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Deconstructing Babel: Toward a Theory of Structural Reparations

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DECONSTRUCTING BABEL: TOWARD A THEORY OF STRUCTURAL REPARATIONS

*Jeffery M. Brown**

The apparent inability of contemporary reparations scholars to reach consensus on prudential considerations such as structure and purpose undermines efforts to obtain reparations of any sort. The Author finds intriguing recent proposals that see black reparations claims not as litigation vehicles, but as broader invitations to re-energize discussions of racial equity via "rehabilitative" or "inward looking" transformations that stress black institutional capacity building. This Article posits that the idea of "rehabilitative" or structural reparations continues to have both conceptual and pragmatic currency. However, successful implementation of this idea demands that scholars and activists reacquaint themselves with the meaning of structural reparations as that concept was generally understood during Reconstruction where it first gained favor.

TABLE OF CONTENTS

I.	INTRODUCTION: LOOMINGS	464
II.	TRADITIONS IN TRANSITION: SHIFTING REPARATIONS PARADIGMS	475
	A. <i>Historical Narrative in Reparations Discourse</i>	475
	B. <i>Shifting Paradigms: An Alternative View of the Slavery Reparations Movement</i>	477
	C. <i>Speaking in Tongues: Contemporary Reparations Discourse</i>	484
	D. <i>Black Reconstruction and the Seeds of Ideological Discord: The Failure of the Blair Education Bill</i>	488
III.	RECONCILIATION AND REPARATIONS: PARADIGMS IN CONFLICT	492
IV.	DECONSTRUCTING BABEL: TOWARD A THEORY OF STRUCTURAL REPARATIONS	499

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A.	<i>There and Back Again: Structural Reparations Revisited</i>	499
B.	<i>A Theory of Structural Reparations</i>	503
C.	<i>Assessing the Aftermath of Blair: Contemporary Discourse</i>	505
D.	<i>Challenges for the Future: Grutter, Black Higher Education, and the Dynamics of Institutional Transformation</i>	507
V.	CONCLUSION	510
I.	INTRODUCTION: LOOMINGS	

Negro poverty is not white poverty. Many of its causes and many of its cures are the same. But there are differences—deep, corrosive, obstinate differences—radiating painful roots into the community, and into the family, and the nature of the individual.

...

They are anguishing to observe. For the Negro [these differences] are a constant reminder of oppression. For the white they are a constant reminder of guilt. But they must be faced and they must be dealt with and they must be overcome, if we are ever to reach the time when the only difference between Negroes and whites is the color of their skin.¹

President Lyndon B. Johnson's historic June 1965 Howard University address sounded an empathetic and conciliatory tone on race relations that today appears almost anachronistic. The proposition that deep systemic differences distinguish black from white poverty denotes a degree of race and class-consciousness no longer in vogue amongst our national political elites. Older African-Americans, many of whom are now leaders within the black community, remember Johnson's address as indicative of a more progressive era where a broader national consensus supported the idea of black socio-economic rehabilitation via massive federal support. Indeed, the Johnson administration became perhaps best known for implementing the Great Society reforms that would redefine the meaning of the modern welfare state, especially as it relates to African-Americans.²

1. President Lyndon B. Johnson, To Fulfill These Rights, Commencement Address at Howard University (June 4, 1965), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>.

2. "The Great Society" is the name given to President Johnson's domestic program. Johnson outlined his vision of the Great Society in his 1965 State of the Union speech. He described his vision as one in which federally sponsored programs

It was during this era that A. Philip Randolph, the celebrated labor and civil rights activist, would, under the auspices of the A. Philip Randolph Institute that bears his name, draft a radical document designed to revitalize America's urban ghettos.³ Officially known as "A Freedom Budget for all Americans," the proposal advocated massive federal expenditures (approximately \$100 billion over a ten-year period) to revive America's decaying inner cities.⁴ The "freedom budget" became more commonly known as the black Marshall Plan.⁵ This initiative would see expression in a number of similarly styled proposals in the intervening decades.⁶ Randolph submitted his transformative budget proposal to the Johnson administration in 1966, but the measure never garnered sufficient support to become reality. It is worth noting that Randolph's proposal linked the larger question of black urban revitalization in the 1960s, not to the imperatives of litigation, but to the dynamics of political activism and deeper structural reform.

Although the "Freedom Budget" lacked the political support necessary to ensure its implementation, the Great Society reforms supported by the Johnson administration were adopted.⁷ These reforms would remain in place throughout the more conservative Nixon and Ford administrations, though by the end of the 1970s, critics of these measures began to express deep reservations about their effectiveness and fairness.⁸ Into this milieu, Ronald Reagan emerged as the champion of smaller government and rolling back federal welfare spending. Predictably, race would occupy center stage in these discussions.⁹ Symbolically, if Reagan-era conservatism and the war on the Johnson-era welfare state signaled the end of official commitment to the aims of the Great Society, it also signaled the

would improve the quality of life for all Americans. The idea was associated with Johnson's War on Poverty, launched in 1964. Great Society measures passed by Congress in 1965 included Medicare, federal aid to education and the arts, and the establishment of the Department of Housing and Urban Development. African-Americans benefited richly from all of these programs. See generally ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 284-286 (1998) (describing President Johnson's Great Society initiative as "the most far-reaching domestic agenda since the New Deal").

3. E.g., FONER, *supra* note 2, at 282-83.

4. *Id.*

5. See BILLY J. TIDWELL, *PLAYING TO WIN: A MARSHALL PLAN FOR AMERICA* (1991).

6. See *id.*

7. See FONER, *supra* note 2, at 284-86.

8. See HAROLD CRUSE, *PLURAL BUT EQUAL* 374-76 (1987) (suggesting that "[b]lack would . . . become the most prominent scapegoats for most of the conservative backlash from critics of liberal public policy").

9. See CRUSE, *supra* note 8, at 374-76 (observing that race had become a central feature of the national debate surrounding the efficacy of social welfare programs).

unofficial end of a broader national consensus generally sympathetic to efforts to eliminate lingering and pervasive black socio-economic pathologies through massive federal intervention.¹⁰

The end of the Cold War once again saw the re-emergence of proposals to address chronic black poverty via aggressive federal intervention under the guise of a so-called "black Marshall Plan."¹¹ Such proposals were fueled by suppositions that the end of the Cold War would yield massive peacetime financial windfalls that could be directed away from national defense and redirected toward important domestic social programs.¹² However, renewed appeals for greater federal assistance to aid the black community now faced mounting white opposition.¹³ The fact that conservative ideology had shifted the locus of the social welfare spending debate to the political right¹⁴ further dimmed prospects of a black Marshall Plan. Even William Jefferson Clinton, the so-called "first black president"¹⁵ largely abandoned the social-welfare-friendly posture championed by earlier southern democrats like Lyndon Johnson, in favor of a more centrist approach.¹⁶ In short, the broad consensus that made possible

10. The Reagan administration did not completely eliminate the programs introduced during the Johnson years. Rather, Reagan sought to limit the reach and scope of such programs by reducing the amount of federal funding they received. In the late 1990s, the idea of eliminating altogether the Department of Housing and Urban Development gained wide currency amongst some conservatives, but talk in that direction is almost non-existent today. Interview by Karen Ceraso & Winton Pitcoff with Andrew Cuomo, Secretary, U.S. Dep't of Hous. & Urban Dev. (June 1998), available at <http://www.nhi.org/online/issues/100/cuomo.html>.

11. See, e.g., Salim Muwakkil, *How Do We Mend the Inequities of Justice?*, CHI. TRIB., June 19, 2000, at 13 (describing a Marshall Plan "as a structured system of reparations").

12. Anne Markusen & Catherine Hill, *Converting the Cold War Economy, Investing in Industries, Workers, and Communities*, ECONOMIC POLICY INSTITUTE LIBRARY/INFORMATION CENTER, 1992, available at <http://www.lights.com/epi/virlib/Studies/1992/convertingtPDF> (last visited Apr. 8, 2004).

13. See CRUSE, *supra* note 8, at 375 (noting that the Democratic party's traditional affiliation with black voters by the 1980s had actually become a "political indictment from the point of view of those of the electorate who labeled blacks as the most palpable scapegoats for a hot issue, to much government spending on social programs").

14. See generally H. Brand, *The Welfare State at Risk*, DISSENT (Summer 1995) (arguing that interpretations of the social welfare state as a politically and socially stabilizing force have given way to more cynical interpretations, and that this shift threatens the very existence of the welfare state in post-war America).

15. This term is widely used, albeit unofficially, by many African-Americans to denote their support of the man, especially during his impeachment, and to suggest Clinton's undeniable appeal to and empathy for those same Americans.

16. Clinton championed the most radical modern social welfare transformation since the Great Society under the guise of welfare reform. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110

the Great Society reforms had given way to increased pessimism, cynicism, and growing racial discord.

Nor did the heady 1990s, an era of unprecedented national prosperity, signal any significant change in direction. The abject failure of President Clinton's Advisory Board on Race,¹⁷ which sought to push to the forefront of the domestic agenda the nation's entrenched racial problems, made this abundantly clear.¹⁸ Black urban poverty persisted and, in some cases, worsened.¹⁹ The income gap between middle-class and poor blacks widened,²⁰ and black urban life became more fractured and tenuous.²¹ Meanwhile, the notion that the nation might reach a functional consensus on how to address the persistent problems of black poverty and black social dislocation seemed ever more remote.

Into this breach, the contemporary slavery reparations movement²² re-emerged after a nearly two-decade hiatus.²³ At one

Stat. 2105 (1996) (codified at 42 U.S.C. § 601 (2000)) (requiring work in exchange for time-limited assistance).

17. In 1997, President Clinton put race at the forefront of his domestic agenda by creating an Advisory Board on Race [hereinafter the Commission]. Jamie L. Wacks, *A Proposal for Community-Based Racial Reconciliation in the United States Through Personal Stories*, 7 VA. J. SOC. POL'Y & L. 195, 196 (2000). The Commission sought to explore racial problems in America by engaging a wide cross-section of the public in open and frank discussions on the topic. *Id.* at 196-97.

18. Jeanne Meserve, *Critics Say Progress Scant in Clinton Race Initiative*, CNN.COM, June 14, 1998, at <http://www.cnn.com/US/9806/14/race.commission/>.

19. For example, while black unemployment figures have dropped significantly from the fourteen to fifteen percent levels seen in the early 1990s, the most recent federal government indicators suggest that black un-employment levels are again on the rise. See Press Release, U.S. Dep't of Labor, Bureau of Labor Statistics, *The Employment Situation: Sept. 2002* (Oct. 4, 2002), at <http://www.bls.gov/news.release/archives/empst10042002.pdf> (indicating a slow but steady rise in black unemployment).

20. U.S. Census Bureau, *Historical Income Tables—Households*, Table H-3b, Mean Income Received by Each Fifth and Top 5 Percent of Black Households: 1967-2001 (Sept. 30, 2002), at <http://www.census.gov/hhes/income/histinc/h03b.html>.

21. See *id.*

22. Commentators have used phrases like "black reparations" or "African-American reparations" to denote the slavery reparations movement. See generally Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 HARV. L. REV. 1689 (2002) (employing the phrase "African-American reparations"). The phrase "black reparations" embraces the entire range of reparations claims advanced by or on behalf of African-Americans. See *id.* at 1692. These claims would include demands against the federal government, state, and private actors not only for the alleged harms stemming from slavery, but also those stemming from Jim Crow-era oppression as well. *Id.* at 1696-97. Slavery reparations claims, by way of contrast, seek compensation for the harms blacks suffered and have suffered growing out of the institution of slavery. See Alberto B. Lopez, *Focusing the Reparations Debate Beyond 1865*, 69 TENN. L. REV. 653, 676 (2002) (book review) (arguing that slavery reparations claims did in fact grow out of the post-slavery

level, the reinvigorated movement echoed (and continues to echo) the theme adumbrated in prior social welfare debates: the need to address, at the national level, the persistent pathologies that continue to retard black social and economic progress.²⁴ However, the reparations movement introduced a more controversial paradigm as well: the belief that the nation had a clear moral obligation to compensate, in some form, the African-American descendants of slaves for the harms the latter had suffered stemming from centuries of forced bondage and Jim Crow-era racial oppression.²⁵

Reconstruction-era dialogue, but that broader discussions of black reparations "should not be confined to that era."). Slavery reparations claims are also quite varied. They include claims sounding in the law of unjust enrichment for black labor purloined during that time, as well as claims for compensation directly against the U.S. government for the harms blacks are said to have suffered as a result of slavery. *See* Compl. and Jury Trial Demand, *Farmer-Paellmann v. FleetBoston Fin. Corp.*, No. Civ. 02-1862 (E.D.N.Y. 2002), *dismissed*, Jan. 24, 2004, available at <http://www.nyed.uscourts.gov/02cv1862cmp.pdf> [hereinafter *Farmer-Paellmann Complaint*]; *see also* *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995).

23. *See generally* Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 287-88 (2003) (noting that from the late 1970s to the 1990s the black reparations movement attracted little academic or public attention). The new millennium saw the re-emergence of the movement through the efforts of the National Coalition of Black Reparations Activists (N'COBRA) and the publication of Randall Robinson's controversial book advocating the payment of black reparations. *See* RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000).

24. Ogletree, *supra* note 23, at 284 ("A central goal of the reparations movement is to repair the damage that still afflicts the black community by targeting the most needy within that community").

25. Defining the source of this obligation has bewitched reparations scholars and drawn the fire of reparations critics. *See generally* Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003) (arguing that the failure of reparations scholars to identify a compelling moral basis for slavery reparations ultimately undermines the credibility of such claims).

By the same token, critics of slavery reparations have taken up with equal vigor the racially charged and defiant tone characteristic of previous social welfare debates. In a thought-provoking review essay, Professor Kevin Hopkins discussed an email message he received suggesting that the nation had already compensated blacks in the form of massive social welfare expenditures and civil war expenditures (including the loss of white Union lives) that led to the end of the slave trade in the United States. *See* Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2537 (2001) ("Don't we get any credit for the \$4 trillion spent on AFDC and federal housing? . . . Any credit for the 200,000 Union army troops lost in the Civil War . . . ? . . . Your people might just owe us when you do an accurate accounting."). Despite the rancor evident in this email, such sentiments resonate powerfully within the white community, denting the balkanizing nature of the black reparations issue. *See id.* at 2539.

