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# Why Reparations to African Descendants in the United States Are Essential to Democracy

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# Why Reparations to African Descendants in the United States Are Essential to Democracy

*Adjoa A. Aiyetoro\**

*We can have democracy in this country or we can have great wealth concentrated in the hands of a few, but we can't have both.*

Louis Dembitz Brandeis 1856–1941

*Democracy is not identical with majority rule. Democracy is a State which recognizes the subjection of the minority to the majority, that is, an organization for the systematic use of force by one class against the other, by one part of the population against another.*

Vladimir Lenin 1870–1924

*State and Revolution*

*Man's capacity for justice makes democracy possible, but man's inclination to injustice makes democracy necessary.*

Reinhold Niebuhr 1892–1971

*Children of Light and Children of Darkness*<sup>1</sup>

## I. INTRODUCTION

Numerous scholars have addressed the issue of defining democracy.<sup>2</sup>

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\* Associate Professor of Law, University of Arkansas, William H. Bowen School of Law. I wish to thank Theresa M. Beiner, Associate Dean for Faculty Development, for review of a draft of this Article. I also wish to thank Corey Thomas and Keia Johnson for excellent research assistance. I dedicate this article to the memory of Ronald W. Walters, whose scholarly and activist work have inspired me to continue my commitment to advocating for reparations for African descendants.

1. *Democracy Quotes*, GOODQUOTES.ORG, <http://www.goodquotes.org/democracy-quotes.html> (last visited Feb. 6, 2011) [hereinafter *Democracy Quotes*].

2. See, e.g., *id.*; JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); HERBERT APTHEKER ON RACE AND DEMOCRACY: A READER (Eric Foner & Manning Marable eds., 2006); CORNEL WEST, *DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM* (2004); Molly Beutz, *Functional Democracy: Responding to Failures of Accountability*, 44 HARV. INT'L L.J. 387 (2003); Erwin Chemerinsky, *The Supreme Court, 1988 Term: Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989) [hereinafter Chemerinsky, *Vanishing Constitution*]; Lane Davis, *Mistakes About Democracy and Politics*, 72 IOWA L. REV. 1315 (1987); Van B. Luong, *Recent Development: Political Interest Convergence: African American Reparations and the Image of American Democracy*, 25 U. HAW. L. REV. 253 (2002); Adam James Tebbble, *Does Inclusion Require Democracy?*, 51 POL. STUD. 197 (2003); Carla D. Pratt, *Way to Represent: The Role of Black Lawyers in Contemporary American Democracy*, 77 FORDHAM L. REV. 1409 (2009); Erwin

As one can tell from the scholarship analyzing democracy and the quotes above, democracy means different things to different people. However, an increasing amount of scholarship focuses on Niebuhr Reinhold's view of democracy, concluding that democracy requires the correction of oppression or consequences of oppression—substantive democracy.<sup>3</sup>

Most of the world would agree that the United States is a democracy. Indeed, many tout the United States as being the most advanced democracy.<sup>4</sup> Yet, significant portions of its citizens are living under conditions or vestiges of oppression. This seems like a non sequitur: How can democracy countenance oppression or allow people to be burdened by the consequences of that oppression?

Groups of color, including Native Americans, Latino/as, Japanese-Americans, and African peoples in the United States have all been the victims of government-created and supported oppression. This Article focuses on the exclusion of African descendants from U.S. democracy due to their oppression. It argues that the way to correct the oppression and continuing consequences of the oppression suffered by African descendants in the United States is to identify the injuries and formulate remedies that will make them whole—reparations.<sup>5</sup>

Reparations have been advanced as a way to address the continuing inequities that flow from the history of slavery and the Jim Crow Era's de jure discrimination. Slavery and Jim Crow were the major occurrences of oppression and exploitation of African peoples in the United States that led to the current state of inequality. The demand for reparations to bridge this

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Chemerinsky, *A Grand Theory of Constitutional Law?*, 100 MICH. L. REV. 1249 (2002) [hereinafter Chemerinsky, *Grand Theory*] (reviewing JEB RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001)); Harvey Gee, *The Warren Court and the Pursuit of Justice*, by Morton J. Horwitz, Hill and Wang, 1998, 26 W. ST. U. L. REV. 241 (1999) (book review).

3. Beutz, *supra* note 2, at 387–401; Tebble, *supra* note 2, at 200 (citing IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE*, 184–85 (1990); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY*, 228–35 (2000)) (arguing that democracy requires “need interpretation” and inclusion of oppressed social groups in a meaningful way); *see also* MANNING MARABLE, *THE GREAT WELLS OF DEMOCRACY: THE MEANING OF RACE IN AMERICAN LIFE* (2002) (addressing how the continued marginalization of the poor and people of color evinces the failure of American democracy); RONALD W. WALTERS, *THE PRICE OF RACIAL RECONCILIATION* (2008) (discussing the continued oppression of blacks and the need for restorative justice if people are to be assured that the United States is a democratic state for all); Chemerinsky, *Grand Theory*, *supra* note 2, at 1257 (suggesting that constitutional democracy is a step in the direction of substantive democracy since it enforces the Bill of Rights and the Constitution despite the will of the majority to deny the minority these rights).

