand ¶ 29, *Farmer-Paellmann* (No. 02–CV–1862).

³¹ *Id.*

³² *Id.* ¶ 30.

porate predecessor “unjustly profited from the institution of slavery” by insuring “slave owners against the loss of their human chattel.”³³

Thus, plaintiffs in *Farmer-Paellmann* contend that reparations are due because African Americans have been systematically deprived of life, liberty, and property through inhumane enslavement and significant de jure and de facto racial discrimination dating back to the 1600s.³⁴ African Americans were captured, kidnapped, auctioned like cattle, raped, slaughtered, lynched, assaulted, whipped, beaten, set upon by dogs, humiliated, starved, experimented upon, worked to death without compensation, and separated from their families. The institution of slavery deprived African Americans of their languages, religions, traditions, and cultural background. African Americans were denied the right of citizenship, the right to vote, and the right of property ownership. Furthermore, African Americans were denied basic personal autonomy in decisions relating to residence, employment, education, religion, marriage, and procreation. This savage practice produced the “super-wrong.”³⁵ The racially motivated atrocities were deliberate, systematic, and lengthy; the results were intentional and inter-generational. Most Americans, regardless of race, have little comprehension of slavery and the continuing impact it has on American culture.³⁶ As the *Farmer-Paellmann* suit illustrates, it was not just southern plantation owners that benefited from the slave trade, but also the government and non-plantation businesses that played critical roles, generating immense profits and taxes from the business of slavery.³⁷

If reparationists’ demands and the ensuing controversy were solely about slavery, then the case for reparations would be simpler. Advocates, however, seek reparations for periods during and after slavery. Indeed, they seek reparations for the period from the official end of slavery to the present.³⁸ They demand reparations for the racially motivated acts and segregation during the lengthy era of Jim Crow (from the end of Reconstruction to the 1970s) and the wealth, health, educational, and other racial disparities associated with those acts.

³³ *Id.* ¶ 31.

³⁴ *See id.* ¶¶ 1–19.

³⁵ *See Rhonda V. Magee, Note, The Master’s Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 901 (1993).

³⁶ Deborah Kong, *Calls for Reparations Brew Revolt of Blacks*, WASH. TIMES, May 16, 2002, at A1.

³⁷ *See FRANKLIN & MOSS, supra note 1*, at 139–43, 150–51.

³⁸ Plaintiffs’ First Amended Complaint ¶ 2, *Alexander* (No. 03–CV–133); Plaintiffs’ Complaint and Jury Trial Demand ¶¶ 13–17, *Farmer-Paellmann* (No. 02–CV–1862).

II. THE DEBATE OVER "TROUBLING SETTLED WATERS"

A. *The Essence of the Debate*

In his compelling and provocative book *The Debt: What America Owes to Blacks*, TransAfrica founder Randall Robinson passionately articulates the position of African-American reparations supporters:

It is, again, not that affirmative action concepts are wrong-headed. They indeed are not. They should remain in place. But such programs are not *solutions* to our problems. They are palliatives that help people like *me*, who are poised to succeed when given half a chance. They do little for the millions of African Americans bottom-mired in urban hells by the savage time-release social debilitations of American slavery. They do little for those Americans, disproportionately black, who inherit grinding poverty, poor nutrition, bad schools, unsafe neighborhoods, low expectation, and overburdened mothers. Lamentably, there will always be poverty. But African Americans are overrepresented in that economic class for one reason and one reason only: American slavery and the vicious climate that followed it. Affirmative action, should it survive, will never come anywhere near to balancing the books here. While I can speak only for myself, I choose not to spend my limited gifts and energy and time fighting *only* for the penny due when a fortune is owed.³⁹

The concept of a debt underlies the views of reparations proponents. African-American reparations are due—indeed long overdue—on the debt owed to African Americans for centuries of racially motivated wrongs committed during the periods of slavery and Jim Crow. Accordingly, as Professor Ogletree states: "This is not a situation of someone sitting at the mailbox waiting for a check That trivializes the broad purpose. The real point is to put closure to a very sorry period in our history."⁴⁰

Reparations opponents contend that although the case for reparations is profound, the objections to it are similarly intense.⁴¹ Some reparations opponents, like Professor Loury, contend that African Americans have more to lose than to gain from seeking reparations be-

³⁹ ROBINSON, *supra* note 2, at 8–9.