At another level, this telling email suggests the degree to which opponents of social welfare spending have succeeded in portraying anti-poverty and other related programs as black directed, ignoring the overall social utility such programs yield. *See id.* at 2541. Of course, one could make the argument that proponents of such programs

Yet far from speaking in one voice, slavery reparations proponents today appear as divided in their aims and approaches as does the nation as a whole on the larger question of race and racial reconciliation.²⁶ The ever-widening diversity of slavery reparations claims and the justifications offered to support them are indicative of this widening rift. From traditional litigation²⁷ to direct appeals to the federal government to compensate the victims of slavery's legacy of oppression;²⁸ from demands for judicial reform²⁹ and the outright confiscation of majority owned firms that allegedly profited from slavery³⁰ to appeals for the establishment of an independent black state;³¹ reparations claims run the legal and political gamut. Unlike some commentators, however, the Author does not believe that differences amongst various claims, including reparations lawsuits, primarily reflect different litigation, procedural, or political strategies.³² Quite the contrary, these differences reflect growing uncertainty about the purpose of reparations, the forms they should take, and how to obtain them.

have exacerbated the racial crosscurrents that underscore social welfare discussions in America, and increasingly in Western Europe, by defending welfare spending not on social utility grounds, but on racial fairness grounds. *See generally* Brand, *supra* note 14 (arguing that interpretations of the social welfare state as a politically and socially stabilizing force have given way to more cynical interpretations, and that this shift threatens the very existence of the welfare state in post-war America).

26. *See generally* Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497 (2003) (observing that there are multiple perspectives emerging for how to evaluate reparations claim).

27. *See generally* Farmer-Paellmann Complaint, *supra* note 22.

28. *See* Hopkins, *supra* note 25.

29. *See* Roy L. Brooks, *Rehabilitative Reparations for the Judicial Process*, 58 N.Y.U. ANN. SURV. AM. L. 475 (2003) (stating "rehabilitative reparations consisting of the internalization of African-American norms in judicial and other American institutions is arguably the most effective way to bring about such an important social transformation").

30. *See* Clinque L. Muhammad, *Chicago Keeps Heat on for Reparations*, FINALCALL.COM NEWS, Apr. 8, 2003, at http://www.finalcall.com/artman/publish/printer_660.shtml. This article reported on comments made by Dr. Anderson Thompson, Associate Professor of Northeastern Illinois University's Center for Innercity Studies,

urg[ing] all Blacks to study their genealogy, chart their family history, and investigate the principal industry of the area in which their ancestors were enslaved. This research, he said, will help one point out which modern corporations still benefit from slave labor. Dr. Anderson contends that over 300 industries reap the rewards of slavery, including the railroad, stock exchange and automotive industries. "We want to take these industries."

31. *See* Lee A. Harris, *Political Autonomy as a Form of Reparations to African-Americans*, 29 S.U. L. REV. 25 (2001).

32. *See* Ogletree, *supra* note 23, at 279-82 (noting that although the black reparations movement encompasses a broad range of approaches, there are strong conceptual similarities between the different strategies employed).

Professors Eric Posner and Adrian Vermeule have gone so far as to suggest that the black reparations movement risks outright incoherence owing to the absence of a clear moral and ideological foundation to support it.³³ They argue that far too much attention is devoted to questions of justice and wrongdoing, to the detriment of prudential and institutional considerations.³⁴ The Author agrees that the apparent inability of contemporary reparations scholars to reach consensus on prudential considerations such as structure and purpose undermines efforts to obtain reparations of any sort. This Article answers Posner and Vermeule by proposing that scholars ground black reparations discourse in the history of Black Reconstruction and the concept of black rehabilitation or "structural reparations," to use modern phraseology, that enjoyed currency during that era.³⁵

In recent years, a small but growing number of scholars have embraced this idea of the "rehabilitative" or systemic transformation of the African-American community via so-called "structural reparations."³⁶ Often described as inward looking, structural

33. See Posner & Vermeule, *supra* note 25 (suggesting that the reparations movement risks moral incoherence owing to the failure of reparations scholars to ground their claims in a more logically coherent prudential and moral framework).

34. *Id.* at 693 (arguing because reparations claims "share the backward-looking, corrective justice focus of many ordinary remedies, but share with transfer programs a willingness to do mass or aggregate justice by dispensing with individualized moral justification for the transfer", they risk moral incoherence).

35. This Article adopts the timeline suggested by W.E.B. Du Bois, who saw Black Reconstruction, the term employed by the famous sociologist (alternatively Reconstruction), as spanning the years 1860-1880, and including the various proposals advocating southern economic and political reform and black empowerment that emerged during that era. See generally W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PAST WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880, at 670-71 (1985). Other historians often refer to this era as Radical Reconstruction. See generally JOHN HOPE FRANKLIN & ALBERT A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 246 (8th ed. 2000).

36. See also Ogletree, *supra* note 23, at 284 (noting the recurrence of the black rehabilitation theme in reparations discourse); see generally Brooks, *supra* note 29 (arguing in favor of the incorporation of black values or perspectives in judicial reasoning as a form of rehabilitative reparations). The term "rehabilitative" may, in the strictest sense, represent something of misnomer in the reparations context. The term suggests the need to repair that which was damaged or to make whole something that was fractured or fragmented. Taken literally, this suggests that the African-American community at one or more points during its history in the New World, enjoyed greater social, cultural, and economic cohesiveness than it does today. The myopic notion that previous decades saw greater black coherence and stability, while true in certain contexts, merely masks a deeper truth: the persistence of debilitating socio-economic pathologies and the failure of black America to achieve its full potential in American society. In this sense, then, it may be more appropriate to think of reparations not as "rehabilitative" but rather as "transformative."

reparations advocates seek to undo the harm visited upon the African-American community through the abuses of slavery and Jim Crow-era racial oppression by sparking "internal cultural repair" within that community.³⁷ It is believed that these internally directed transformations might overcome the legal barriers that have thus far impeded the progress of reparations activists and that have invoked the ire of critics like Posner and Vermeule.³⁸ Such barriers include difficulty tracing particular harms to particular wrongdoers, or the so-called problem of correlativity,³⁹ statute of limitations concerns,⁴⁰ and the inability of prior litigants to identify specific constitutional harms as a basis of liability.⁴¹ Professor Emma Coleman Jordan, for example, believes that addressing the racial violence of "the period 1865-1955 provides a promising and ultimately more satisfyingly fertile field for undertaking the same project as the reparations-for-slavery movement, with far fewer of the disabilities of the slavery-focused effort."⁴²

This Article posits that such optimism is largely misplaced. While the idea of structural reparations certainly has useful currency in contemporary reparations discourse, recent formulations of this idea do little to expose the deeper historical and institutional implications suggested by the idea of genuine black structural reform. This includes both internal reform of black institutions, such as black public education, as well as reform of broader societal institutions, such as labor markets,⁴³ or the judicial system⁴⁴ to cite some important examples. Briefly, this Article suggests that proposals that ground the idea of structural reparations in the imperatives of traditional litigation are beset by pragmatic implementation problems and by the inability of such proposals to impact more than a small number of African-Americans at most.

37. See generally Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 N.Y.U. ANN. SURV. AM. L. 557 (2003) (arguing that reparations litigation should focus on the period of 1865-1955).

38. See generally Posner & Vermeule, *supra* note 25.

39. See Jordan, *supra* note 37, at 558 (citations omitted) (defining correlativity as "the expectation that there must be a 'nexus between two particular parties'").

40. See Anthony J. Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y.U. ANN. SURV. AM. L. 651, 654-55 (2003) (arguing that use of an equity claim will not avoid the hurdles caused by the statute of limitations).

41. See generally *Cato*, 70 F.3d at 1103 (affirming dismissal of a suit against the United States by slave descendants for damages caused by slavery and subsequent discrimination).

42. See Jordan, *supra* note 37, at 559.

43. See DU BOIS, *supra* note 35, at 670.

44. See Brooks, *supra* note 29, at 477.

The Author suggests that to understand fully the deeper implications of the idea of structural reparations, reparations scholars must develop a more nuanced understanding of the history of the reparations movement. This Article posits that reparations scholars have largely misinterpreted this history.⁴⁵ In doing so, they tend to romanticize the broader goals of the reparations movement (racial justice, economic equity, and racial reconciliation), while remaining largely oblivious to the deeper ideological contradictions that confront the movement.⁴⁶

On this level, Part II of this Article challenges recent slavery reparations historicism (as distinct from the actual history of reparations movements generally),⁴⁷ as both one-dimensional and uncritical of the deeper tensions that have shaped the movement. Overwhelmingly, slavery reparations scholarship stresses both the persistence and commonality of reparations claims when historically tracing the genesis and development of the movement from its pre-Civil War origins to the present.⁴⁸ However, in stressing the common thematic elements that link the various permutations of both older and contemporary slavery reparations claims, this celebratory narrative, found in recent slavery reparations historicism, all too often obfuscates the deeper conceptual ambiguities that underscore the movement's history.

This Article traces the roots of this uncertainty to two main sources: (1) the general failure of Black Reconstruction⁴⁹ and the ideological confusion that afflicted black leadership in the years immediately following Reconstruction; and (2) the contemporary inability of reparations scholars to appreciate the impact these earlier developments had in shaping the contemporary reparations movement. Central to this analysis will be an examination of the Blair Education Bill, a noble but doomed initiative that would have equalized federal funding for public schools during Reconstruction, and the impact Blair's failure had on black leadership at the time.⁵⁰

45. See discussion *infra* Part II.C.

46. *Id.*

47. See generally Posner & Vermeule, *supra* note 25 (critically and often skeptically delineating the trajectory of various kinds of reparations claims that have been advanced in recent years and assessing the moral and prudential consistency or lack thereof, of these claims).

48. See Ogletree, *supra* note 23, at 282 (stressing the thematic and conceptual connectedness of black reparations claims over time); see also Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 600-09 (1993).

49. See Lopez, *supra* note 22, at 653 n.2 (citing ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 235-36 (1988)).

50. See discussion *infra* Part II.D.

Moreover, unlike many recent historical assessments that assign only passing importance to Black Reconstruction in the reparations debate,⁵¹ this Article places the unfinished business of that crucial era in American history at stage center. In the U.S. context, the Author argues that Black Reconstruction remains the paradigm exemplar of so-called structural reparations.⁵² This is not to suggest that Black Reconstruction itself did not suffer from internal inconsistencies or conflicting policies; it did.⁵³ This Article argues simply that contemporary reparations scholars, and especially proponents of so-called "structural reparations," can benefit from a more nuanced assessment of earlier historical antecedents of that concept as we attempt to move the debate forward.

More broadly, this Article advocates a more exhaustive appraisal of certain important assumptions that define contemporary reparations discourse. In Part III, reparations scholars are urged to cast off a central pillar of contemporary slavery reparations orthodoxy: racial reconciliation. Part III sees the eradication of this closely held slavery reparations shibboleth as a necessary precondition of future progress. The Author suggests that the idea of racial reconciliation is a byproduct of the ideological uncertainty that grew out of Reconstruction's failures, which continues to impact both reparations discourse and, at a larger level, the discourse of black empowerment. Specifically, the Author argues that the continued popularity of the racial reconciliation theme denotes a failure to distinguish between symbolic appeasements by the majority on the one hand, and genuine substantive justice on the other. Indeed, while it is customary to view racial reconciliation, including official apologies, as a form of "in-kind" reparations that denote the eventual payment of compensation of some sort,⁵⁴ recent history suggests otherwise.

The history and work of the South African Truth and Reconciliation Commission ("TRC") suggests some of the pitfalls that await domestic slavery reparations advocates as they refine the parameters of the debate.⁵⁵ Charged with promoting racial

51. See Oglethorpe, *supra* note 23, at 285-90; see also Verdun, *supra* note 48, at 600-02 (noting that Reconstruction was one of, but not the central historical era within which black reparations claims came to prominence).

52. See Lopez, *supra* note 22, at 676 (noting that Reconstruction era dialogue forged the basic template of contemporary reparations discourse, but that contemporary reparations scholars must move beyond this earlier paradigm).

53. See FRANKLIN & MOSS, *supra* note 35, at 249-53.

54. See Posner & Vermeule, *supra* note 25, at 689, 730.

55. See TRUTH AND RECONCILIATION COMMISSION, at <http://www.doj.gov.za/trc> (last updated Apr. 10, 2003); *Truth and Reconciliation in South Africa*, NEWSLETTER ON INTERNATIONAL COOPERATION, at <http://www.apu.udel.edu/apu/archive/newsletters/>

reconciliation in post-apartheid South Africa, the TRC process also implied the promise of substantive justice for millions of black South Africans.⁵⁶ Unfortunately, neither the TRC nor the state could actually deliver on such promises. The overt goal is to suggest that the domestic reparations movement should view with great skepticism attempts to link both conceptually and strategically the related but distinct goals of substantive economic justice and racial reconciliation. This observation grows out of that body of scholarship generally critical of the notion that culturally bound concepts of justice and reconciliation can even translate well. Stated more succinctly, reconciliation via disclosure, acknowledgement, and apology does not imply the ultimate delivery of substantive economic justice,⁵⁷ despite conventional thinking to the contrary.⁵⁸

Part IV of this Article expressly makes the case for “rehabilitative” or structural reparations, minus the racial reconciliation gloss so widely embraced by contemporary reparations proponents. In this context, the Author finds promising some recent proposals that see black reparations claims not as litigation vehicles but as broader invitations to re-energize discussions of racial equity via “rehabilitative” or “inward looking” transformations. And while the Author generally applauds these recent efforts to redirect reparations discourse along more productive lines, he sees the attendant proposals to discard slavery as the operative historical paradigm, to cite an approach favored by Professor Emma Coleman Jordan, as an unnecessary capitulation to reparations critics.⁵⁹ The Author suggests instead that we link the idea of “inward looking” transformations to the idea of black rehabilitation advanced during Black Reconstruction and reinterpret those earlier themes in contemporary terms. Such an approach would achieve two important goals. First, it would render Jordan’s historical and moral

v98n2/international/lotter.asp (last visited Apr. 16, 2003) [hereinafter *Truth and Reconciliation*].

56. See THE COMMITTEES OF THE TRC, at <http://www.doj.gov.za/trc/trccom.htm> (last visited Apr. 16, 2003); *Truth and Reconciliation*, *supra* note 55.

57. Critical race globalism generally uses the term “substantive justice” to denote distributive justice in broader socio-economic terms. Cf. Gil Gott, *Critical Race Globalism?: Global Political Economy, and the Intersections of Race, Nation and Class*, 33 U.C. DAVIS L. REV. 1503 (2000) (arguing in favor of a synthesis of critical race theory and international racial justice concerns as a response to the neo-liberal discourse of economic globalization); see also Ibrahim J. Gassama, *Transnational Critical Race Scholarship: Transcending Ethnic and National Chauvinism in the Era of Globalization*, 5 MICH. J. RACE & L. 133 (1999) (acknowledging the need to incorporate a broader global perspective into social justice discussions).