4. MARABLE, *supra* note 3, at xii.

5. This Author is not of the view that one can ever give back to African peoples what was taken during the centuries of slavery and almost eighty years of Jim Crow. Remedies are created in law after the horse has left the barn. Remedies are an approximation. The government can assess the damage and develop remedies to put African descendants in the position in society they would have been in but for invasion of their human and civil rights, much like reparative injunctions. *See, e.g.*, *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 295–310 (4th ed. 2010) (discussing reparative injunctions).

inequality is not new nor has it been relinquished. Indeed, reparations to African descendants in the United States for enslavement, Jim Crow, and continuing discrimination are the focus of numerous books and scholarly articles.<sup>6</sup>

The major focus of these works has been the rationale for reparations to descendants of African peoples enslaved in the United States. Many works delineate the history of enslavement and the horrors of that institution as well as the continuing debasement and oppression experienced by African descendants in the United States during the Jim Crow Era. Other works suggest remedies for reparations. Many of the arguments put forth are couched in terms of morality or argue that reparations are a right because of the injury the federal and state governments caused African descendants and the benefits gained by whites.<sup>7</sup>

The importance of making reparations to African peoples in the United States has therefore been presented as a benefit to whites. Scholars have presented the issue as a way of removing the stain of slavery, Jim Crow, and their continuing consequences, and as a way of absolving the country—and, in some cases corporations—of the debt owed to blacks.<sup>8</sup> However, there is little scholarship that focuses on the essentiality of reparations to a democratic society or on how reparations must be given in order to maintain

6. See, e.g., RICHARD F. AMERICA, *PAYING THE SOCIAL DEBT: WHAT WHITE AMERICA OWES BLACK AMERICA* (1993); ALFRED L. BROPHY, *REPARATIONS: PRO & CON* (2006); ROY L. BROOKS, *ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS* (2004); CHARLES P. HENRY, *LONG OVERDUE: THE POLITICS OF RACIAL REPARATIONS* (2007); MARABLE, *supra* note 3, at 223–53; *REDRESS FOR HISTORICAL INJUSTICES IN THE UNITED STATES: ON REPARATIONS FOR SLAVERY, JIM CROW, AND THEIR LEGACIES* (Michael T. Martin & Marilyn Yaquinto eds., 2007) [hereinafter *REDRESS*]; RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000); *SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS* (Raymond A. Winbush ed., 2003); WALTERS, *supra* note 3, at 162–88; *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* 309–435 (Roy L. Brooks ed. 1999) [hereinafter *WHEN SORRY ISN'T ENOUGH*]; Adjoa A. Aiyetoro & Adrienne D. Davis, *Historic and Modern Social Movements for Reparations: The National Coalition of Blacks for Reparations in America (N'COBRA) and Its Antecedents*, 16 TEX. WESLEYAN L. REV. 687 (2010); Martha Biondi, *The Rise of the Reparations Movement*, 87 RADICAL HIST. REV. 5 (2003); Maxine Burkett, *Reconciliation and Nonrepetition: A New Paradigm for African-American Reparations*, 86 OR. L. REV. 99 (2007); Tuneen E. Chisholm, *Sweep Around Your Own Front Door*, 147 U. PA. L. REV. 677 (1999); William Darity, Jr., *Forty Acres and a Mule in the 21st Century*, 89 SOC. SCI. Q. 3 (2008); Adrienne D. Davis, *The Case for United States Reparations to African Americans*, 7 HUM. RTS. BRIEF 3 (2000); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323 (1987); Carlton Waterhouse, *Follow the Yellow Brick Road: Perusing the Path to Constitutionally Permissible Reparations for Slavery and Jim Crow Era Governmental Discrimination*, 62 RUTGERS L. REV. 163 (2009); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998); Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1 (2007).

7. See, e.g., BROOKS, *supra* note 6, at 155 (arguing that reparations expiate past sins); Matsuda, *supra* note 6, at 324–26, 362–63 (developing a legal argument for obtaining reparations by arguing that the legal community should devise “remedial reparations” by listening to the victims.).