⁴⁰ Jacoby, *supra* note 4, at A13.

⁴¹ See *id.*; Loury, *supra* note 4.

cause the hostility toward reparations is just as intense as it is against racial preferences.⁴² In the view of many reparations opponents, focusing on reparations is an engagement in wishful thinking. The potential for white backlash is another basis for opposition to reparations. In response to the view that reparations will bring closure to the painful history of racial discrimination against African Americans, reparations opponent and *Boston Globe* columnist Jeff Jacoby cautions:

Closure, however, is the one thing a great debate on the subject of reparations is assuredly not going to provide. Far from calming racial grievances, it will only inflame them further A national campaign for a vast transfer of wealth from whites to blacks is not going to make things better.⁴³

There is a critical division between the two camps. On the one hand, proponents view African-American reparations as the opportunity to eradicate racial disparities and all vestiges of slavery and Jim Crow. On the other hand, opponents view African-American reparations as fraught with peril. In other words, the parties differ sharply on whether reparations discourse, demands, legislative efforts, and litigation unnecessarily “trouble settled waters.”

Since this Article contends that the disagreement over “reparations talk”⁴⁴ is a dispute about “troubling settled waters,” definitions of “troubling,” “settled,” and “waters” are necessary. First, the term “troubling,” for purposes of this Article, means acts employed to challenge the status quo in order to eradicate racial disparities. Second, the term “waters” refers to the United States—its people and its institutions. Third, the term “settled” represents a state of full racial equality, integration, tolerance, and harmony in the union. The Declaration of Independence, the First Amendment to the U.S. Constitution, and the Emancipation Proclamation all proffer elegant definitions of “settled.”⁴⁵ It is the state when, in the eloquent words of the Reverend Martin Luther King, Jr., African Americans “will not be judged by the color of their

⁴² See Loury, *supra* note 4.

⁴³ Jacoby, *supra* note 4, at A13.

⁴⁴ See Brophy, *supra* note 7, at 497.

⁴⁵ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”); U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person . . . the equal protection of the laws.”); FRANKLIN & MOSS, *supra* note 1, at 686 (on September 22, 1862, President Lincoln issued a proclamation stating “[t]hat on the 1st day of January, A.D. 1863, all person held as slaves . . . shall be then, thenceforward, and forever free.”).

skin but by the content of their character.”⁴⁶ Simply stated, it is the state when race does not matter in America.⁴⁷

B. *The Debate: Opportunity or Peril*

If the waters are “settled” as described above, then African-American reparations are unnecessary. If the waters are “settled,” reparations represents a clear and unnecessary “peril.” The “settled” state described above, however, is a significantly different one than the present state of the union. It is therefore justifiable for reparations proponents to pursue African-American reparations.

C. *Troubling Is Required Because Race Still Matters*

In *Grutter v. Bollinger*, which upheld affirmative action in educational institutions, Supreme Court Justice Sandra Day O’Connor acknowledges that: “in a society, like our own . . . race unfortunately still matters.”⁴⁸ In an earlier article, I similarly asserted that race still matters centuries after white America forced African Americans into slavery.⁴⁹ Professor Guinier captures the complexity of race’s role in society:

Few would dispute that race as a *universal* biological category or as a generic and unassailable social signifier is a fiction or a fraud. But race matters as a function of context. When we use the term *race*, we may mean physical race, social race, cultural race, and/or political race. Race is not necessarily limited to what you look like; it may implicate what you look like in conjunction with your lived experience as an individual associated in our culture and our classrooms with others “similarly situated.”⁵⁰

Race is, without question, a pervasive feature of American society that affects our social, political, and economic interactions.⁵¹ Americans and their institutions are organized according to racial norms and hierarchies.⁵² This has led some to conclude that racial equality is an un-

⁴⁶ See AFRICANA, *supra* note 6, at 1099 (quoting Martin Luther King, Jr., Speech at the March on Washington (Aug. 28, 1963)).

⁴⁷ See generally WEST, *supra* note 13.

⁴⁸ *Grutter v. Bollinger*, 123 S. Ct. 2325, 2341, 2347 (2003).