58. See Posner & Vermeule, *supra* note 25, at 729-30 (apologies function as official promissory notes implying the eventual delivery of actual reparations payments).

59. See Jordan, *supra* note 37, at 559-60.

capitulation unnecessary. Second, a theory of structural reparations that embraced Reconstruction-era ideology would capture more fully the spirit and meaning of true “inward looking” black transformation.

Part IV is also pragmatic in tone. It challenges another widely held pillar of contemporary reparations orthodoxy, the need to create a national education trust fund that would attempt to educate *all* Americans about the evils of slavery. This Article suggests that the creation of a national education trust fund of the sort generally championed by reparations scholars is both inconsistent with a historically grounded theory of structural reparations and impractical. Theoretically, this discussion builds on themes introduced in Part II concerning the Blair Education Bill. The Author suggests here that the pragmatic missteps committed by black leadership during the Blair debates denote the triumph of symbolism over pragmatism on the question of black education, and that this disjuncture continues to resonate in debates involving the fate of black education as an institution. Pragmatically, a theory of structural reparations would direct valuable taxpayer resources to address the moribund state of the many *de facto* black schools in America’s inner city wastelands, not to exclusively pursue a program of symbolic interracial appeasement.⁶⁰

The Article concludes with a brief assessment of the potential for a theory of structural reparations to redirect how we think about slavery reparations. In particular, the Author stresses the importance of rethinking how this theory might impact the continued development of other black institutions, such as the black economy.

II. TRADITIONS IN TRANSITION: SHIFTING REPARATIONS PARADIGMS

A. *Historical Narrative in Reparations Discourse*

The use of historical narrative as a way to bestow upon the reparations movement a sense of conceptual continuity and legitimacy has become increasingly popular.⁶¹ Such narratives often stress the overarching commonality of slavery reparations claims, from their pre-Civil War beginnings to the present. For example, in tracing the origins of the black reparations movement from its early nineteenth century origins to the present, Vincene Verdun has identified five distinct epochs or stages in the movement’s

60. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY*, 57-58 (1987) (tracing the sad state of urban black primary and secondary education to deeper socio-economic factors).

61. Verdun, *supra* note 48, at 628-45.

development.⁶² These five stages include: (1) slavery emancipation initiatives and post-slavery Black Reconstruction;⁶³ (2) compensation claims made during the great black migrations of the early twentieth century; (3) reparations claims associated with Marcus Garvey and the rise of black nationalism in the 1920s; (4) general calls for black reparations during the civil rights movement; and (5) post-Civil Rights era reparations activism.⁶⁴ These distinct historical stages coincide with particular social, political, and economic transitions that took place at the time and can therefore be thought of as reflective of those developments.⁶⁵

In detailing this history, Verdun felt it necessary to stress both the continuity of black reparations claims over the past two centuries and the political legitimacy of such claims in the face of mounting white opposition. In stressing their constancy, Verdun notes the "almost constant plea for reparations over the past one hundred thirty years."⁶⁶ In stressing their legitimacy, the author suggests that "the reparations movement cannot be easily dismissed or discredited, in part because so many of its supporters are part of the American mainstream."⁶⁷ Verdun continues: "A movement that has been sustained through several generations and that has won the support of knowledgeable and reputable people throughout history . . . cannot be dismissed as frivolous."⁶⁸

Employing Verdun's five-stage historical model, Professor Charles Ogletree has recently argued that slavery reparations claims, despite certain strategic differences, more often than not

62. See *id.* at 600-09.

63. *Id.* at 600. For example, Professor Charles Ogletree notes that early anti-slavery activist David Walker in 1829 vigorously objected to "the lack of compensation for the labor of slaves." See Ogletree, *supra* note 23, at 286 n.30 (quoting Ewart Guinier, Book Reviews, 82 YALE L. J. 1719, 1721 (1973) (reviewing BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS (1973)). For a more comprehensive chronicle of Walker's writings, see DAVID WALKER, DAVID WALKER'S APPEAL, in FOUR ARTICLES, TOGETHER WITH A PREAMBLE TO THE COLOURED CITIZENS OF THE WORLD, BUT IN PARTICULAR, AND VERY EXPRESSLY, TO THOSE OF THE UNITED STATES OF AMERICA (1995). W.E.B. Du Bois also saw the labor issue as the central economic dilemma of slavery and of Reconstruction. For Du Bois, the slave economy was subject to criticism not simply for its past exploitation of black labor, but also for the pattern of economic exploitation along racial lines that the peculiar institution set in motion, both domestically and globally. Du Bois' economic historicism would therefore view the eradication of present day economic exploitation along racial lines as the primary goal of the reparations movement, not redressing past acts of labor exploitation. See DU BOIS, *supra* note 35, at 14-15.

64. See Verdun, *supra* note 48, at 600-10.

65. *Id.* at 601-07.

66. *Id.* at 607.

67. *Id.*

68. *Id.*

reflect a core thematic unity that renders them neither derivative of other kinds of reparations claims nor untimely.⁶⁹ In this sense, Ogletree echoes the constancy and legitimacy themes central to Verdun's historicism. For example, in explaining the purpose of his approach, Ogletree notes: "This Essay will attempt to explain why the asserted distinctions between various types of reparations lawsuits are overstated."⁷⁰ Whatever differences do exist simply reflect, in Ogletree's view, "the variety of legal strategies adopted by the different litigation teams"⁷¹ He concludes that these claims do not suggest "any legal, moral, or political distinctions in the arguments for reparations in the slavery and Jim Crow contexts."⁷²

For both Ogletree and Verdun, an important task of reparations historicism is to liberate from the national collective unconscious, the history of black oppression in American society, and to link black reparations claims to this under-appreciated history.⁷³ The themes of continuity and legitimacy ultimately attempt to de-radicalize reparations ideology by suggesting that reparations claims have been and remain a central feature of the ongoing national discourse on race, racial equality, and racial justice.

While acknowledging that reparations claims have enjoyed what Professor Ogletree calls a "long and nuanced history,"⁷⁴ the author argues, unlike Ogletree and Verdun that this history, and the movement itself are rife with internal contradictions and ambiguities. This history reveals that particular conceptions of black reparations have altered over time, sometimes quite drastically, and that appeals to a deeper conceptual unity and shared moral grounding as amongst these claims rings only partially true.

B. *Shifting Paradigms: An Alternative View of the Slavery Reparations Movement*

Borrowing from Verdun's multi-staged approach,⁷⁵ this Article suggests that a deeper, more nuanced assessment of the history of the slavery reparations movement will reveal a less coherent historical mosaic than that painted by either Verdun or Ogletree.

69. See Ogletree, *supra* note 23, at 285-90, 299-305 (responding to criticisms that black reparations proponents are late-comers to the reparations dining table, behind the Jews vis-à-vis the Holocaust and the victims of the Japanese-American interment, and that black reparations claims are time barred because the alleged harms transpired long ago).

70. *Id.* at 282.

71. *Id.*

72. *Id.*

73. *Id.* at 283; Verdun, *supra* note 48, at 600.

74. Ogletree, *supra* note 23, at 285.

75. See *supra* notes 62-64 and accompanying text.

Stage one, closely linked to the emancipation movement advocating the abolishment of the transatlantic slave trade and later Black Reconstruction, sought to obtain an award of real property for the freedmen from the period beginning in about 1860 and running through to the mid-1870s.⁷⁶ Importantly, the call for black reparations at this time typically framed the question of black economic empowerment within the larger context of southern economic and political reform.⁷⁷

Briefly, some of the most important Black Reconstruction initiatives stressed: (1) southern property reform coupled to a program of black land acquisition; (2) democratic governance, including black enfranchisement; and (3) free public schooling and attendant social welfare benefits.⁷⁸ Of course, all of these proposals occurred against the backdrop of the need to rebuild the devastated economies of the southern states as quickly as possible.⁷⁹ In March of 1865, after considerable political wrangling between Congress and former President Andrew Jackson, the Bureau of Refugees, Freedmen, and Abandoned Lands, more commonly known as the Freedmen's Bureau, was established.⁸⁰ Briefly, the Freedmen's Bureau oversaw relief efforts in the devastated South, attempted to manage the vast number of black and white refugees left homeless after the war, organized Freedmen's courts to administer justice in the face of judicial prejudice in southern courts and, perhaps most importantly, supervised the establishment of black schools in the region.⁸¹

Another important feature of Reconstruction involved land redistribution under the auspices of the Southern Homestead Act of 1866.⁸² Under the Act, the federal government encouraged settlers,

76. See Verdun, *supra* note 47, at 600-02; see also MELVIN M. LEIMAN, *THE POLITICAL ECONOMY OF RACISM: A HISTORY* 39-49 (1993) (arguing broadly that Southern reconstruction failed because the type of economic reforms and property transfers to blacks necessary to make the plan work would have undermined many of the core assumptions of the American capitalist system, such as "the inviolability of private property").

77. See LEIMAN, *supra* note 76.

78. See DAVID LEVERING LEWIS, *W.E.B. DU BOIS: BIOGRAPHY, 1868-1919*, at 383-84 (1993).

79. See FRANKLIN & MOSS, *supra* note 35, at 248.

80. *Id.* at 252-55; see also GEORGE R. BENTLEY, *A HISTORY OF THE FREEDMAN'S BUREAU* 49 (Octagon Books 1970) (1955).

81. FRANKLIN & MOSS, *supra* note 35, at 255-57. Some of the schools established during that time and supported by the bureau include: "Howard University, Hampton Institute, St. Augustine's College, Atlanta University, Fisk University, Storer College, and Biddle Memorial Institute (now Johnson C. Smith University)". *Id.* at 257.

82. Southern Homestead Act, ch. 31, 14 Stat. 66, 39th Cong., 1st Sess. (June 21, 1866).

regardless of race, to settle on unoccupied lands in the South and to put such land to productive use.⁸³ Thus, Reconstruction both envisioned a more pluralistic economic order than had ever existed in the post-war South and saw blacks as autonomous free agents in this larger milieu.⁸⁴

Such developments suggested a profound reordering of the prevailing economic order, not just in the South, but nationally as well. In this historical context, then, black rehabilitation could be thought of as echoing not only notions of redistributive justice, but also larger southern, and even national, economic and social developmental considerations.⁸⁵ By the same token, the concept of "black rehabilitation" or reparations at this time embraced the idea of an American polity defined by political and economic pluralism for blacks and poor whites (i.e., non-land owning whites).⁸⁶ Indeed, Black Reconstruction saw black rehabilitation as a necessary component of continued southern and also national economic and political progress.⁸⁷ To be sure, only a minority of progressive Americans held to such notions;⁸⁸ even the poor whites that might have benefited from the type of reforms advocated by these progressives ultimately opposed true "reconstruction."⁸⁹

Regardless, the thematic trajectory of Black Reconstruction remains clear: black economic and political empowerment as an essential component of southern assimilation into the post-agricultural, early-industrial mainstream of American capitalist

83. *Id.*

84. FRANKLIN & MOSS, *supra* note 35, at 260-61.

85. See Lopez, *supra* note 49, at 653 n.2 (citing ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 235-36 (1988)) (noting that property redistribution was conceived as part of a larger effort to duplicate Northern capitalism in the South); see also FRANKLIN & MOSS, *supra* note 35, at 249 (observing that "[a]lmost as obvious is the fact that the problem of Reconstruction was essentially the problem of how to move the nation toward greater economic and political democracy"); LEIMAN, *supra* note 76, at 40-41 (noting the powerful economic, political, and racial barriers to achieving such reform in post-slavery America).

86. See LEIMAN, *supra* note 76, at 45-46.

87. This thematic distinction is not insignificant. White backlash against slavery reparations of any kind typically masks deep-seated impressions that African-Americans have, via social welfare programming, affirmative action and other benefits, received "in-kind" compensation for past harms. See generally Hopkins, *supra* note 25, at 2537 (arguing that the nation had already compensated blacks in the form of social welfare programs and civil war expenditures). Recasting reparations claims as necessary structural investments might go some way toward alleviating white opposition to the idea of black reparations.

88. See LEIMAN, *supra* note 76, at 41 (noting that "[t]he small progressive Southern white minority willing to accept, however reluctantly, the blacks as free agents in the economy were ultimately swamped by the forces of reaction").

89. *Id.* at 41.

society. In other words, the imperatives of Black Reconstruction were overwhelmingly economic and pragmatic, not moral in their trajectory.

Reflecting the notion that economic and prudential considerations, not moral ones, should drive contemporary assessments of Black Reconstruction, and therefore black rehabilitation, W.E.B. Du Bois has noted:

The true significance of slavery in the United States to the whole social development of America lay in the ultimate relation of the slaves to democracy. What were to be the limits of democratic control in the United States? If all labor, black as well as white, became free—were given schools and the right to vote—what control could or should be set to the power and action of these laborers?⁹⁰

Refining this basic theme, Du Bois went on to suggest that “[i]t was thus the black worker, as founding stone of a new economic system in the nineteenth century and for the modern world, who brought civil war in America.”⁹¹

Du Bois’s assessment also suggests that the thematic orientation of Black Reconstruction bore little resemblance to the thematic orientation of contemporary black reparations discourse. Contemporary slavery reparations discourse and methodology remains largely, if not exclusively, grounded in: (1) human rights law and the attendant concept of slavery as a crime against humanity;⁹² and (2) the law of unjust enrichment.⁹³ And while certain pre-Reconstruction voices did embrace the unjust enrichment rationale noted above,⁹⁴ Black Reconstruction and the theme of black economic and political empowerment as an essential component of southern

90. See DU BOIS, *supra* note 35, at 13.

91. *Id.* at 15.

92. See Michelle E. Lyons, Note, *World Conference Against Racism: New Avenues for Slavery Reparations?*, 35 VAND. J. TRANSNAT’L L. 1235, 1265-58 (2002) (arguing that there appears to be greater global support for the proposition that slavery was a crime against humanity at the time it occurred and also acknowledging the practical limitations to any type of recovery).

93. See Farmer-Paellmann Complaint, *supra* note 22 (class action plaintiffs seeking to recover billions of dollars from a group of corporate defendants who were allegedly unjustly enriched through their participation in the transatlantic slave trade, via the outright ownership or sale of slaves, by transporting slaves, or by issuing insurance policies to slave holders to cover slavery-related losses).