8. ROBINSON, *supra* note 6, at 201–34.

the equality promised in the evolving understanding of a true democracy.<sup>9</sup>

This Article has democracy as its starting point. First, this Article will discuss the theories of democracy and argue that true democracy incorporates both majoritarian and substantive democracy. Next, this Article will argue that substantive democracy requires each citizen to be valued and heard equally, which cannot happen if some citizens are oppressed or languishing under the vestiges of oppression. This Article will then present a summary of slavery, the Jim Crow Era's de jure discrimination, and their continuing legacies. It will argue that the effects of the U.S. government's oppression of and discrimination against Africans and their descendants during slavery and Jim Crow persist today. This Article will also argue that because this oppression exists, the United States is not a true democracy. Next, this Article will outline the history of resistance to oppression and discrimination, as well as demands for reparations. The Author will assert that there is a need for assessment and remedy formulation for this oppression in the form of reparations and that substantive democracy requires reparations—a sincere effort to identify the continuing injuries and develop reparative remedies, both material and symbolic, to address these continuing injuries that result in U.S. society treating African descendants as citizens, yet, not equal to whites. This Article also argues that the United States' failure to make reparations maintains the myth of white superiority and black inferiority.<sup>10</sup> This Article concludes that in making reparations, the United States can become a true democracy.<sup>11</sup>

## II. DEMOCRACY

Democracy is a concept that has been analyzed and embraced in varying forms since the founding of the United States. The concept is susceptible to many definitions and viewpoints. "The word is what some philosophers have called 'an essentially contested concept', one of those terms we can never all agree to define in the same way because the very definition carries a different social, moral, or political agenda."<sup>12</sup> The most

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9. In his book *The Great Wells of Democracy*, Manning Marable addresses the "lie" of democracy that is the marginalization of people of color and the poor that exists in the United States. See generally MARABLE, *supra* note 3.

10. Race is a social construct. All value is socially assigned, not inherent. As such, it is a myth that whites are superior and blacks are inferior. Nevertheless, race has social meaning. From its formation, this country was racialized. The racial imbalance has been reinforced through social and legal mechanisms creating a white supremacy that has real effects, serving to perpetuate the myth of white superiority and black inferiority.

11. Of course, to be a true democracy the United States must remove the badges of inequality worn by other groups of color, such as Native Americans and Latinos/as. That discussion is beyond the scope of this article.

12. BERNARD CRICK, *DEMOCRACY: A VERY SHORT INTRODUCTION* 1 (2002); see also Beutz,

common understandings of democracy include majority rule, representative democracy, and constitutional democracy, with majority rule and representative democracy incorporating the principle of the government following the will of the people.<sup>13</sup> In contrast, constitutional democracy is based on the rights and privileges guaranteed in the Constitution and protected by the courts. Another understanding of democracy is substantive democracy; it is an extension of constitutional democracy that “denotes a social state in which all have equal rights without hereditary or arbitrary differences in rank or privilege.”<sup>14</sup> This Section critiques majority-rule democracy in the United States and argues that only substantive democracy ensures the inclusion of all people as participants in a democratic state.

#### *A. Democracy as Majoritarian Rule*

Most people in the United States embrace the definition of democracy that asserts that democracy is following the will of the majority in an electoral process—majority rule.<sup>15</sup> This definition focuses on the process and not the result. It is based on what is euphemistically identified as one person, one vote. Erwin Chemerinsky, a constitutional law scholar, argues that “[n]either descriptively nor normatively is majority rule a proper definition of American democracy.”<sup>16</sup> This Subsection furthers Chemerinsky’s argument by examining ways in which American democracy belies majoritarian rule.

There is evidence in the Constitution itself that the drafters of the Constitution were not embracing majority rule as we define it today. Their democracy was exclusive; it was only for white, landowning men, and they showed their fear of and disdain for the usual understanding of democracy by placing constitutional limits on majority rule.<sup>17</sup> The Constitution includes

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*supra* note 2, at 396; Chemerinsky, *Vanishing Constitution*, *supra* note 2, at 71 (discussing that political scientists disagree on the definition of democracy).

13. Majority rule and representative democracy at times appear to be interchangeable terms; the Author uses majority rule to mean the majority of the voters selecting representation in legislative bodies. *See, e.g.*, Chemerinsky, *Vanishing Constitution*, *supra* note 2, at 48 (discussing the view of democracy that embraces the concept that majority rule leads to the election of representatives who reflect the will of the majority).

14. OXFORD ENGLISH DICTIONARY 443 (2d ed. 1989).

15. Chemerinsky, *Grand Theory*, *supra* note 2, at 1250–51.

16. *Id.* at 1256. Descriptively, drafters of the Constitution included an electoral college, and only two senators per state; therefore, votes were not representative of the population. Also, the Bill of Rights put limits on majority rule. *Id.* Normatively, American democracy should be considered a constitutional democracy: “a system where the choices of the majority and their elected officials are allowed only so long as they are consistent with the Constitution.” *Id.*

17. *Id.* *See also* MARABLE, *supra* note 3, at 68 (U.S. democracy was originally restricted “to a small elite of white merchants, bankers, and slaveholding plantation owners.”); Pratt, *supra* note 2, at 1409 (stating that the United States “was founded as a race-conscious liberal democracy”).

the election of the President of the United States by the Electoral College and not the majority vote.<sup>18</sup> The Electoral College, therefore, has the power to decide who becomes the President of the United States, contrary to popular vote.<sup>19</sup> U.S. senators were initially chosen by state legislatures, not popular vote; the Bill of Rights further constricted the senators, ostensibly representing the majority, in their ability to act.<sup>20</sup>