⁴⁹ Robinson, *supra* note 3, at 313; see also WEST, *supra* note 1313.

⁵⁰ Lani Guinier, *The Pigment Perplex*, AMERICAN LAWYER, Aug. 2002, at 61.

⁵¹ Robinson, *supra* note 3, at 314.

⁵² *Id.* at 318.

realistic goal.⁵³ Race is at the core of American democracy and has had a central role throughout this nation's history.⁵⁴ Indeed, the history of America is a history of racial division and animosity.⁵⁵ Race dominates our social order.⁵⁶ It determines everything from life expectancy⁵⁷ to identity.⁵⁸ Finally, it is important to understand that "race is a complex concept that undoubtedly influences our collective experiences and perspectives; it is much more than skin color or ancestry."⁵⁹

Hence, the ideal of a "settled" America is significantly different from the current state of the union. For this reason, reparations discourse and demands present the opportunity to change America from a country where race critically matters to one where race matters insignificantly. The waters are not "settled" and reparations "troubling" is appropriate.

⁵³ See, e.g., Derrick A. Bell, Jr., *Racial Realism*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 302 (Kimberlé Crenshaw et al. eds., 1995) [hereinafter *CRITICAL RACE THEORY: THE KEY WRITINGS*].

⁵⁴ ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 17 (1992). Professor Delgado and Professor Stefancic provide this explanation of the critical race theorist view on the role of race in America:

First . . . racism is ordinary, not aberrational—"normal science," the usual way society does business, the common, everyday experience of most people of color in this country. Second, most would agree that our system of white-over-color ascendancy serves important purposes, both psychic and material. The first feature, ordinariness, means that racism is difficult to cure or address The second feature, sometimes called "interest convergence" or material determinism, adds a further dimension. Because racism advances the interests of both white elites (materially) and working-class people (psychically), large segments of society have little incentive to eradicate it A third theme of critical race theory, the "social construction" thesis, holds that race and races are products of social thought and relations. Not objective, inherent, or fixed, they correspond to no biological or genetic reality; rather, races are categories that society invents, manipulates, or retires when convenient.

RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 7 (2001).

⁵⁵ Robinson, *supra* note 3, at 319.

⁵⁶ *Id.* at 316. See generally *AMERICA BECOMING*, *supra* note 20; COLLINS & YESKEL, *supra* note 20, at 43–68.

⁵⁷ Robinson, *supra* note 3, at 316; see also Dorothy A. Brown et al., *Social Security Reform: Risks, Returns, and Race*, 9 CORNELL J.L. & PUB. POL'Y 633, 637 (2000) ("blacks have shorter life expectancies than whites").

⁵⁸ Robinson, *supra* note 3, at 316; see also HACKER, *supra* note 54, at 218 ("It is white America that has made being black so disconsolate an estate. Legal slavery may be in the past, but segregation and subordination have been allowed to persist. Even today, America imposes a stigma on every black child at birth."); e. christi cunningham, *The "Racing" Cause of Action and the Identity Formerly Known as Race: The Road to Tamazunchale*, 30 RUTGERS L.J. 707, 716 (1999) (urging people of color to consider "race as a cause of action while re-considering race as a foundation for identity").

⁵⁹ Guinier, *supra* note 50, at 61.

D. *The Lessons of History*

Reparations proponents and opponents are essentially renewing a centuries-old debate about the proper means, timing, and pace of racial equality, and the causes of the racial disparities. I previously examined the issue of the causes of today's racial disparities and concurred with reparations proponents that present racial disparities are linked to past racially motivated acts occurring during slavery and the Jim Crow era.⁶⁰ Reparations opponents argue that African Americans face no greater burdens than any other Americans.⁶¹ Thus, according to reparations opponents who believe that African Americans have already achieved complete equality, it is unfair to seek redress from today's Americans who did not own slaves.⁶²

The current debate over "troubling settled waters" is an old one. It is a conflict over different philosophical approaches to the goal of racial equality for African Americans. Throughout history, some have cautioned that African Americans will best achieve equality in a deliberate, non-confrontational manner.⁶³ Others contend that present racial disparities justify a more confrontational and impatient agitation on the part of African Americans.⁶⁴

Similarly, during slavery, some argued for a moderate pace of change, with the idea that full racial integration could only be achieved over time.⁶⁵ More activist African Americans, however, advo-

⁶⁰ Robinson, *supra* note 3, at 365.