94. Early anti-slavery activist David Walker objected to the exploitation of black workers on both moral and equitable grounds, but Walker’s views did not dominate discussions of black post-war transformation in the way Reconstruction did. See WALKER, *supra* note 63.

assimilation into the post-agricultural, early-industrial mainstream was an important theme at the time.⁹⁵

Stage two in Verdun's model occurred at the turn of the twentieth century.⁹⁶ This era of the movement included actual demands for monetary reparations.⁹⁷ According to Verdun, much of the impetus for this second wave of reparations claims came from the work of southern businessman Walter R. Vaughn, who sought to establish a freedmen's pension fund.⁹⁸ These demands appear to have been prompted by two defining features of black life in the early twentieth century: (1) endemic black poverty and the prevailing specter of racial violence and oppression in the South; and (2) the need for financial assistance to facilitate the assimilation of the waves of poor, rural, southern blacks who recently migrated to northern industrial centers in search of a better life.⁹⁹ Unlike Black Reconstruction, however, it is not clear that these demands stemmed from a larger desire to hold the nation financially accountable to African-Americans, in the form of reparations, for the harms the latter suffered as a result of four centuries of forced bondage.

The third stage of the black reparations movement coincided historically with the activities of Marcus Garvey and the Universal Negro Improvement Association ("UNIA").¹⁰⁰ A central tenet of the Garvey movement stressed black self-help and black commercial development as a necessary condition of black economic empowerment.¹⁰¹ However, a secondary feature of Garveyism stressed the need to create a separate black homeland that would liberate the black Diaspora from the stultifying effects of racial oppression in American society.¹⁰² Verdun notes that Senator Theodore Bilbo of

95. See LEWIS, *supra* note 78, at 283-84.

96. See Verdun, *supra* note 48, at 600-09.

97. See *id.* at 600-01.

98. *Id.* at 602 (citing WALTER R. VAUGHN, FREEDMAN'S PENSION BILL, A PLEA FOR AMERICAN FREEDMEN (1891)).

99. *Id.* at 602.

100. See Verdun, *supra* note 48, at 600.

101. See E. DAVID CRONON, BLACK MOSES: THE STORY OF MARCUS GARVEY AND THE UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION 3 (1969).

In the years immediately following World War I there developed among the Negroes of the world a mass movement of considerable influence and importance. Under the leadership of a remarkable Jamaican Negro, Marcus Garvey, the Universal Negro Improvement Association attracted the attention of the colored world to a degree never before achieved by a Negro organization. Garvey's activities were world-wide in scope, and his organization had members scattered from Africa to California, from Nova Scotia to South America.

Id.

102. See *id.* at 77-78.

Mississippi actually proposed a bill to create a Bureau of Colonization that would explore the feasibility of migrating American blacks out of the United States and worked with the UNIA in securing two and one-half million signatures in support of the legislation.¹⁰³ Importantly, students of Garveyism and the UNIA know that the movement generally stressed self-help over overt government assistance programming, thus casting doubt on whether the Bureau of Colonization initiative should actually be thought of as embracing a notion of slavery reparations at all.

Verdun places the fourth stage of reparations activism within the social and political maelstrom that defined the 1960s civil rights era.¹⁰⁴ According to Verdun, this era saw both direct and indirect appeals for reparations payments from a diverse chorus of voices, including the Honorable Elijah Muhammad, former head of the Nation of Islam,¹⁰⁵ and Martin Luther King, Jr.¹⁰⁶ Muhammad came closest to advocating an actual claim for reparations when he reiterated earlier demands for a separate black territory as a necessary pre-condition of black group rehabilitation.¹⁰⁷

By way of contrast, King's more general observation that the nation's debt to black Americans has repeatedly been delivered via a bad check "marked 'insufficient funds,'" given both the context and the overall tenor of King's thinking, suggests that he had in mind not reparations *per se*, but a more broadly framed conception of racial justice. Professor Charles Ogletree has attempted to link these comments to the reparations movement by suggesting that King's appeal for "colorblind justice," coupled with the check reference,

103. See Verdun, *supra* note 48, at 603 (discussing Senator Bilbo's proposed bill and its support in the black community). It would seem almost contradictory to consider black migration to a black homeland outside of the United States as a form of reparations. A central tenet of progressive Reconstruction era discourse stressed the desirability of assimilating the freedmen into the economic and political fabric of American life, especially in the south. Cf. LEIMAN, *supra* note 76, at 41. Indeed, if one views progressive late-Reconstruction era discourse as the paradigm expression of a structurally grounded vision of black assimilation into the American polity, then demands for a separate black homeland would appear to represent the ultimate abandonment of that noble idea.

104. See Verdun, *supra* note 48, at 603-04 (stating that the reparations activism of the 1960s "was part of the civil rights movement" that peaked with the "Black Manifesto").

105. See Verdun, *supra* note 48, at 604-05 (discussing the Nation of Islam's request via "The Muslim Program" and citing THE FINAL CALL, Sept. 7, 1990, at 39).

106. See e.g., Martin Luther King, Jr., I Have a Dream, in I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 101 (1992) (describing America's debt to African-American's as having been delivered via a bad check marked "insufficient funds").

107. See Verdun, *supra* note 48, at 604-05 (discussing Muhammad's statements that former masters must supply and maintain this territory).

amounts to a reparations claim.¹⁰⁸ A more plausible interpretation suggests that King's descriptive language more likely reflected his deeper commitment to social justice via racial reconciliation and inclusiveness, not outright economic compensation.¹⁰⁹ More problematically, Verdun and Ogletree's generalizations on this point denote a recurring tendency on the part of reparations scholars to view civil rights discourse, colorblind justice demands, and reparations claims as largely indistinguishable.¹¹⁰

Importantly, King's vision of a rights-based conception of racial progress grounded in the imperatives of racial equality and racial reconciliation between blacks and whites became the defining features of his version of civil rights inclusiveness. That vision would ultimately prevail within the black community and amongst progressive whites as well, establishing a tone that would dominate the discourse of black empowerment for the next three decades.¹¹¹ Black Nationalist appeals to economic self-sufficiency embraced by the Nation of Islam never engaged the collective black imagination in quite the way that King's integrationist orthodoxy did.¹¹²

What remains clear is that, by the 1960s, the black civil rights establishment had all but abandoned Reconstruction era notions of deeper black structural rehabilitation, even as the conceptual descendants of that ideal continued to inspire a vocal but politically marginalized minority within the black community—the Black Muslims.

108. See Ogletree, *supra* note 23.

109. CRUSE, *supra* note 8, at 74-75 (stating that black civil rights leadership had no economic program for black Americans).

110. Reparations scholars should de-link reparations discourse from demands for racial reconciliation. See discussion *infra* Part IV. A thorough assessment of the distinctions between civil rights empowerment, reparations, and other related concepts lies beyond the scope of this Article.

111. A trenchant but largely overlooked criticism of the integrationist vision of assimilation embraced by Dr. King and the black civil rights establishment suggests that their general abandonment of black economic empowerment as a necessary condition of black rehabilitation was a profound sin of omission. See CRUSE, *supra* note 8, at 75-80.

112. *Id.* at 78-79 (arguing that the twentieth century civil rights movement overwhelmingly embraced what Cruse called a philosophy of "noneconomic liberalism," a centrist political platform that stressed civil rights "inclusionism" and the dismantling of Jim Crow era segregationist policies to the exclusion of black economic empowerment. Cruse argued that the limited appeal the Nation of Islam owed not to its message, but to the religious orientation of the messenger given the overwhelmingly Christian orientation of most African-Americans). But see generally Gary Chartier, *Civil Rights and Economic Democracy*, 40 WASHBURN L.J. 267 (2001) (arguing that the black civil rights struggle in America has always reflected an underlying commitment to black economic empowerment).

C. *Speaking in Tongues: Contemporary Reparations Discourse*

The recent plethora of reparations proposals and strategies, representative of Verdun's fifth stage of reparations claims, is indicative of the persistent waxing and waning of reparations thinking on issues such as structure and purpose. Indeed, far from revealing an underlying and persistent moral and ideological center, recent developments have reflected a rapid movement away from such consensus. For example, the California Legislature recently passed the California Slavery Era Insurance Act.¹¹³ The Act empowers the Commissioner of the State Department of Insurance to request and obtain information on slave-era insurance policies issued by any and all insurers doing business in the state, and to disseminate this information to the public.¹¹⁴ This initiative is important because it denotes a belief in the basic notion that slavery was wrong at the time it occurred on the part of the California Legislature. However, it is not clear how this state initiative can or will serve to repair the damage the black community has suffered as a result of slavery and Jim Crow-era racial oppression.¹¹⁵

113. CAL. INS. CODE §§ 13810–13 (West 1988 & Supp. 2004).

114. The code instructs the state insurance commissioner to "request and obtain information from insurers licensed and doing business in [California] regarding any records of slaveholder insurance policies issued by any predecessor corporation during the slavery era." *Id.* § 13810. Once obtained the code instructs the commissioner to "obtain the names of any slaveholders or slaves described in those insurance records, and . . . make the information available to the public and the Legislature." *Id.* § 13811. The provisions also impose obligations on each insurer doing business in the state to investigate and disclose to the commissioner knowledge of "any records within the insurer's possession or knowledge relating to insurance policies issued to slaveholders that provided coverage for damage to or death of their slaves." *Id.* § 13812.

115. A number of local municipal governments have taken up the reparations issue through a host of initiatives urging Congress to study the question. These initiatives include legislation or resolutions passed by the states of Louisiana and California, as well as the city councils of Detroit, Michigan; Cleveland, Ohio; Chicago, Illinois; Evanston, Illinois; Atlanta, Georgia; Washington, D.C.; Baltimore, Maryland; Inglewood, California; Dallas, Texas; Philadelphia, Pennsylvania; Paterson, New Jersey; and Burlington, Vermont. See Hopkins, *supra* note 25, at 2536 n.24 (identifying some of the above-noted municipalities that have passed resolutions urging Congress to take up the black reparations question via formal hearings). The Chicago reparations resolution provides in pertinent part:

There will never be racial healing until America decides to face the criminal debauchery that people enriched themselves by committing wrongful acts against African American slaves; . . .

The freed slaves and their descendants have never received any compensation for the generations of free labor, oppression and degradation, while making great contributions to economic strength, safety and security of this nation; . . .

Adding fuel to the proverbial fire, the academy has taken up the slavery reparations question in full chorus, but certainly not in harmony, as a growing number of commentators have noted.¹¹⁶ Compounding this growing dissonance, some commentators appear to have lost sight of the underlying goal of slavery reparations altogether, namely, making whole the descendants of African slaves.¹¹⁷ In proposing the creation of a reparations education trust fund that ostensibly would “redress” African-American racial justice concerns by disclosing to *all* Americans the extent of black contributions to American cultural and economic development,¹¹⁸ one commentator appears to ignore entirely the deeper problem of the “mis-education”¹¹⁹ of scores of black school children in post-industrial American urban wastelands, a continuing source of black social and economic retardation.¹²⁰ Acknowledgment of slavery’s impact on black America by the majority is thus equated with the idea of “redress.”

Whereas, We recognize and support the emergence of other initiatives advocating reparations for descendants of American slaves, including Race Riot Commissions in Tulsa, Oklahoma, and Rosewood, Florida; resolutions passed in cities in the states of California, Michigan, Ohio, Texas, Louisiana; and

Whereas, We support the joint Illinois Senate/House Resolution to form the Illinois Riot and Reparations Commission to study violent historic events that resulted in the loss of African American lives and property.

City of Chi. Res. Doc. No. PR2000-20, Slavery Reparations (2000), *available at* <http://chicago.about.com/library/blank/blslaveryresolution01.htm> [hereinafter Chicago Resolution].

116. See generally Brophy, *supra* note 26 (discussing various proposals for reparations).

117. See ROBINSON, *supra* note 23, at 201, 206-14 (arguing generally that the purpose of black reparations is to make whole spiritually and economically the descendants of African slaves).

118. See Chad W. Bryan, *Precedent for Reparations? A Look at Historical Movements for Redress and Where Awarding Reparations for Slavery Might Fit*, 54 ALA. L. REV. 599, 607 (2003) (using the public education fund established under the Civil Liberties Act and designed “to increase awareness as to the truth about [the Japanese] internment” as a template, the author proposes the creation of a black reparations education fund to increase public awareness “on the truth about slavery in America”); see also 50 U.S.C. app. § 1989b-5(a)-(b) (2000) (outlining the purpose of the Civil Liberties Education Fund).

119. Carter G. Woodson, the celebrated African-American historian, first coined the phrase “the mis-education of the Negro” in his seminal book of the same name. See CARTER G. WOODSON, *THE MIS-EDUCATION OF THE NEGRO* (1933) (arguing that the Talented Tenth intellectuals heralded by W.E.B. Du Bois as the progenitors of an African-American rebirth were incapable of serving in this capacity because their development as functional intellectuals had been retarded by an “institutionalized” American education system insensitive to the unique social, cultural, and institutional needs of black America).

120. See WILSON, *supra* note 60, at 57-58 (tracing the generally poor academic performance of large numbers of minority school children not merely to poor schools,

That slavery reparations talk¹²¹ has engendered such divergent viewpoints should come as no surprise. A century ago, W.E.B. Du Bois sagely predicted that race and racial reconciliation would emerge as the most perplexing dilemma of twentieth century American life.¹²² History, it would seem, including the slavery reparations wars, has proven him right. Unfortunately, the trajectory of contemporary reparations discourse has proven far less susceptible to sage predictability.

At one level, then, Verdun's historicism reveals the general, if uneven, persistence of black reparations claims over the past two centuries, beginning in the early nineteenth century. At another level, this history also suggests that prudential conceptions of black reparations have altered, indeed transformed over time, along with the moral justifications that underscore such claims. From earlier proposals that tied black reconstruction to massive Southern land redistribution¹²³ and subsequent freedmen pension fund initiatives, to contemporary demands for greater black political autonomy¹²⁴ and an accounting by multinational corporations that allegedly profited from slave-era transactions,¹²⁵ reparations claims embrace a host of perspectives and approaches. Unfortunately, whatever consensus existed during Black Reconstruction amongst black leadership regarding the general urgency and basic contours of black reconstruction/rehabilitation has largely evaporated.

but to impoverished neighborhoods and dysfunctional families that discourage "[t]he development of cognitive, linguistic, and other . . . skills necessary for the world of work in the mainstream economy").

121. The idea that the debate over slavery reparations has come to denote rhetorically "a renewed activism against racial oppression," indeed that it has become its own narrative form, has gained greater currency in recent years. See, e.g., Jordan, *supra* note 37, at 558-59 (arguing that reparations scholars should view reparations for slavery not as a litigation strategy exclusively, but as a means to renew informed, constructive debate about the lingering effects of racial oppression in American society and as a catalyst for internal repair of the black community).