Although the popular definition of democracy is majority rule, there are instances in which the courts overturn decisions of the majority. The courts frequently find unconstitutional legislative actions, actions passed by the majority of those elected to office by a majority of the people in legislators' districts to represent the interests of the legislators' constituencies.<sup>21</sup> The government justifies its reversals of the will of the legislative majority on the theory that the U.S. Constitution protects the interests and rights of the minority from the tyranny of the majority—constitutional democracy.<sup>22</sup> Thus, the concept of constitutional democracy trumps majority rule. In fact, constitutional democracy foretells a lesser-known form of democracy—substantive democracy—which seeks to assure stability and equal treatment among the members of the society.<sup>23</sup> Substantive democracy must necessarily incorporate the principle of inclusion. It is within the embrace of substantive democracy that we can conclude the necessity for reparations to African descendants in the United States.

Furthermore, the U.S. democracy is exclusive rather than inclusive. It historically has excluded the voices of many in the society, most notably women, Native Americans, and African descendants. Although the Fourteenth Amendment to the U.S. Constitution guaranteed citizenship to the freed Africans and their descendants, the Fifteenth Amendment guaranteed the right of black men to vote, and the Nineteenth Amendment made women electorally equal to men,<sup>24</sup> it was not until the passage and enforcement of the 1965 Voting Rights Act that African descendants, especially in the South, were able to actualize their right to vote and participate fully in majoritarian democracy, or what some call political

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18. Chemerinsky, *Grand Theory*, *supra* note 2, at 1256–57.

19. *Id.* at 1258.

20. *Id.* at 1256–57.

21. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

22. Chemerinsky, *Grand Theory*, *supra* note 2, at 1257; Beutz, *supra* note 2, at 399–400 (discussing the limitations of majoritarian democracy in protecting the rights of minorities).

23. Beutz, *supra* note 2, at 396; Chemerinsky, *Grand Theory*, *supra* note 2, at 1257 (asserting that constitutional democracy safeguards rights and furthers substantive democracy); Chemerinsky, *Vanishing Constitution*, *supra* note 2, at 47; Davis, *supra* note 2, at 1316 (explaining that democracy is better understood as leading to equality and justice).

24. U.S. CONST. amend. XIV, XV, & XIX.

democracy.<sup>25</sup> Therefore, the U.S. democracy and the definition of “majority” have been based on exclusionary laws and practices by white males who held power in the United States. Even given the expansion of voting rights to African descendants, women, and other oppressed persons, majority rule, or political democracy, has limited the definition, since the majority of those in the United States do not vote on legislation that governs their lives and the business of the United States. Rather, majoritarian democracy means that the majority of voters’ choices for representatives in the House or Senate will be honored. These representatives make decisions about the laws and policies that will govern the lives of those in the United States. Majoritarian democracy, therefore, has developed into what is called representative democracy, where the representatives purportedly represent the interests of the majority.<sup>26</sup>

The problem with representative democracy is that it is not always majority rule, because the representative may vote against what the majority wants.<sup>27</sup> Carla Pratt embraces the term representative democracy, although she does not embrace the narrow definition of democracy as majoritarian rule.<sup>28</sup> She views democracy as more than political equality—the ability to vote and have your vote counted; she asserts that social equality is inherent to democracy.<sup>29</sup> Thus, Pratt’s view of democracy appears to include substantive democracy. Even in speaking specifically about representative democracy, she expands the meaning of representative democracy to suggest that black lawyers should represent the interests of the black populace and make their needs known to the powers that be.<sup>30</sup>

The view that there is a shortcoming of representative democracy in the electoral system, whereby the elected officials frequently “do not vote in accord with the preferences of a majority of their constituents,”<sup>31</sup> seems to apply to Pratt’s argument that black lawyers serving as African descendants’ representatives enhance political democracy for African descendants; however, black lawyers may not voice the needs of all blacks, leaving what

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25. See generally GLORIA J. BROWNE-MARSHALL, *RACE, LAW, AND AMERICAN SOCIETY: 1607 TO PRESENT* 115–36 (2007) (discussing voting rights and restrictions used to oppress African descendants).

26. Chemerinsky, *Vanishing Constitution*, *supra* note 2, at 78; see also Beutz, *supra* note 2, at 400–01 (asserting that representative democracy is a more substantive form of procedural democracy).

27. Chemerinsky, *Vanishing Constitution*, *supra* note 2, at 78.

28. Pratt, *supra* note 2, at 1409 n.1.

29. *Id.*

30. *Id.* at 1411–12, 1413 n.17. Pratt’s theory of representative democracy also bleeds into substantive democracy.

31. Chemerinsky, *Vanishing Constitution*, *supra* note 2, at 78.



may be a significant number of blacks unrepresented.<sup>32</sup> Indeed, some argue “black politics lost its direction when black leaders were ‘pulled further and further away from their communities.’”<sup>33</sup>

### *B. Substantive Democracy*

Substantive democracy is the removal of inequalities born from government-sanctioned oppression. To be a true democracy, the United States must guarantee substantive democracy. American democracy falls short of substantive democracy due to the treatment of African descendants. The lack of substantive democracy resulting from African descendants’ inequality maintains white supremacy.