⁶¹ See, e.g., HOROWITZ, *supra* note 4, at 13–14, 107.

⁶² See David Horowitz, *Ten Reasons Why Reparations for Blacks Is a Bad Idea for Blacks—and Racist Too*, FRONTPAGE MAG., Jan. 3, 2001, at <http://www.freerepublic.com/frum/a3a54b37c6b16.htm> (last visited Sept. 15, 2003).

⁶³ For example, on December 11, 1964, Martin Luther King, Jr. stated in his Nobel Peace Prize acceptance that: "Man must evolve for all human conflict a method which rejects revenge, aggression and retaliation. The foundation of such a method is love." SIMPSON'S CONTEMPORARY QUOTATIONS: THE MOST NOTABLE QUOTES FROM 1950 TO THE PRESENT 375 (James B. Simpson ed., 1997).

⁶⁴ Radical leaders like Malcolm X believed that African Americans had to be more aggressive in their ongoing fight for equality. "We no longer endorse patience and turning-the-other-cheek. We assert the right of self-defense by whatever means necessary, and reserve the right of maximum retaliation against our racist oppressors . . ." MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS 76–77 (George Breitman ed., 2d ed. 1989).

⁶⁵ ENCYCLOPEDIA OF BLACK AMERICA 790 (W. Augustus Low & Virgil A. Clift eds., Da-Capo Press 1984) (1981) [hereinafter ENCYCLOPEDIA] ("By the 1830s most abolitionists had become pessimistic about the slow pace of the gradualist approach: the slave trade laws were not enforced; . . . free blacks were still denied equal rights in the North as well as in the South; efforts to boycott slave-produced goods had not gained sufficient support to be effective . . .").

cated for direct action.⁶⁶ They believed that the only way to achieve emancipation and integration was through vigorous and uncompromising demands.⁶⁷ Moral speech would not be enough to persuade racists,⁶⁸ and no slave owner would voluntarily relinquish the benefits of slave ownership.⁶⁹ Furthermore, white Americans would not even associate with African Americans on an integrated level.⁷⁰ To think otherwise, argued activists, was naive.⁷¹

At some level, the Civil War was a war about the appropriate pace and process of African American emancipation and integration.⁷² Even the abolitionists argued over the issue of the pace and process of emancipation.⁷³ The contentions included the radical, violent views of John

⁶⁶ Freed African Americans, such as David Walker, believed that in order to eradicate slavery, African Americans must take a more aggressive approach:

Are we men!! I ask you . . . are we MEN? Did our creator make us to be slaves to dust and ashes like ourselves? Are they not dying worms as well as we? . . . How we could be so *submissive* to a gang of men, whom we cannot tell whether they are as good as ourselves or not, I never conceive . . . with our *blood and tears*. The greatest riches in all America have arisen from our blood and tears: And they will drive us from our property and homes, which we have earned with our blood.

FRANKLIN & MOSS, *supra* note 1, at 194.

⁶⁷ In 1865, two years after the Emancipation Proclamation, "A black convention in Nashville protested seating the Tennessee delegation to Congress because the legislature had not passed just laws for African Americans. It also demanded that Congress recognize black citizenship." *Id.* at 254.

⁶⁸ The rise of the age of militant abolitionists demonstrates this point. *See id.* at 193-204.

⁶⁹ Southerners had great difficulty adjusting to the idea of emancipation for slaves:

Soon after the War of 1812 sectionalism was apparent as the North swung to manufacturing and the South, still wedded to agriculture, came to see clearly that the interests of the section were becoming antagonistic . . . In the South . . . the plantation system tended to preserve frontier independence: there was little communal life, only slight civic responsibility, and little interest in various programs for the improvement of humanity.

Id. at 193.

⁷⁰ *See* ENCYCLOPEDIA, *supra* note 65, at 758.

⁷¹ Even freed slaves continued to face restrictions. "[Slaves] could neither testify in court against a white person, nor purchase firearms or liquor without the recommendation of a 'reputable' white person . . . one state (Georgia) forbade free blacks to own property." *Id.* at 759.