122. Du Bois' famous introduction to *The Souls of Black Folk* begins: "Herein lie buried many things which if read with patience may show the strange meaning of being black here in the dawning of the twentieth Century. This meaning is not without interests to you, Gentle Reader; for the problem of the twentieth Century is the problem of the colorline." W.E.B. DU BOIS, *The Souls of Black Folk*, in WRITINGS 357, 359 (1986).

123. See DU BOIS, *supra* note 35, at 319-23 (arguing that President Johnson abandoned the idea of large-scale economic reform as a pillar of southern reconstruction when it became clear that the freedmen would be the single largest group beneficiaries of such a plan).

124. See Harris, *supra* note 31, at 56 (discussing political autonomy as an alternative form of reparations).

125. See Farmer-Paellmann Complaint, *supra* note 22, at 15 (requesting accounting of defendants' profits from slave labor).

Moreover, while the general theme of compensation owed for past harms persists amongst many reparations proponents,¹²⁶ the theme of structural repair, and discourse linking internal black capacity building to the general health of the nation, has waxed and waned. Thus, what began in the nineteenth century as an appeal to the economic and structural (i.e., institutional) needs of the freedmen and an economically and industrially backwards southern United States, would over the ensuing 140 years, be recast as an ideology grounded in distinctly different paradigms, although it is not clear that Verdun would agree with this assessment.¹²⁷ Indeed, this Article posits that reparations discourse generally, and the notion of rehabilitative or structural reparations specifically, would become infused with, and arguably subsumed by the ideology of civil rights liberation orthodoxy (integration and racial reconciliation) that has largely dominated the mainstream black empowerment agenda for the last fifty years. Thus, by the 1960s, the apogee of the American civil rights movement, the basic concept of reparations had become so infused with civil rights orthodoxy that earlier considerations of structural reform had effectively lost their practical meaning.¹²⁸

126. See Brooks, *supra* note 29, at 477, 495 (arguing in favor of the incorporation “of black values or perspectives in judicial reasoning” as a form of rehabilitative black reparations).

127. This shift was understandable and perhaps unavoidable given the practical barriers that true structural reconstruction encountered in the post-slavery era. See LEIMAN, *supra* note 76, at 39-49. Despite the general failure of reconstruction, the idea of smaller scale structural reparations still enjoyed limited currency at that time, as evidenced by the history of the Blair Education Bill, discussed more fully in Part III *infra*.

128. While some recent reparations proposals appear to represent thoughtful and intellectually balanced approaches to an admittedly thorny legal and political question, such as calls for the creation of a federally funded trust to finance black reconstruction, Hopkins, *supra* note 25, at 2534-35, others appear less pragmatically grounded. For example, a recent student authored article proposed the creation of an autonomous black administrative state within the larger American polity as an alternative form of slavery reparations. See Harris, *supra* note 31, at 50-54. While admittedly creative, it is not at all clear what, if any, long-term benefits blacks would derive from such an outcome, or how it might reasonably be achieved.

It is worth noting that the idea of a separate African-American homeland has deep roots in the black community. The efforts of the early Free Africa societies in the nineteenth century stressed the need for blacks to return to Africa as a way to escape the perils of chattel slavery and the ever-present burden of racial oppression and violence. In the early 1920s, Marcus Garvey and his Universal Negro Improvement Association advocated a radical but largely ill-conceived plan to create a Pan-African commercial trade and manufacturing network that would empower people of color around the globe. A corollary goal advocated the repatriation of a select group of industrious blacks back to Africa to create a progressive modern black state, thereby demonstrating to the world that blacks could competently manage their own affairs. The movement drew substantial support from working class blacks at the time. See CRONON, *supra* note 101, at 3, 77-78.

As such, the deeper pragmatic considerations suggested by the very idea of internal black repair often get lost amidst more broadly framed, and more importantly, undifferentiated, discussions of racial reconciliation, truth-telling, disclosure, and racial justice. This failure to clearly adumbrate a set of defined goals all too often leads to discord when it comes to designing reparations strategies. What results then is a conceptual "free-for-all," a veritable reparations "Tower of Babel" increasingly characterized by a plethora of impractical solutions that have little chance of making whole, either economically or institutionally, the African-American descendants of African slaves, but a dearth of pragmatically grounded alternatives.¹²⁹

D. *Black Reconstruction and the Seeds of Ideological Discord:
The Failure of the Blair Education Bill*

As suggested in Part II.A, the conceptual origins of structural reparations lie in the history of Black Reconstruction and the sentiments of a few progressive southern and northern politicians and activists who envisioned black rehabilitation as a necessary precondition of wider economics and political rehabilitation of the South.¹³⁰ In the immediate aftermath of the Civil War, black

During the 1960s and 1970s civil rights era, the Nation of Islam resurrected the idea of a separate black homeland as a necessary pre-condition of black group rehabilitation. See Verdun, *supra* note 48, at 604-05 (citing THE FINAL CALL, Sept. 7, 1990, at 39). The idea of the creation of an independent and economically viable black homeland continues to ignite the imagination of black writers. See, e.g., Kevin Hopkins, *Back to Afrolantica: A Legacy of (Black) Perseverance?*, 24 N.Y.U. REV. L. & SOC. CHANGE 447 (1998) (arguing that the Back to Africa ideal still has currency as an emblem of black spiritual perseverance and creativity in the face of racial subordination and discrimination).

The true relationship between black political autonomy and reparations owes to suggestions that African-Americans, and indeed the nation as a whole, could never reasonably anticipate black assimilation into the social and economic fabric of the American system given the profound level of structural change that such assimilation would require. The failure of the Bureau of Refugees, Freedmen, and Abandoned Lands to implement southern land redistribution and the implications such an undertaking would have connoted for the institution of private property in the American capitalist system, to cite one example, suggests, at least to the Author, that a separate black state was the only way to insure true and lasting post-Reconstruction black progress at that time.

129. See Brophy, *supra* note 26, at 536 & n.167 (citing Devon W. Cabado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1305 (2002)) and noting the absence of a broad consensus among reparations proponents over "exactly what they are seeking" in terms of compensation).

130. See Wiley P. Harris, Speech at a Democratic Campaign Meeting, Jackson Mississippi (Aug. 23, 1875), in ULRICH BONNELL PHILLIPS, *THE SLAVE ECONOMY OF THE OLD SOUTH: SELECTED ESSAYS IN ECONOMIC AND SOCIAL HISTORY* 288-89 (Eugene D. Genovese ed., 1968) (arguing that the political and economic empowerment of the

rehabilitation was linked to the larger question of southern (and national), economic, and democratic reform. Black Reconstruction, then, can be thought of as embracing two distinct paradigms: assimilation and transformation.

First, Reconstruction can be thought of as assimilative in that it sought to deliver the freedmen into the national political and economic mainstream by granting black men suffrage and by recognizing blacks as economic free agents in southern labor markets.¹³¹ Second, Reconstruction can be thought of as transformative in that it sought to strengthen the ability of the freedmen to function in the political and economic life of the South, via specific institutional capacity building initiatives like southern land reform and education development.¹³² Thus, Black Reconstruction can be seen as “rehabilitative” or systemically transformational in its goals.

Unfortunately, Reconstruction promised, but never delivered to the freedmen the fruits of genuine political and economic pluralism in the post-slavery era.¹³³ Instead, the unfinished business of Reconstruction left black leadership, and the nation as a whole, deeply divided over how to both define and achieve on behalf of African-Americans the promises of political and economic democracy in post-Reconstruction America.¹³⁴

Central to this unfinished business was the generally miserable state of southern education, black and white.¹³⁵ There emerged a

freedmen was a necessary precondition of Southern reconciliation and nationalization). According to one contemporary historical account, W.E.B. Du Bois himself argued that collaboration between enlightened black politicians and progressive white Democrats was largely responsible for the progressive discourse and dynamics of late Reconstruction. See DAVID LEVERING LEWIS, W.E.B. DU BOIS: BIOGRAPHY OF A RACE, 1868-1919, at 383-84 (1993).

131. See LEIMAN, *supra* note 76, at 41.

132. See FRANKLIN & MOSS, *supra* note 35, at 253-64.

133. See DU BOIS, *supra* note 35, at 670-71.

134. See generally Jeffery M. Brown, *Black Internationalism: Embracing an Economic Paradigm*, 23 MICH. J. INT'L L. 807 (2002) (noting black leadership's lingering confusion over how best to secure for their constituents the promises of economic prosperity in post-industrial America); see also CRUSE, *supra* note 8, at 75-80.

135. In a historical sense, there were indeed two separate and unequal education systems in the south: one black, one white. By all accounts, both were miserable, the black educational system being the more miserable of the two. Of course, the Supreme Court's landmark fourteenth Amendment decision in *Plessy v. Ferguson* legally sanctioned “separate but equal” facilities for blacks and whites, a situation purportedly remedied by *Brown v. Board of Education* and its progeny. Despite the sea change that *Brown* promised, there is a growing realization that primary and secondary education in America is still largely separate, and increasingly unequal. See CRUSE, *supra* note 8, at 21-24.

general understanding that millions of southerners were growing up in abject ignorance, barely able to read and comprehend the nuances of their own language.¹³⁶ Moreover, the problem of persistent illiteracy threatened to undermine any efforts to assimilate the freedmen into the political and economic fabric of southern life.¹³⁷ Responding to this crisis, Republican Senator Henry W. Blair proposed the introduction of a bill ("Blair Bill") that would redress the resource limitations of the southern states by channeling millions of dollars in federal aid to rebuild much of the southern public schooling system, known at the time as common schools.¹³⁸

The Blair Bill was first introduced in 1881.¹³⁹ Of particular note, the bill required that equal expenditures be made for both black and white schools, thereby embracing a literal interpretation of the "separate but equal" doctrine¹⁴⁰ that the Supreme Court would establish as the law of the land a decade later in the landmark case *Plessy v. Ferguson*.¹⁴¹ The bill enjoyed wide support in the black community, and that support appeared to cross class lines.¹⁴² Both illiterate southern blacks and members of the black bourgeoisie initially lauded the aims of the Bill.¹⁴³ Importantly, Blair historian Professor Daniel Crofts notes that black enthusiasm for the Bill was matched by a belief that the southern states would distribute in a fair and equitable fashion the funds promised by Congress as part of the common schools appropriation process.¹⁴⁴ Interestingly, there appears to be no indication that blacks saw, in the Blair Bill, the delivery of some sort of reparation entitlement. Indeed, the tenor of the discourse surrounding the bill more plausibly suggests that both its sponsor and the Bill's other supporters (black and white) saw the

136. See Daniel W. Crofts, *The Black Response to the Blair Education Bill*, 37 J. S. HIST. 41 (Feb. 1971).

137. See Crofts, *supra* note 136.

138. The Committee on Education and Labor was in favor of allocating the recommended funding to achieve the aims of the bill. See S. Rep. No. 474 (1882) ("A majority of the committee is in favor of, and recommends the appropriation of money from the Treasury to aid in the establishment and temporary support of common schools, the same to be distributed to the several States and Territories for a limited period of time, and upon the basis of illiteracy."); see also Crofts, *supra* note 136, at 42 (noting that the bill called for the payment of approximately \$77 million to the identified states for common school development over an eight year period, a sum that far exceeded what the states were currently spending on public education at the time).

139. See Crofts, *supra* note 136, at 42 n.5.

140. *Id.* at 43.

141. 163 U.S. 537 (1896).

142. See Crofts, *supra* note 136, at 45 (noting that "inarticulate blacks apparently shared the opinions of the Negro elite on the bill").

143. See *id.* at 45-46.

144. *Id.*

Blair Bill as an essential element in the road to southern rehabilitation via universal common school support that blacks would benefit from.¹⁴⁵

The eventual failure of the Blair Bill to become law reflects an intersection of complex factors. Crofts has identified several that, while hardly exhaustive, certainly bear mention. They include: (1) opposition on the part of reactionary politicians who objected in principal to any financial support for black education;¹⁴⁶ (2) uncertainty on the part of a small but influential group of black leaders who believed that separate funding for black schools represented a badge of black inferiority;¹⁴⁷ and (3) growing recognition that the states themselves could not be trusted to fairly and even-handedly distribute the funds Congress would allocate.¹⁴⁸

Importantly, a small but influential number of black leaders like T. Thomas Fortune denounced the idea of the two separate, but more or less financially equal, state school systems that the Bill would create as fiscally wasteful.¹⁴⁹ Fortune also criticized the perceived injustice of suggesting that black children were inferior to white children and therefore needed separate schools.¹⁵⁰ In one sense, Fortune's criticism might strike contemporary legal scholars as indicative of a philosophical premise around which there exists today widespread consensus: that racially separate schooling facilities do not serve the long term interests of either black or white children. However, in another sense, Fortune's capitulation seems unforgivable given the woeful state of black education at the time.

Fortune's retreat is important for two additional reasons. First, it symbolized the emergence of two distinct paradigms in black thinking on the question of black progress and empowerment in post-slavery America: symbolic equality (integrated schools) versus specific substantive advances (adequate funding to operate separate black schools). Second, it symbolized a recurring class-driven trend in African-American society: an educated black elite speaking for a largely uneducated black majority. This class disjuncture appears even more telling, and indeed disturbing, when one considers that

145. *Id.*

146. *Id.* at 49-50.

147. *Id.* at 55.

148. *Id.* at 49-53. It is interesting to note that according to Crofts, reactionary elements in the South were prepared and indeed supported discriminating against poor whites as well as the freedmen when it came to the dissemination of Blair funds. Thus, poor whites were viewed as highly expendable commodities in the deeper political and economic struggle between the freedmen and their advocates on the one hand, and the still influential southern plantation owners on the other. *Id.*

149. See CRUSE, *supra* note 8, at 15.

150. *Id.*

most poor and illiterate blacks at the time overwhelmingly supported the aims of the Blair Education Bill.¹⁵¹ Thus, Fortune's criticisms appear not only perplexing, but also distinctly out of step with the sentiments of most other freedmen (and women).

In historical terms, Fortune's misgivings would re-emerge several decades later as the underlying thematic centerpiece around which much of the mid-century black civil rights movement would, in part, be based.¹⁵² Students of constitutional history will note the close similarity between Fortune's critique of the Blair Bill and the underlying rationale cited by the Supreme Court seventy-two years later in its landmark decision reversing *Plessy*, *Brown v. Board of Education*.¹⁵³ In other words, persistent, though hardly universal,¹⁵⁴ black criticism of the express "separate but equal" assumptions that underscored the Blair Education Bill debates would become the rallying cry around which much of the twentieth century civil rights struggle would be grounded, i.e., dismantling at all costs that most pernicious of Jim Crow institutions, separate but equal.