Substantive democracy addresses the needs of the populace for justice and equality. Substantive democracy requires dismantling the inequality that the government’s conduct creates. This would remove the disabilities obtained through the noncompetitiveness of racism and thereby create an even playing field.<sup>34</sup> As discussed, the democracy that those in power in the United States have articulated developed from a democracy that included only white males and was constricted by the Constitution, which took away their authority to have a representative democracy where the majority of voters selected someone to speak for them and legislate in their interest. Furthermore, the Bill of Rights is inherent in U.S. democracy and guarantees certain rights to all citizens regardless of the will of the majority. The Constitution, therefore, guarantees certain substantive rights to citizens, leading to the conclusion that in creating a constitutional democracy, the drafters of the Constitution adopted a form of substantive democracy.

Protecting the rights given in the Constitution and its amendments is protecting substantive values of the country—and the right to equal protection (the Fifth and Fourteenth Amendments) is among those values. The courts, however, have enforced this right in a procedural way—striking down laws that treat blacks in a discriminatory fashion;<sup>35</sup> there are no cases requiring that the gaps between blacks and whites that are the product of de jure and de facto discrimination be closed in order to ensure equality of opportunity. The one exception may be some of the affirmative action cases, such as the Court ordering the hiring of blacks.<sup>36</sup> Yet, the judicial system’s

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32. See Tebble, *supra* note 2, at 202.

33. MARABLE, *supra* note 3, at 209.

34. LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 11–13 (2006) (discussing the initial advantage of being white, obtained through “anti-competitive conduct”).

35. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (finding Virginia’s miscegenation law unconstitutional).

36. See, e.g., *United States v. Paradise*, 480 U.S. 616 (1987) (affirming the lower court’s order

embrace of affirmative action is narrow, holding that affirmative action plans are constitutional only if they are created for the purpose of remedying discrimination in the institution adopting such a plan.<sup>37</sup> This rationale fails to address the lingering effects of slavery and de jure and de facto discrimination against black people, which created the disparities that affirmative action is designed to remedy. Thus, it does not address the underlying equal protection flaw in the creation of democracy, that “race was deliberately used to restrict democratic processes over several centuries.”<sup>38</sup>

This use of race to restrict democratic processes has resulted in the continuation of black people being disproportionately underrepresented in high-status professional positions and lacking the indicia of well-being and status in this society. For example, there is a disparity in wealth between whites and blacks, with black families’ median net worth being “about ten cents for every dollar of the median white family.”<sup>39</sup> In addition to the wealth gap, blacks are significantly underrepresented in high-status occupations and those that wield power and authority. Black physicians make up 3.5% of the physician populations in the United States.<sup>40</sup> Black lawyers are 3.9% of the lawyer population and blacks are 8.8% of the judges, magistrates, and other judicial workers.<sup>41</sup> Although the U.S. President is black, only 42 of the 435 members of the U.S. House of Representatives are black, and it is more disconcerting that there is only one

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of an affirmative-action plan that required Alabama to promote black state troopers).

37. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007) (striking a voluntary plan that used race as a factor to assign children to schools). However, in *Grutter v. Bollinger*, the Court allowed the use of race as a factor in admitting students to a law school under the guise of creating diversity, which the Court determined was valuable to student learning. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

38. MARABLE, *supra* note 3, at xiii.

39. Dalton Conley, *Black-White Differences in Wealth Mobility and Volatility 2* (2007) (unpublished manuscript) (on file with The Journal of Gender, Race & Justice); see also MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (2006); THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* 47 (2004) (describing the role of private money in passing on inequalities); Francine D. Blau & John W. Graham, *Black-White Differences and Asset Composition*, 105 Q. J. ECON. 321, 321 (1990) (“Young black families hold only 18 percent of the wealth of young white families.”).

40. *Physician Statistics: Total Physicians by Race/Ethnicity—2006*, AMA, <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/minority-affairs-consortium/physician-statistics/total-physicians-raceethnicity-2006.shtml> (last visited Mar. 5, 2011).