⁷² *See* AFRICANA, *supra* note 6, at 1734 ("As the war dragged on, Northern war aims gradually shifted from preserving the Union to abolishing slavery and *remaking* the Union.").

⁷³ *See* ENCYCLOPEDIA, *supra* note 65, at 789-90; FRANKLIN & MOSS, *supra* note 1, at 193-204.

Brown,⁷⁴ to the more moderate views of the majority of abolitionists who wanted to change the hearts and minds of white men slowly.⁷⁵

The debate over the pace and progress of integration gained momentum during the brief Reconstruction period and during the Jim Crow era. Debates between the eloquent former slaves Fredrick Douglass, who would accept nothing less than complete equality, and Booker T. Washington, who believed in accepting some forms of racial segregation, typified the dispute.⁷⁶ This debate over differing approaches to integration continued throughout the Jim Crow era.⁷⁷

Subsequently, we witnessed a resurrection of the debate over the appropriate pace and process of racial equality during the modern Civil Rights period, which included such voices as Dr. Martin Luther King, Jr., Malcolm X, Elijah Muhammad, leaders of the Black Panthers, and others.⁷⁸ Dr. King believed that a slow and non-confrontational ap-

⁷⁴ John Brown, a radical abolitionist, was hanged on December 2, 1859 for his involvement in a raid of a federal arsenal at Harpers Ferry, Virginia. FRANKLIN & MOSS, *supra* note 1, at 216–18. Following his trial and conviction, John Brown told a *New York Herald* reporter:

I pity the poor in bondage that have none to help them; that is why I am here; not to gratify any personal animosity, revenge or vindictive spirit. It is my sympathy with the oppressed and wronged, that are as good as you and as precious in the sight of God Now, if it is deemed necessary that I should forfeit my life for the furtherance of the ends of justice, and mingle my blood further with the blood of my children and with the blood of millions in this slave country whose rights are disregarded by wicked, cruel, and unjust enactments, I say, let it be done.

Id. at 218.

⁷⁵ ENCYCLOPEDIA, *supra* note 65, at 789.

⁷⁶ See *id.* at 839–40. See generally *id.* at 319–24 (describing Frederick Douglass's life and accomplishments); *id.* at 839–45 (providing an overview of Booker T. Washington's contributions to the movement).

⁷⁷ Woodward describes the essence of the Jim Crow era in America:

The public symbols and constant reminders of [the African Americans'] inferior position were the segregation statutes, or 'Jim Crow' laws. They constituted the most elaborate and formal expression of sovereign white opinion upon the subject [The] enforcement [of] the segregation codes [was] comparable with the black codes of the old regime That code lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries.

C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 7 (Commemorative ed. 2002).

⁷⁸ See FRANKLIN & MOSS, *supra* note 1, at 465, 550; *supra* notes 63, 64 (discussing Martin Luther King's and Malcolm X's views regarding various approaches to Jim Crow oppo-

proach, but with direct actions, would be most effective.⁷⁹ Others argued that a more aggressive, even violent approach was the best means of achieving racial progress.⁸⁰

Today, we are in the midst of the same debate. African-American reparations present both opportunities and perils, just as demands for racial equality did in the past. Today's fears regarding reparations are the same historical fears of white backlash and racial division. Just as in the past, there are opportunities to eradicate intractable racial disparities, such as the wealth gap.⁸¹ It is to the discussion of the opportunities and perils reparations present that this Article now turns.

E. Opportunities

The provision of reparations to African Americans will help achieve the ultimate civil rights goal—i.e., full racial equality.⁸² There has always been hesitation over how to accomplish the civil rights objectives of African Americans; nevertheless, on balance the perils of reparations are not so new or significant as to warrant cessation of the reparations effort. The fact that the first racial discriminatory acts occurred in the past (for example, from 1600–1863),⁸³ does not mean that one should ignore current manifestations of racially motivated

sition). During the Jim Crow Era, Elijah Muhammad led African-American Muslims in "renounc[ing] their faith in the ultimate solution of the race problem in the United States, reject[ing] all names that might imply a connection with white America, and [seeking] complete separation from the white community." FRANKLIN & MOSS, *supra* note 1, at 465. A group deemed radical during their time was the Black Panthers. "[Y]oung California militants led by Huey P. Newton and Bobby Seale organized the Black Panther Party for Self-Defense, and Eldridge Cleaver, its most articulate spokesman, declared that the choice before the country was 'total liberty for black people or total destruction for America.'" *Id.* at 550.