In a larger sense, one can interpret the unfulfilled prospects for change and the unfortunate collapse of a functional consensus amongst black leadership over the prudential benefits of the Blair Bill as setting the stage for continued discord over the meaning of black empowerment, including reparations discourse that was to the follow in the next century. Accordingly, one can find in the black criticism of the Blair Bill the thematic seeds of twentieth century civil rights activism: namely, a wholesale rejection of the doctrine of separate but equal in any guise, coupled with a general retreat from the principle of structural repair of the black community. Indeed, a contemporary assessment of the Blair Bill debates suggests that by abandoning the goal of structural transformation in favor of a policy of racial inclusiveness, the civil rights establishment unwittingly dealt a blow to black education that resounds to this day. This Article assesses these lingering tensions in Part IV.

III. RECONCILIATION AND REPARATIONS: PARADIGMS IN CONFLICT

Racial reconciliation through a complete public disclosure of the harms slavery has produced in the black community, or via an

151. See Crofts, *supra* note 136, at 45.

152. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

153. *Id.*

154. According to historian Harold Cruse, the majority of the freedmen wholeheartedly supported the goals of the bill, even if administered in a truly "separate but equal" fashion. CRUSE, *supra* note 8, at 11-15. Significantly, influential black leaders like W.E.B. Du Bois, recognizing the historic opportunity for black progress that Blair represented, attempted to rekindle congressional interest in the bill's passage in its final years, but to no avail. *Id.* at 11.

official apology,¹⁵⁵ has emerged as a central theme in reparations discourse.¹⁵⁶ Racial reconciliation refers to the process of achieving, in general terms, a degree of rapprochement or accommodation between historically antagonistic racial groups. In the American context, reparations scholars have suggested that black-white racial reconciliation occur in one of two ways: (1) either through an official acknowledgment of the harms caused by slavery,¹⁵⁷ or (2) in the form of an official apology, either from Congress, a congressionally sanctioned commission, or the President.¹⁵⁸ Indeed, some have suggested that a formal apology remains an essential element of any formal reconciliation process.¹⁵⁹

Reference to the importance of racial reconciliation vis-à-vis the slavery reparations question today appears almost *de rigeur*. In assessing the historical significance of the Civil Liberties Act¹⁶⁰ and its impact on the slavery reparations movement, one commentator has suggested that reconciliation through a formal apology would do much to reduce the racial tensions that continue to define black and white relations in American society.¹⁶¹ Another has suggested that we

155. Some scholars classify official apologies as a form of reparation. See Bryan, *supra* note 118, at 605-06; see also Posner & Vermeule, *supra* note 25, at 729-30 (categorizing official government apologies for past harms "as a form of 'in-kind' reparations and arguing that the apology "represents something of an official promissory note on future reparative payments").

156. See generally Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988) (expired 1998) (seeking to acknowledge that the internment of Japanese-Americans during World War II was wrong and to issue a formal congressionally sanctioned apology for the harm that resulted); see also Bryan, *supra* note 118, at 604-05 (arguing by analogy to the Civil Liberties Act that securing a formal apology for the harms slavery has caused should be an important goal for the slavery reparations movement); Fran Spielman, *Time to Start the Healing; City Votes to Urge Congress to Make Slavery Reparations*, CHI. SUN-TIMES, May 18, 2000, at 3; CHICAGO CITY COUNCIL, CITY DOC. PR2000-20 (Ill. 2000), available at <http://www.chicago.about.com/library/blank/blslaveryresolution01.htm> (last visited Feb. 19, 2004) (providing in pertinent part that "[t]here will never be racial healing until America decides to face the criminal debauchery that people enriched themselves by committing wrongful acts against African American slaves.").

157. See Bryan, *supra* note 118, at 605-07.

158. See *id.* at 605-06.

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

160. The Civil Liberties Act awarded reparations to thousands of the surviving victims of the infamous World War II internment of Japanese-Americans. Importantly, through the Civil Liberties Act, Congress expressly apologized for the harms caused by the interment to Japanese Americans. See Pub. L. No. 100-383, 102 Stat. 903 (1988).

161. See Bryan, *supra* note 118, at 604-05 (arguing that reconciliation through a formal apology for slavery could help to heal the racial divide that plagues black-white relations). It is worth noting that at least one highly influential African-American, Secretary of State Colin Powell, has publicly opposed any type of formal governmental apology for the harms visited upon African-Americans as a result of centuries of

view reparations not only in a compensatory sense, but also as a means to "help the American people find closure from the terrible acts of their nation's past."¹⁶² Noted global activist Randall Robinson suggests that the process of reconciliation is a central feature of the black reparations agenda. He notes: "Our whole society must first be brought to a consensus that it *wants* to close the socioeconomic gap between the races. It must accept that the gap derives from the social depredations of slavery."¹⁶³ Although Robinson is not clear precisely what type of reconciliation he favors, the above quotation suggests that he envisions racial reconciliation occurring through a process of factual disclosure of the harms slavery has produced, although a formal apology cannot be ruled out.

This preoccupation with racial reconciliation is not surprising: it has remained a central theme of the black civil rights empowerment struggle for much of the latter-half of the twentieth century.¹⁶⁴ Indeed, one can make the argument that the idea of racial reconciliation, at least as a means of ameliorating overt racial tensions between blacks and whites in post-war America, provided much of the social and ideological impetus that underscored the Supreme Court's landmark decision in *Brown v. Board of Education*.¹⁶⁵ In the ensuing decades, the theme of racial reconciliation more generally has become ingrained as a central feature of American racial discourse. For example, the Civil Liberties Act of 1988 contained an official congressional apology for the hardship caused by the internment of Japanese Americans during World War II.¹⁶⁶ In conjunction with a provision in the Act to fund public education initiatives to increase awareness of the internment,

enslavement. WASHINGTON OFFICE NOTES COLIN POWELL'S EFFORTS TO LIMIT UN CONFERENCE ON RACISM, *available at* http://www.witherspoonsociety.org/Global/powell_on_un_conf_.htm (last visited Feb. 7, 2004).

162. Bryan, *supra* note 118, at 607 (arguing that perhaps the central purpose of the slavery reparations movement is to promote an interracial rapprochement in American society).

163. See ROBINSON, *supra* note 23, at 173.

164. See, e.g., KING, *supra* note 106. The theme of racial reconciliation was also central to the establishment of democratic rule in post-apartheid South Africa as well. Indeed, the interim constitution enacted after the fall of the National Party specifically mandated the formation of a national Truth and Reconciliation Commission as a condition of democratic rule in South Africa. See THE COMMITTEES OF THE TRC, *supra* note 56; *Truth and Reconciliation*, *supra* note 55.

165. See FONER, *supra* note 2, at 258-59 (detailing the efforts of the Truman Administration, including the filing of an *amicus* brief in the *Brown* case, to demonstrate to the world that America intended to make good on its democratic promises to African-Americans. In its brief, the Administration urged the court to consider "the problem of racial discrimination . . . in the context of the present world struggle between freedom and tyranny").

166. See Bryan, *supra* note 118, at 605.

this act of contrition served to “acknowledge a governmental wrong and to extend a national apology to those who suffered as a direct result of that wrong.”¹⁶⁷ More recently, President Bill Clinton in his official capacity apologized to the survivors of the infamous Tuskegee syphilis experiments¹⁶⁸ by noting that “without remembering it, we cannot make amends and we cannot go forward.”¹⁶⁹

More importantly, the perceived centrality of racial reconciliation to the slavery reparations question, and indeed to the larger question of achieving black racial equity in American society in general, has gone virtually unchallenged.¹⁷⁰ This prevailing belief in the inherent interconnectedness of reconciliation and reparations no doubt stems from a basic political determination that views official recognition of the harms that slavery (or other forms of racial oppression) engendered as a prerequisite to any grant of reparations, whatever form they might take.¹⁷¹

However, it is important to distinguish here between official recognition of the harms slavery has engendered and actual racial reconciliation. The Author argues that acknowledgment of the former does not and should not be thought of as representative of racial reconciliation. If that were the case, the content of President Johnson’s famous 1965 commencement address at Howard University, entitled “To Fulfill These Rights,” might very well be considered perhaps the greatest official acknowledgement to date of the impact that slavery has had on black life in America.¹⁷²

Apart from the admittedly important symbolic and societal value that an apology or other attempt at black-white interracial rapprochement would serve, there are sound reasons why the idea of racial reconciliation should not be included as part of the reparations movement. First, there is widespread opposition to the issuance of an official apology for slavery by many white Americans, and some

167. See *id.* at 605-06.

168. See TUSKEGEE SYPHILIS STUDY LEGACY COMMITTEE, FINAL REPORT OF MAY 20 (1996), available at <http://www.med.virginia.edu/hs-library/historical/apology/report.html> (last visited Jan. 12, 2004).

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

170. At least one reparations scholar has suggested that reparations proponents expand the historic range of reparations discourse to include post-Civil War era racial violence, but has not advocated that racial reconciliation be ignored as an important goal of reparations initiatives. See Christian Sundquist, *Critical Praxis, Spirit Healing, and Community Activism: Preserving A Subversive Dialogue on Reparations*, 58 N.Y.U. ANN. SURV. AM. L. 659, 663-64 (2003).

171. See Posner & Vermeule, *supra* note 25, at 731-32.

172. See Johnson, *supra* note 1.

African-Americans as well.¹⁷³ More importantly, the history of civil rights discourse suggests that linking the idea of racial reconciliation to the reparations question is strategically unsound.¹⁷⁴

It is more accurate to think of racial reconciliation not as a necessary ideological component of slavery reparations, but rather as an appendage to the idea of reparations stemming from civil rights discourse.¹⁷⁵ The brief history of Black Reconstruction recounted in Part II suggests that proponents of that noble idea did not view racial reconciliation as an important consideration.¹⁷⁶ Rather, the central goals envisioned by radical reconstruction proponents concerned the institutional and economic incapacities of the freedmen vis-à-vis the southern economy, not racial rapprochement between former slaves and former slaveholders.¹⁷⁷ Indeed, if one considers the pragmatic effects of the ill-fated Blair Bill as an example, where separate but equally funded institutions were envisioned as a necessity of the times, the idea of racial reconciliation appears less urgent.

The picture becomes murkier when one considers the response of some black leaders over the implicit separate but equal mandates suggested by the Blair Bill.¹⁷⁸ For example, T. Thomas Fortune's opposition to the Bill underscored his belief that the idea of the two separate, but more or less financially equal, state school systems was both fiscally wasteful and unfair to black children by implying that black children were inferior to white children and, therefore, needed separate schools.¹⁷⁹ If indeed Fortune believed that a unified, interracial school system was the preferred avenue for reconstruction administrators to pursue, and that seems to be a fair reading of his position, then black-white racial rapprochement would not just be desirable, it would be a necessary feature of southern rebirth.

In the end, unfortunately, black school children got neither equalized funding nor integrated schools.¹⁸⁰ Rather, the willingness of black leaders like Fortune to sacrifice the very real prospect of improved resource allocations to black schools desperately in need of such assistance, in favor of a myopic vision of racial equality

173. See Paul Leavitt & Robert Silvers, *Poll: Congress Shouldn't Make Apology for Slavery*, U.S.A. TODAY, July 2, 1997, at A5; see also *supra* note 122.

174. See Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 65-69 (1997).

175. See discussion *supra* Part II.C.

176. See discussion *supra* Part II.

177. See Lopez, *supra* note 49, at 653-55 (summarizing the history of reparations during Reconstruction).

178. See CRUSE, *supra* note 8, at 15 (discussing objections to the Blair Bill).

179. See *id.*

180. See *id.* (noting the Blair Bill's defeat).

immediately after the Civil War, suggests that black leadership was ideologically unprepared to pursue a coherent platform of genuine economic and institutional empowerment for poor blacks. In other words, in their pursuit of symbolic accommodation (symbolic justice) by the majority in the form of integrated schools, Fortune and others sacrificed genuine substantive progress (substantive justice) in exchange for the promise of an alternate prospect: racial reconciliation via racial integration at some future point.

Comparative history similarly suggests that strategically linking reconciliation and reparations efforts might actually undermine the goal of obtaining slavery reparations of any sort. Nowhere were the thorny and often contradictory imperatives of racial reconciliation and reparations or substantive justice claims more clearly highlighted than with the work of the famous (or infamous, depending on one's perspective) South African Truth and Reconciliation Commission ("TRC").¹⁸¹ Created in the immediate aftermath of the end of white minority rule in South Africa, the TRC attempted to uncover the extent of government involvement in the numerous incidents of political violence directed against black and other anti-apartheid South African activists during the apartheid era.¹⁸² Importantly, the work of the TRC has been cited by at least one domestic commentator as a model of racial reconciliation that should be adopted in the United States.¹⁸³

In many circles, the work of the TRC was heralded as an important attempt to overcome the legacy of brutal racial oppression employed by the South African National Party to ensure continued minority rule, even in the face of growing international pressure to dismantle the apartheid system.¹⁸⁴ However, more recent critiques suggest that the optimistic belief that the TRC could deliver both racial reconciliation and substantive (economic) racial "justice" to millions of impoverished black South Africans promised more than was actually possible.¹⁸⁵

181. The TRC was created to uncover the details of the use of racial violence as an expression of apartheid era racial separation. The South African Interim Constitution mandated the creation of the TRC and implied the delivery of racial justice to the people of South Africa as a result. See S. AFR. CONST. postamble (Interim Constitution, Act 200, 1993).

182. *Id.*

183. See Wacks, *supra* note 17 (suggesting that local communities might overcome entrenched racial animosities by utilizing the South African truth and reconciliation admission and disclosure model as a way to heal the wounds of racial discrimination in America, especially in the South).

184. See RANDALL ROBINSON, *DEFENDING THE SPIRIT: A BLACK LIFE IN AMERICA* 151-52 (1998).

185. See Mutua, *supra* note 174, at 63-69.

In assessing the implications of the Free South Africa Movement, Ibrahim Gassama has suggested that the political compromises that followed the end of apartheid rule in South Africa, primarily the creation of the TRC, and the establishment of democratic rule in that state, left unfulfilled the deeper material aspirations of millions of black South Africans.¹⁸⁶

Echoing similar skepticism over growing tendencies to link the discourse of rights to substantive economic justice considerations, Makau wa Mutua has suggested that the South African transition sacrificed deeper economic reforms in favor of more superficial rights-based reforms, to the detriment of black South Africans.¹⁸⁷ As Mutua notes:

[I]t is the contention of this Article that the rights discourse has been the predominant medium for change. Although it is too early to say with total certainty what the exact difficulties of employing the rights discourse in South Africa are, many of the pitfalls of that medium are identified and explored in this Article. Time will only further underscore these limitations.