41. *Census 200 EEO Data Tool*, U.S. CENSUS BUREAU, <http://www.census.gov/eo2000/index.html> (Select radio button for “Employment by Census Occupation Codes” and “Residence: Data based on where people live.” Click “Next.” Select radio button for “US Total.” Click “Next.” Selection Census Occupation Codes “Lawyers (210)” and “Judges, Magistrates, and Other Judicial Workers (211).” Select radio button for “Show Detailed Race/Ethnicity Categories.” Click “Display Table”) (last visited Mar. 15, 2011).

black senator out of the one hundred U.S. senators.<sup>42</sup> Melvin L. Oliver and Thomas M. Shapiro's explanation for the wealth gap applies as well to the low representation of blacks in positions of power: "Disparities in wealth are not the product of haphazard events . . . . [W]ealth inequality has been structured over many generations through the same systemic barriers that have hampered blacks throughout their history in American society: slavery, Jim Crow, so-called de jure discrimination, and institutionalized racism."<sup>43</sup> This institutionalized racism or structural racism maintains the imbalance in power and the gaps in educational achievement, employment, income and wealth, health status and life expectancy, as well as the disproportionate representation of blacks in the criminal punishment system.<sup>44</sup>

So, although procedural democracy is legally guaranteed in the United States, the democracy is tilted in favor of whites, creating a second-class democracy that allows the oppressor group to remain in control through exercising the advantages gained through oppression.<sup>45</sup> The result is that white supremacy prevails even though legislatures made laws that purported to end racial discrimination and courts have procedurally eliminated discrimination and upheld the right of each adult to cast a vote. This means that the minority is still subject to the tyranny of the majority—it simply follows procedural rules and the resultant maintenance of inequality is blamed on the victims of structural racism, i.e. people of color. Yet, true substantive democracy results in the minority having an equal voice in the government and an equal opportunity to have its needs met—social equality. The democracy practiced in the United States leaves a significant part of the population with an unequal voice in the operation of this country; therefore, it is not a true democracy. A true democracy would include the voices of African descendants by eliminating the structural inequalities that law and practice created.<sup>46</sup>

### *C. Inclusion as an Essential Component of Substantive Democracy*

Inclusion is an essential component of substantive democracy.<sup>47</sup> Because inclusion is an essential component of substantive democracy, to achieve substantive democracy, one must be able to hear all voices. To include the voices of those who were historically oppressed, society must

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42. *The U.S. Congress Quick Facts*, THISNATION.COM, <http://www.thisnation.com/congress-facts.html> (last updated Feb. 4, 2010).

43. OLIVER & SHAPIRO, *supra* note 39, at 12–13.

44. *Supra* Part II.B; *infra* Parts III, IV.

45. WANG, *supra* note 34.

46. Tebble, *supra* note 2, at 209.

47. *Id.* at 197.

remove the barriers oppression causes so that each person has equal value in society, thus giving each person's voice the same power to influence.

"[Martin Luther] King, [Jr.] believed that this nation's flawed and often hypocritical democratic project could be constructed to be truly inclusive, reflecting the rich diversity of humanity that makes up this nation."<sup>48</sup> In analyzing the role of inclusion in democracy, it appears to be implicit that inclusion is synonymous with "one person one vote"—that all voices are heard.<sup>49</sup> Yet true inclusion cannot exist when segments of society are laboring under oppression or the vestiges of oppression.

In a situation where oppression is present, there exists a higher ranking of the oppressor population due to forced non-competitiveness.<sup>50</sup> The voices of oppressed groups, or those languishing under the vestiges of oppression, are not heeded. The group is less in quantity and perceived by the majority to be less in quality, thus allowing the majority to ignore the group's needs. It is also more capable of being unduly influenced by members of the oppressor group. Therefore, the underlying principle of substantive democracy is the requirement that the inequalities born of societal barriers be addressed.<sup>51</sup> Addressing the inequalities born of oppression places the groups (the past oppressed and oppressor) on an equal footing such that the voices can be heard and one not dominate the other because of the oppression.<sup>52</sup>

Some scholars argue that a democracy must include the voice of the oppressed.<sup>53</sup> It seems to be an oxymoron to equate democracy with "inclusion of the oppressed." In a true democracy there should no longer be an oppressed group. If oppressed groups exist in a society, their voices are not equal because the quality of rights is not equal and a core value of democracy, equal rights, is bastardized.<sup>54</sup> Equality allows the citizen's interest to be protected by democratic rights. Equality means "the state of being equal,"<sup>55</sup> and equal means "having the same quantity, measure or value as another."<sup>56</sup> In this capitalist society, quantities by necessity are

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48. MARABLE, *supra* note 3, at xi.

49. See, e.g., Tebble, *supra* note 2, at 197.

50. WANG, *supra* note 34.

51. Beutz, *supra* note 2, at 397.

52. LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 72–79 (1995).

53. Tebble, *supra* note 2, at 200.

54. COREY BRETTSCHEIDER, *DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT* 65 (2007).

55. *THE AMERICAN HERITAGE DICTIONARY* 461 (2d College ed. 1985).

56. *Id.*

unequal. Yet, if it is a democracy, each citizen should be equally valued. To argue that one can include the oppressed in a representative democracy<sup>57</sup> defies the meaning of democracy, as it means that they are included on a lesser level because they are wearing the badge of inferiority that comes with oppression—they are devalued.