⁷⁹ Though many agreed with the peaceful approach taken by Martin Luther King, Jr., he also "had been criticized by militant, action-oriented blacks who insisted that whites would not respond to black demands on the basis of Christian charity, good will, or even peaceful demonstrations." *Id.* at 550.

⁸⁰ More aggressive groups such as the Black Panthers "called for full employment, decent housing, black control of the black community, and an end to every form of repression and brutality Several [members] were sent to prison, charged with murder, attempted murder, and lesser crimes. The [FBI] declared the Black Panthers to be dangerous and subversive." *Id.* at 553.

⁸¹ See Keith N. Hylton, *A Framework for Reparations Claims*, 24 B.C. THIRD WORLD L.J. 31, 34 tbl.1 (2004).

⁸² Professor Westley suggests that even the discussion of the subject has the potential to break down racial barriers. See Westley, *supra* note 5, at 432–37.

⁸³ The first slaves arrived in the colonies in the 1600s. See FRANKLIN & MOSS, *supra* note 1, at 37–44. Of course, slavery did not end officially until the Emancipation Proclamation in 1863. *Id.* at 231.

old and new injuries. Were that the case, the recent tobacco litigation and settlements would have failed.⁸⁴ Furthermore, in response to those opponents who insist that all present problems are the result of self-inflicted injuries of African Americans (e.g., teenage pregnancy), the moral and legal bases for reparations claims are actually stronger than those of the tobacco litigation claims. Reparations claims are based on injuries suffered due to slavery and Jim Crow laws and norms, all of which were imposed involuntarily on African Americans. Tobacco claims, however, arose from many adult smokers' risky, voluntary behavior.

Moreover, reparations claims will not "tax" today's white Americans for the sins of deceased white Americans any more than income taxes improperly tax all Americans in order to reduce national deficits created by deceased Americans. Reparations claims do not blame today's white Americans for the sins of deceased white Americans any more than reparations claims of interned Japanese Americans blamed today's white Americans for the shameful conduct of federal government officials during World War II.

Finally, reparations discourse and demands do not waste sparse resources. The issues reparations raise are critical to African Americans. Reparations discourse seeks to address the underlying causes of racial disparities, and to develop concrete, long-term solutions for them. In view of the disparities between whites and African Americans, it is difficult to imagine an effective and legitimate national civil rights agenda without the inclusion of the underlying issues reparations raise.

Reparations discourse and demands may well cause racial and ethnic division and may resurrect painful memories that Americans would rather forget. This is not new. The struggle for African-American civil rights has been long and difficult and has often been the source of tension and divisiveness. Social change always comes with discomfort. Equal opportunity in America is always worth the costs.

CONCLUSION

Notwithstanding the trepidation of reparations opponents, African-American reparations discourse and demands are significant issues that warrant substantial public attention. I share Professor Westley's view that there is an enormous benefit to reflection and debate on African-American reparations, even if such reparations never

⁸⁴ For an article discussing the tobacco litigation, see Frank J. Murray, *Court Strips FDA of Cigarette Control: Ruling Gives Power Back to Congress*, WASH. TIMES, Mar. 22, 2000, at A1.

become a reality.⁸⁵ The conversation itself is worthy of pursuit. Admittedly, theoretical and practical issues abound about the propriety and feasibility of reparative measures. Nevertheless, Americans must address the thorny question of persistent disparities between white and black Americans. In particular, we must focus on the widespread perception and reality of racial inequality in this country.

Reparations may well expose the ugly side of America. Yet only through exposing the ugly side of America and examining proposals for change have we historically been able to reveal America's greatness. The subject of African-American reparations will provide the necessary public scrutiny to explore the persistent significance of race in America and proposals for change. I am quite confident that the republic shall survive that exploration.

⁸⁵ See Westley, *supra* note 5, at 436.