While rights discourse had the power to galvanize the oppressed and garner the sympathy of some segments of the middle and upper classes during the struggle against official apartheid, *the Mandela government's near total dependence on rights discourse as the tool for the transformation of the legacy of apartheid is a mistake*. First, the double-edged nature of rights language has already become evident in South Africa. The new constitutional rights framework has frozen the hierarchies of apartheid by preserving the social and economic status quo.¹⁸⁸

At another level, the observations of Gassama and Mutua suggest the dangers of imposing western formulations of justice, largely grounded in the discourse of rights, upon the South African system, without considering the deeper pragmatic implications of such an exercise. In this sense, Gassama and Mutua join a growing body of scholars generally critical of the idea that culturally bound norms, including conceptions of justice, translate well from one culture to another absent significant translation.¹⁸⁹

186. See Ibrahim J. Gassama, *Transnational Critical Race Scholarship: Transcending Ethnic and National Chauvinism in the Era of Globalization*, 5 MICH. J. RACE & L. 133, 153-54. Gassama and the Author are in agreement that an underlying problematic concerns the widespread but often ill-defined concept of "justice" that appears in such discussions.

187. See Mutua, *supra* note 185, at 65-69.

188. *Id.* at 68 (emphasis added).

189. See generally Jill M. Brannelly, *The United States' Grant of Permanent Normal Trade Status to China: A Recipe for Tragedy or Transformation?*, 25 SUFFOLK

By analogy, the pursuit of racial reconciliation in the U.S. context, while not necessarily a capitulation on economic issues, would inevitably divert attention away from efforts to place economic justice/reparations discussions front and center of the national agenda. Indeed, the foregoing suggests that it is strategically unsound to link reparations discourse either to broader domestic racial reconciliation notions, or to reconciliation models employed by other cultures in distinctly different contexts.

IV. DECONSTRUCTING BABEL: TOWARD A THEORY OF STRUCTURAL REPARATIONS

A. *There and Back Again: Structural Reparations Revisited*

The foregoing discussion suggests that a contemporary theory of structural reparations should, at a minimum, seek to more concretely delineate the meaning of internal black transformations, minus the related, but more often than not misleading, notion of racial reconciliation. Recent proposals that see black reparations claims as broader invitations to re-energize discussions of racial equity via "rehabilitative" or "inward looking" transformations are promising.¹⁹⁰ While these recent efforts should be generally applauded, to redirect reparations discourse along more productive lines, attendant suggestions such as Professor Emma Coleman Jordan's proposal to discard slavery as the operative historical paradigm,¹⁹¹ are an unnecessary capitulation. This Article instead suggests that we link the idea of "inward looking" transformations to the idea of black rehabilitation advanced during Black Reconstruction, and reinterpret those earlier themes in contemporary terms. Such an approach would achieve two important goals. First, it would render Jordan's historical capitulation on the slavery reparations question unnecessary. Second, a theory of structural reparations that embraced Reconstruction-era ideology would capture more fully the spirit and meaning of internal black transformation.

TRANSNAT'L L. REV. 565 (2002) (noting that the normalization of trade relations is unlikely to persuade China to embrace the western ideal of human rights protections); Bruce A. Markell, *A View from the Field: Some Observations on the Effect of International Commercial Law Reform Efforts on the Rule of Law*, 6 IND. J. GLOBAL LEGAL STUD. 497, 498-99 (1999) (noting that western cultural assumptions about the function of law in society are not readily transferable to developing states, whose lawyers and administrators lack the training and insights of their western counterparts).

190. See Jordan, *supra* note 37.

191. *Id.* at 559-60 (discussing how reparation efforts should focus on racial lynching rather than on slavery).

Jordan's proposal to recast reparations strategies to address Jim Crow and post-Jim Crow era racial violence and oppression, but not slavery, reflects her recognition that slavery-based claims lack "correlativity."¹⁹² Jordan defines the factual and temporal nexus between alleged victim and the alleged victimizer, action and result (or harm) as "correlativity."¹⁹³ Briefly, correlativity is the central premise upon which our system of private law is grounded, i.e., that a plaintiff in civil court can only collect a monetary judgment against the specific party that occasioned his or her injury or harm.¹⁹⁴ For Jordan, the absence of correlativity in slavery reparations claims is a potentially fatal pragmatic flaw.¹⁹⁵ At a minimum, Professor Jordan, like Professors Posner and Vermeule, views the absence of correlativity as undermining the basic conceptual pillars upon which slavery reparations claims are typically grounded, if not other kinds of reparations.¹⁹⁶

For Jordan, the answer to the legal and conceptual barriers that confront black reparations claims lies in redirecting the focus of those claims *beyond* slavery.¹⁹⁷ For Jordan, reparations discourse would become a conceptual platform upon which lawyers and activists could seek redress in the courts or state/federal legislatures for acts of racial violence where correlativity is not problematic.¹⁹⁸ Jordan

192. *Id.* at 558.

193. *Id.*

194. *Id.*

195. *Id.* at 558-59.

196. It is important to note that Jordan does not appear to view the absence of correlativity as necessarily undermining the *moral* basis for seeking reparations for past racial harms. Rather, her observations appear grounded in a practical assessment of the difficulties Africans-Americans have and will continue to face in their attempts to obtain some form of public or private reparations for slave-era harms. *See id.* at 558-60. By way of contrast, Professors Posner and Vermeule appear to attach great moral significance to the absence of correlativity in the majority of slavery reparations claims. They suggest that the absence of correlativity in slavery reparations claims undermines the moral substructure upon which our system of compensatory justice is built. *See* Posner & Vermeule, *supra* note 25, at 693.

197. *See* Jordan, *supra* note 37, at 560.

198. *See id.* at 559 (suggesting that disclosure of the monstrous history of 20th century lynching and racial violence coupled with appropriate compensation could serve as an effective vehicle for black redress in the 21st century). Of equal importance, basing lawsuits on more recent acts of racial violence would overcome certain statute of limitations and correlativity problems that have frustrated reparations strategies of late. *Id.* Growing pessimism over the ability of courts (both civil and international) to craft remedies responsive to needs of black Americans, or in some instances even to entertain effectively slavery reparations claims, has led some scholars to suggest divorcing slavery from reparations talk altogether. *Id.* Professor Alberto B. Lopez suggests that the preoccupation with slavery as a self-contained and independent phenomenon has stifled creative thinking about the restorative function

counsels activists to base their claims on more recent expressions of racial oppression, like lynching during the early twentieth century.¹⁹⁹ Jordan grounds her conceptual departure from accepted orthodoxy in the belief that black reparations claims should be seen not as a litigation vehicle primarily, but as a broader invitation to re-energize discussions of racial equity and justice within the black community.²⁰⁰

Sounding a theme similar to Jordan's, but more squarely grounded in the dynamics of internal group transformation, Roy Brooks suggests that contemporary reparations discourse actually embraces two basic models of group redress: so-called compensatory reparations on the one hand, and so-called rehabilitative reparations on the other.²⁰¹ Brooks suggests that "[c]ompensatory reparations are directed toward the individual victim or the victim's family."²⁰² By way of contrast, Brooks observes that rehabilitative reparations "are designed to benefit the victim's group, to nurture the group's self-empowerment and, thus, aid in the nation's social and cultural transformation."²⁰³ For Brooks, these so-called rehabilitative reparations would take the form of judicial reform, specifically the incorporation of black social values and perspectives in judicial reasoning.²⁰⁴

What distinguishes the reparations proposals of both Professors Jordan and Brooks is their appeal to inward-looking black reform or transformation. Having found conventional (if we can even use that term with any veracity in the reparations context) black reparations proposals wanting on conceptual and pragmatic grounds, the authors find solace in the idea that reparations can nurture black self-

reparations might serve in response to more recent acts of discrimination and racial violence such as the Tulsa race riots. See Lopez, *supra* note 49, at 676.

199. Jordan, *supra* note 37, at 560.

200. *Id.* at 558-59.

201. See Brooks, *supra* note 29, at 475-76.

202. *Id.* at 475.

203. *Id.* at 476 (noting that compensatory and rehabilitative reparations can take the form "of monetary or non-monetary relief").

204. *Id.* at 477. Brooks clarifies this premise by suggesting that a profound disjuncture exists vis-à-vis the judicial expectations of poor blacks versus those of middle-class blacks and that the judiciary should strive to incorporate the values of all segments of black society. *Id.* In line with this thinking, the Author is reminded of a story conveyed by a friend and practicing criminal attorney. Apparently, the defendant in a particular case, a young African-American male, showed up at a sentencing hearing wearing clothing wholly appropriate in the African-American community, and indeed, considered as semi-formal by some young blacks, but indicative of black hip-hop culture. Sensing unease on the part of the court, my friend requested a sidebar to explain her client's behavior. The lawyer is convinced that this timely explanation of this cultural disjuncture to the judge helped to secure a reduced sentence for her client.

empowerment and serve as a "stimulant for internal cultural repair within the African-American community."²⁰⁵

These formulations, both of which see traditional litigation as holding the possibility of future success, are flawed on two grounds. First, even if the re-worked litigation strategy advocated by Professor Jordan proves successful, the peculiar nature of the harms she describes suggests that the impact of such litigation will be minimal. Thus, while the survivors of racial violence and the owners of property destroyed in race riots have compelling claims for compensation,²⁰⁶ recovery would be limited to the named plaintiffs of the lawsuit(s). Realistically, such an outcome, however noteworthy, would do little to redress the important material, social, and institutional needs of African-Americans who are not parties to the proposed lawsuits. Ironically, they would find themselves barred from participating in such claims for precisely the same reason Professor Jordan proposed rethinking black reparations litigation in the first place: the absence of correlativity.²⁰⁷

Recent developments in the Farmer-Paellmann reparations litigation suggest an additional and related problem: the likely inability of state and, in this case, federal courts to resolve reparations cases. Because of the breadth, scope, and complex political problems inherent in these claims, many courts appear reluctant to even hear them.²⁰⁸ In dismissing a group of consolidated reparations claims, including the Farmer-Paellmann case, U.S. District Judge Charles R. Norgle held that the "[p]laintiffs' attempt to bring these claims more than a century after the end of the Civil War and the formal abolition of slavery fail[ed]," as plaintiffs' claims "[were] beyond the constitutional authority of [the] court."²⁰⁹ He also noted that the suit alleged no specific connection between the plaintiffs and the companies named as defendants.²¹⁰ This development highlights a deeper institutional problem: the possibility that traditional litigation represents a strategic dead end for slavery and black reparations advocates.

These criticisms underscore the true shortcomings of a litigation-based effort to secure structural reparations. Thematically, these proposals de-emphasize true internal black institutional

205. Jordan, *supra* note 37, at 559.

206. See generally ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: CONTEMPLATING CIVIL RIGHTS ACTIONS AND REPARATIONS FOR THE TULSA RACE RIOT OF 1921* (2000).

207. See Jordan, *supra* note 37, at 557-60.

208. See generally *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995).

209. Michael Robinson, *Slave Reparations Case Dismissed*, MSNBC.COM, Jan. 26, 2004, at <http://-msnbc.msn.com/id/4066501/>.

210. See *id.*

rehabilitation in favor of initiatives that largely, if not exclusively, remain grounded in the dynamics of traditional litigation. Thus, the concept of reparations is simply recast as a way to redress, preferably in a court of law, the harms caused by more recent expressions of racial oppression and violence such as lynching or early twentieth century race riots, as opposed to slavery.²¹¹ In this way, the concept of inward-looking black rehabilitation is denied full expression, and indeed strays from the type of interrelated and contemporaneous black and societal institutional transformations understood by progressive Reconstruction era white democrats and black politicians (and some twentieth century Black Nationalists as well) as a necessary precondition of reform.²¹²

While such proposals might very well overcome the litigation limitations highlighted above, invariably they continue to link the process of "inward-looking black rehabilitation" to the process of disclosure of the harms racial oppression has engendered and to official recognition of those harms by a court, tribunal or commission. In this sense, rehabilitation remains indelibly linked to the idea of disclosure, just as disclosure remains indelibly linked to basic conceptions of reconciliation and accountability. For some, reconciliation via disclosure then becomes a necessary prerequisite to rehabilitative transformation. This preoccupation with disclosure, racial healing, and reconciliation has the potential to distract reparations proponents and blacks in general, in that such developments invariably suggest the inevitable delivery of some form of economic compensation.

At the same time, potentially more meaningful institutional reforms, albeit at the political level, are downplayed in favor of more hi-visibility but ultimately dead-end litigation efforts.

B. *A Theory of Structural Reparations*

A historically-grounded theory of structural reparations would, at a minimum, embrace the concept of inward-looking black

211. See Jordan, *supra* note 37, at 559-60; see also Lopez, *supra* note 49, at 673 (positing that the preoccupation with slavery as a self-contained and independent phenomenon has stifled creative thinking about the restorative function reparations might serve in response to more recent acts of discrimination and racial violence such as the Tulsa race riots).

212. Of great practical importance lies the deeper question about whether the judiciary can actually deliver the kind of structural or transformative justice envisioned by the proposals of Professors Jordan and Brooks. Recently, the federal district court judge presiding over the Farmer-Paellman litigation dismissed the case citing the inability of the courts to resolve the deeper social, political, and economic issues that underscored plaintiff's claims. See Robinson, *supra* note 209.

institutional capacity building as a primary goal.²¹³ An emerging body of scholarship suggests that it is precisely in the area of institutional pragmatism that reparations theory has made the least progress.²¹⁴ Ideally, a theory of structural reparations would promote institutional reform at multiple levels, that is, internally within the black community, and, externally, as well. During Black Reconstruction, this meant: (1) southern land redistribution and the right of blacks to sell their labor; (2) democratic governance (i.e., black enfranchisement); and (3) free public schooling, school reform, and attendant social welfare programming.²¹⁵

This is not to suggest that the same economic and political considerations that drove Reconstruction policy towards the freedmen hold sway today. Rather, embracing a historically grounded understanding of structural reparations will reveal that many of the prudential black institutional problems prevalent during the Reconstruction era continue to impede black progress in the post-industrial era.²¹⁶ Such a theory would stress as a primary goal black institutional reform. This includes reform of the institution of reparations and reform of other black institutions like black education, discussed more fully in Part IV. A theory of structural reparations would certainly not rule out proposals like those advocated by Professor Brooks, involving the transformation of public institutions to better serve the needs of the black community. This Article would simply assign priority to genuine black institutional capacity building.