State-imposed disabilities belie equality because they decrease the value that the oppressed have in the society; thus, claiming that there is a democracy when these disabilities exist is contradictory. It is the continuation of the rule of the oppressor over the oppressed. Inclusion is not possible through representative democracy, having a representative speak as or for the oppressed. Inclusion requires the removal of the structural barriers to equality in order for the groups to have an equally valued voice.<sup>58</sup> The value of equality protects citizens' interest at least to the extent that they have equal value in the society.<sup>59</sup>

#### *D. Democracy: From Majoritarian Rule to Ensuring Equality*

The continuing inequality in the United States underlies the antidemocratic nature of majority rule in American democracy. Constitutional democracy cures some of the defects of majoritarian rule, thereby creating a bridge between majority rule and substantive democracy. Since the United States has recognized the importance of substantive democracy, it should ensure that it exists here. The history of the mistreatment of Africans and their descendants reveals that the United States is not yet a true democracy.

##### 1. Getting to Equality: Acknowledging the Difference Between Procedural and Substantive Democracy

The view of democracy as majoritarian rule is antidemocratic because it is based on who is given the opportunity to vote and whose vote counts. Often in majoritarian politics, the majority swallows up the minority and does not give voice to their needs.<sup>60</sup> Unless the actions of the majority are deemed to violate the U.S. Constitution and are therefore void, the voices of the minority are not heard. Constitutional democracy thus serves as a bridge

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57. Tebble, *supra* note 2, at 202.

58. *Id.* at 210.

59. Some may say that having significantly less financial resources means there is no equality and therefore no democracy. See *Democracy Quotes*, *supra* note 1 ("We can have democracy in this country or we can have great wealth concentrated in the hands of a few, but we can't have both."). Yet having equal value means that the quality of your voice is not diminished because of your status or condition in society. See *infra* Part III (discussing the indicia of inequality).

60. Beutz, *supra* note 2, at 399–400.

between majoritarian democracy and substantive democracy by professing to guarantee that the actions of the majority do not void the rights that the Constitution grants.<sup>61</sup>

However, as the work of Lani Guinier demonstrates, although the current concept of majority rule is not unconstitutional as such, in many instances it denies the minority a voice in matters that impact the quality of their lives.<sup>62</sup> Substantive democracy posits that in order to be a true democracy, the government must eliminate structural inequalities, or inequalities created by law, giving all voices an opportunity to be heard.<sup>63</sup> Substantive democracy, therefore, incorporates procedural democracy. At the same time, it limits the authority of the majority by requiring that structural inequalities—those inequalities that are born of the laws and institutions of the society—be eliminated in order to be a true democracy. Substantive democracy thus goes further than constitutional democracy to require the dismantling of the continuing effects of slavery, Jim Crow, and structural racism.

The U.S. government recognizes the importance of substantive democracy. The United States has often demanded that a foreign country become a democracy. In some of its exhortations it appears as if it is calling only on procedural democracy (majoritarian democracy):

Haitian President Jean-Bertrand Aristide himself observed that “forces of order wanted us to vote so that it would appear to the outside world that we were a happy, peaceful democracy, and then the exploitation and corruption could go on just as before.” Although democratic procedures are ostensibly intended to ensure legitimate authority, such procedures now themselves confer and measure legitimacy.<sup>64</sup>

Yet at times it also appears that the U.S. government is calling on other governments to introduce substantive democracy, ending the discrimination against or maltreatment of a minority (insular group).<sup>65</sup> In fact, many argue that in order to legitimize international demands for democratic reforms the government had to act in the 1960s to end the violence against blacks and refusals of states to eliminate de jure segregation.<sup>66</sup> Indeed, one can argue

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61. Chemerinsky, *Grand Theory*, *supra* note 2, at 1257.

62. See generally GUINIER, *supra* note 52, at 71–114; Chemerinsky, *Vanishing Constitution*, *supra* note 2, at 83–84, 98.

63. Gee, *supra* note 2, at 243.

64. Beutz, *supra* note 2, at 399.

65. S. Res. 437, 111th Cong. (2010) (showing democracy in Iraq is challenged because of civil and human rights abuses).

66. BROWNE-MARSHALL, *supra* note 25, at 27–28, 93 (2007). See also Luong, *supra* note 2, at 266–67 (quoting MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000)).

that the elimination of de jure discrimination was a step toward implementing substantive democracy because it eliminated legal barriers to equality. Yet, true democracy means more than eliminating legal barriers to equality; it requires active efforts to eliminate the inequality.<sup>67</sup>

In more recent years, presidential administrations have seemed to demand that foreign governments embrace some form of substantive democracy. For example, the Bush Administration after 9/11 justified its invasion of Afghanistan, asserting it was attempting to introduce democratic principles by eliminating oppression of the Afghan people by the Taliban and protecting the human rights of the Afghan people.<sup>68</sup> At least the executive leadership of the United States has defined democracy as more than procedural or representative. Its apparent understanding of democracy is expansive, inclusive of assuring equality of treatment. This supports the argument in this Article that a true democracy must dismantle the structural inequalities between blacks and whites.