Considered more broadly, and apart from the prudential institutional concerns discussed above, a contemporary theory of structural reparations would invariably seek to uncover the deeper economic mandates suggested by widespread black institutional reform. W.E.B. Du Bois has suggested that the overarching challenge for black leadership in assessing Reconstruction and adumbrating a contemporary strategy responsive to current black needs lies in

213. This contemporary formulation would not rule out the desirability of institutional reform at the federal, state, or municipal levels; it simply would place greater priority on the imperatives of black institutional capacity building. Other considerations would become secondary.

214. See generally Posner & Vermeule, *supra* note 25 (addressing issues related to institutional design of reparation programs).

215. See LEWIS, *supra* note 78, at 384 (identifying contributions black rule brought to the South).

216. Noted southern historian C. Vann Woodward has described the Reconstruction era as a time of the "forgotten alternatives." This phraseology suggests that the discourse over the fate of the freedmen, the fate of the Post-civil war South, and underlying structural imperatives that politicians of that time had to come to terms with have largely been forgotten. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 31, 33, 44-45 (1966).

determining the implications of black participation in the southern, national, and ultimately the global economies.²¹⁷ Given the central role that Du Bois assigns to black labor issues in his history of Black Reconstruction,²¹⁸ and the centrality of that theme to broader discussions of black economic empowerment,²¹⁹ labor issues would also seem worthy of deeper consideration, as well as ongoing discussions concerning the relationship of African-Americans to the broader global economy.

C. Assessing the Aftermath of Blair: Contemporary Discourse

As noted above in Part II, the failure of Reconstruction left unfinished many of the deeper systemic maladies that persisted in post-Civil War southern society. In a larger sense, one can interpret the unfulfilled prospects for change and the unfortunate collapse of a functional consensus amongst black leadership over the prudential benefits of the Blair Bill as setting the stage for continued discord over the meaning of black empowerment, including reparations discourse that was to follow in the next century. Accordingly, one can find in the black criticism of Blair the thematic seeds of twentieth century civil rights activism: namely, a wholesale rejection of the doctrine of separate but equal in any guise, coupled with a general retreat from the principle of structural repair of the black community.²²⁰ Indeed, a contemporary assessment of the Blair debates suggests that by abandoning the goal of structural transformation in favor of a policy of racial inclusiveness, the civil rights establishment unwittingly dealt a blow to black education that resounds to this day.²²¹

To understand the true dynamics at play here, one must fast-forward to the mid-1950s and the days leading up to *Brown*. By this time, separate but equal education had become a defining and well-known feature of American society. Ironically, most of the civil rights establishment had long since forgotten the reforms suggested but never delivered under the auspices of Blair seventy years earlier as

217. See DU BOIS, *supra* note 35, at 13-14 (identifying black labor issues and their relationship to democracy).

218. *Id.*

219. See Brown, *supra* note 134, at 865 (noting that the issue of labor migrations resulting from globalization are important, but ultimately unavoidable consequences of global economic expansion); see also Manning Marable, *Free South Africa Movement: Black America's Protest Connections with South Africa*, in *SPEAKING TRUTH TO POWER: ESSAYS ON RACE, RESISTANCE, AND RADICALISM* 189, 192-95 (1996) (citing the migration of black jobs to offshore destination like South Africa as a central economic concern that failed to illicit the proper response from human rights activists during the Free South Africa Movement).

220. See CRUSE, *supra* note 8, at 10-21.

221. *Id.*

part of an unofficial separate but equal system. At the dawn of the *Brown* era, separate but equal was seen as anathema to the civil rights establishment and black progress.²²² It was seen as nothing more than an archaic and offensive carryover from the Jim Crow era that had to be dismantled at any cost.²²³

What the civil rights establishment failed to consider, however, was the impact that dismantling separate but equal education systems would mean in practice. Because the profound inadequacies and funding inequalities that prompted Senator Blair to propose a program of massive educational reform persisted in the deep south, civil rights advocates saw overturning *Plessy* as the only way to correct these imbalances.²²⁴ It was not of course. Professor Cruse has gone so far as to suggest that southern efforts to stave off the litigation that led to the *Brown* decision should have been embraced by the black power establishment or firmly implemented by Congress, thus avoiding the "Supreme Court's judicial extremism in *Brown* in 1954."²²⁵

In any event, it now seems clear that the civil rights establishment's unwavering focus on racial segregation and the perceived evils of "separate but equal" blinded it to the foreseeable prudential results that the reversal of *Plessy* suggested. Namely, wholesale elimination of most of the professional infrastructure that supported the separate, unequal, but nevertheless still important system of black primary and secondary education in America.²²⁶ Professor Cruse argues that implementation of *Brown* meant the "equalization" of the two systems would be achieved through the dismissal of "untold numbers of black schoolteachers, principals, and administrators from the formerly segregated schools, sending them into the ranks of the displaced and unemployed."²²⁷

The historical irony here appears even more profound when one considers that a central platform of the Black Education Leadership Summit's 1994 Advisory Report noted the continuing decline in the number of qualified black grade school teachers to instruct black school children in America's still *de facto* segregated school system.²²⁸

222. See generally *id.*

223. *Id.*

224. *Id.*

225. See *id.* at 20.

226. *Id.*

227. See *id.* at 21.

228. See BLACK EDUC. LEADERSHIP SUMMIT, SHAPING THE NATIONAL AGENDA: MANIFESTO FOR THE EDUCATION OF AFRICAN AMERICAN CHILDREN 7 (2001) [hereinafter ADVISORY REPORT], available at <http://www.howard.edu/schooleducation/documents/manifesto.pdf> (noting that while 22.1% of blacks in 1977 received their bachelor's degrees in education, by 1991, that number had fallen to only 7.4%). The

In many ways, this decline is one of the unforeseen consequences of *Brown's* radical "progressivism," a reality the civil rights establishment seems reluctant to admit.²²⁹

D. *Challenges for the Future: Grutter, Black Higher Education, and the Dynamics of Institutional Transformation*

Contemporary challenges loom, as evidenced by the language in the Supreme Court's most recent pronouncements on affirmative action and its function in American society. At one level, affirmative action relates to the question of black reparations because some reparations scholars consider affirmative action to be a form of black reparations.²³⁰ At a deeper level, and in keeping with the Court's pronouncements in *Grutter v. Bollinger*²³¹ on affirmative action, the structural dimensions of black education are as important today as at any time in our history.

In *Grutter*, in a majority decision penned by Justice Sandra Day O'Connor, the Court upheld the use of race as a "what counts" factor in the University of Michigan Law School's admissions procedures.²³² More specifically, the Court reaffirmed its holding in *Regents of University of California v. Bakke*,²³³ which sanctioned the use of race in achieving student diversity, but restricted that usage to the furtherance of the state's compelling interest in "the attainment of a

Advisory Report strongly suggests that black student exposure not merely to qualified teachers, but to highly qualified black teachers remains an important goal of reform-minded black educators. *Id.*

229. It seems highly unlikely that the most recent federal initiative to repair failing schools, the so-called No Child Left Behind Act of 2001, H.R. CONF. REP. NO. 107-334 (2001), will have any more success than earlier efforts. Reports from major cities like Chicago suggest that the efforts of parents in failing schools to transfer their children to better performing ones, a key feature of the new law, have been undermined by the dearth of available spaces in better performing schools. See Sue Ontiveros, *Lots of Children Being Left Behind Despite New Federal Law*, CHI. SUN-TIMES, Aug. 23, 2003, at 15 (reporting that there are 367 failing schools in the city of Chicago alone and that the logistics of transferring thousands of potentially eligible transfer students enrolled in under-performing schools to compliant ones has proven impossible); see also Stephanie Banchemo & Lori Olszewski, *19,000 Kids Seek New School: Chicago System Has Spaces for Only 1,035 to Transfer*, CHI. TRIB., Aug. 28, 2003, at § Metro 1 (noting that of the 19,000 students eligible to transfer under NCLB, the city of Chicago can accommodate only 1,035 transfer requests). The message here seems clear: poorly performing minority schools in large urban centers are a permanent feature of the 21st century urban landscape. Our goal should be to make those schools as productive as possible, not to embrace programs that invalidate their existence, or that embrace myopic reform platforms with no hope of succeeding, like NCLB.

230. See Posner & Vermeule, *supra* note 25, at 733 (suggesting that society might view affirmative action as representative of a form of "in-kind" reparation).

231. 123 S. Ct. 2325 (2003).

232. *Id.* at 2342.

233. 438 U.S. 265 (1978).

diverse student body" exclusively.²³⁴ In supporting affirmative action in that context, the Court cited with approval the importance of promoting racial diversity in publicly funded institutes of higher education.²³⁵ The Court also held that considerations of an applicant's race should represent only one of many factors considered by admission's committees, but could not be the central factor.²³⁶ In this sense, *Grutter* can be thought of as both an affirmation of the limited use of racial preferences and, as a practical primer, an outline of the conditions of that practice.²³⁷ Predictably, proponents of affirmative action have heralded the decision in *Grutter* as a major development.²³⁸

But for black educators and black policy makers, the most important aspect *Grutter* arguably involves is not the precise holding, but select dicta that may prove more pertinent to the future of black higher education than the Court's decision to uphold the use of affirmative action.²³⁹ In noting the ways that affirmative action benefits society, and noting that the use of racial criteria invariably involves a balancing of sometimes conflicting interests, Justice O'Connor sagely prophesized that the day when affirmative action will no longer be needed to redress the harms of past institutional discrimination was fast approaching.²⁴⁰ Justice O'Connor noted that in twenty-five years the Court would perhaps revisit the affirmative action question, and that a decidedly different result might be forthcoming at that time.²⁴¹ The Court's dicta here suggests that the real issue confronting the African-American community on the education front is not whether affirmative action will still exist or be needed in twenty-five years; rather, the African-American community must be prepared to ask a more difficult question: twenty-five years from now, will the majority of college-aged black

234. *Id.* at 311-12.

235. "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter*, 123 S. Ct. at 2339 (citing *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).

236. *Id.* at 2342 ("Instead, a university may consider race of ethnicity only as a 'plus in a particular applicant's file.'") (citations omitted).

237. *See id.*

238. *See* NAACP NEWSLETTER, PRESIDENT'S MESSAGE, at <http://www.naacplansing.org/newsletterOCT.htm> (last visited Mar. 6, 2004).

239. *Grutter*, 123 S. Ct. at 2347; SALT NEWSLETTER, LAW SCHOOLS AND AFFIRMATIVE ACTION, at <http://www.saltlaw.org/affaction.htm> (last visited Mar. 6, 2004).

240. *Grutter*, 123 S. Ct. at 2347.

241. *Id.* ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

high school graduates be able to compete in the American higher education free-for-all in the event that the Court dismantles entirely the institution of affirmative action?

If the answer is no (and the steep decline in black student enrollment at California's premier state institutions of higher education after the passage of Proposition 209 suggests that we view this unpleasant fact as a distinct possibility),²⁴² then what should we as black academics, educators, and policy makers do? One suggestion is to rethink the question of black education at the collegiate level. If we indeed are living in the waning days of affirmative action and if the lingering pathologies that afflict black public education in the inner cities persists, then the role of black colleges and universities will become increasingly important. In such a scenario, we might very well witness a return to *de facto* "separate but equal" education, only this time at the collegiate and university level.

Out of an abundance of caution, then, black leadership must outline both short and long-term proposals for addressing this possibility. Having been caught entirely unprepared for the profound economic and institutional dislocations that *Brown* heralded fifty

242. C.A. CONST. ART. I, § 31 provides:

(a) 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.

(b) This section shall apply only to action taken after the section's effective date.

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

years earlier, it would be unforgivable to repeat this strategic blunder in the affirmative action setting. At a minimum, the African-American community must address some of the real and persistent problems confronting black higher education, including accreditation concerns at a number of schools, funding shortfalls, and the more troubling perception held by many that black higher education is by definition inferior.

V. CONCLUSION

This Article embraces the idea of structural reparations as a pragmatic alternative to other slavery reparations strategies. It suggests that linking this idea to the unfulfilled goals of Black Reconstruction can overcome the conceptual and prudential barriers that have impeded substantive slavery reparations progress. Far from representing a call to engage in moribund and irrelevant historical revisionism, the Author hopes to reconnect reparations discourse to a more productive and historically functional paradigm, but in a way that proves relevant to current socio-economic realities.

Of course, blind appeals to historicism are fraught with perils, the most pernicious involving the challenge of reinterpreting historical paradigms in a way that renders them both comprehensible and useful to contemporary policy makers. This Article has suggested two ways that reparations scholars might begin the task of historical reassessment: by jettisoning from slavery reparations discourse demands for racial reconciliation and by embracing a program of internal group transformation that stresses black institutional capacity building.

More broadly, this Article suggests that the black reparations movement must, if it is to be successful, focus on two core imperatives: (1) the economic mandates of internal group transformation; and (2) the corresponding institutional dynamics implicit in that task. In other words, reparations scholars are urged to address not merely the moral and jurisprudential considerations that underscore contemporary reparations ideology, but the economic and institutional imperatives as well. Ideally, such a reassessment would impact not only how slavery reparations scholars think about the movement, it would also impact the way that the slavery reparations issue is framed in ongoing public debates over the desirability, feasibility, and ultimate purpose of such an endeavor.

Beyond these threshold considerations, the implications of a theory of structural reparations appear wide-ranging. For example, what other institutional reforms are suggested by this theory? Clearly, black institutional transformation would remain a central priority. But, black institutions (universities, business associations, community organizations, and the Black Church, to name a few) do

not operate in a vacuum. Invariably, they interact with society at large either directly or indirectly via contact with larger official institutions such as banks, local, state, and national regulatory agencies, and the nation as a whole. In the opening chapter of his seminal history on Black Reconstruction, W.E.B. Du Bois observed that the relationship of the freedmen to the national and ultimately global economic orders remained the paramount unfinished business of reconstruction.²⁴³ For Du Bois, then, the overarching challenge for black leadership vis-à-vis Reconstruction remains to assess the implications of black participation in the southern, national, and ultimately the global economies.²⁴⁴

Finally the Author hopes that reparations scholars will take the suggestions contained herein not as outright criticism but as a call to explore heretofore unexplored ways of conceptualizing and implementing the still unfinished business of America's forgotten decades, the era of Black Reconstruction.

243. See DU BOIS, *supra* note 35, at 13-16.

244. As this Article has attempted to demonstrate, black leadership remains deeply divided over how to achieve true black empowerment. This uncertainty afflicts both broader discussions of race, racial equality, racial justice in American society, and contemporary reparations discourse as well. Overcoming this uncertainty remains an essential task in moving forward on the economic empowerment question. *But see* Chartier, *supra* note 112 (arguing, incorrectly in the Author's estimation, that the black civil rights struggle in America has always reflected an underlying commitment to black economic empowerment).