## 2. Getting to Equality: The Africans' Journey from Slavery to Modern Inequality

Removing the disabilities slavery and Jim Crow caused is necessary for U.S. society to view and include African descendants as equals. Removal of these disabilities is essential if the United States is to be a true democracy and not a mockery of democracy.<sup>69</sup> Despite the definitions of its democracy at any one time, the United States has lied about the presence of democracy because of the oppression and exclusion of people of color, particularly black people.<sup>70</sup> African descendants' struggle for civil and human rights is a struggle for the realization of democracy.

[E]ver since the first Africans were brought to this country, African Americans have been on a journey to take their place within "We the People," a journey that has taken us down what Bessie Smith called a "long road." We have not stood still and we have made some progress down that road. We have left behind the midnight hour of slavery, traveled through the gray dawn of segregation, and we are now in a cloudy divide, poised between freedom and

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67. See generally MARABLE, *supra* note 3 (exposing the conflict between an American democracy that doesn't speak to the marginalized and the building of a democracy that does.).

68. Luong, *supra* note 2, at 269.

69. Of course, to be a true democracy the United States must remove the badges of inequality worn by other groups of color, such as Native Americans and Latinos/as. That discussion is beyond the scope of this article.

70. MARABLE, *supra* note 3, at 8–9.

inequality.<sup>71</sup>

The exclusion of black people from the U.S. democracy had its birth in the enslavement of Africans that began in 1619.<sup>72</sup> The U.S. government stole African peoples from their land, traversed them through the Middle Passage, and treated them as chattel—selling them at auction to the highest bidder. They lost their right to an African identity by, among other things, having their names changed to Anglo names and not being allowed to speak their native language. When the first Africans were brought to the colonies they became indentured servants with a term of service which, unlike the one for white indentured servants, lasted “for as long as the purchaser desired, or even for life.”<sup>73</sup> The legal status of “slave” began in 1662 when legislatures began to craft laws that affirmed the “inferiority” of Africans; these laws developed into legislation that legalized the status of enslaved Africans as chattel.<sup>74</sup> The exclusion of Africans continued as the U.S. Constitution limited democracy to elite, white males.<sup>75</sup> Enslaved Africans could not participate in U.S. democracy and “had no rights which the white man was bound to respect.”<sup>76</sup>

Slave owners subjected enslaved Africans to all forms of inhumanity. Africans were held in bondage and forced to work for no wages—most often from before sunrise to after sunset.<sup>77</sup> Slave owners subjected them to extreme acts of brutality in an effort to “break them in” and maintain control and a sense of power and authority over them.<sup>78</sup> Included in these acts of “cruel and unmercifully severe” treatment were brutal acts of rape specifically directed at enslaved females, most often by the “slave master” who assumed that part of his ownership rights included the right to sexually abuse enslaved females.<sup>79</sup> Enslaved Africans were frequently torn from their families, starting of course with the theft of Africans from Africa and

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71. A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS*, at xxxii (1996).

72. *Id.* at 19; *see also* KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 21 (1956).

73. HIGGINBOTHAM, *supra* note 71, at 19; *see also* STAMPP, *supra* note 72 (explaining that Africans were initially indentured servants, although terms may have been more severe than white indentured servants.).

74. HIGGINBOTHAM, *supra* note 71, at 28–30; *see also* STAMPP, *supra* note 72, at 197 (Africans viewed as chattel).

75. MARABLE, *supra* note 3, at 68.

76. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

77. STAMPP, *supra* note 72, at 44; JOY DEGRUY LEARY, *POST TRAUMATIC SLAVE SYNDROME: AMERICA’S LEGACY OF ENDURING INJURY AND HEALING* 77 (2005).

78. STAMPP, *supra* note 72, at 25, 174, 178–91; LEARY, *supra* note 77, at 77–83.

79. LEARY, *supra* note 77, at 78–80.



continuing in the colonies and the United States as they formed family units.<sup>80</sup>

The abolition movement culminating in the Civil War and the Emancipation Proclamation lifted the bonds of slavery, eliminating legal physical bondage—the enslavement of Africans. However, the emancipation of Africans did not lift the badge of inferiority; it simply removed the shackles that visibly placed Africans in an unequal, inferior position as related to whites. The myth of white superiority remained, as blacks were, for the most part, landless and penniless.<sup>81</sup> With the exception of the short-lived Field Order 15 that General Sherman issued, which gave freed Africans “forty acres and a mule,”<sup>82</sup> freed Africans received no reparations for their captivity and the brutalization attendant to that captivity. The government, however, to emphasize the materiality of white superiority and black inferiority, provided reparations to former slaver owners for their lost property—the once enslaved Africans.<sup>83</sup>

After the Thirteenth Amendment abolished slavery and involuntary servitude “except as a punishment for crime whereof the party shall be duly convicted,”<sup>84</sup> the struggle to include enslaved Africans within the “democratic project”<sup>85</sup> continued. Indeed, Alexis de Tocqueville in his seminal work on American democracy foretold the difficulties that the United States would have in integrating blacks into the United States if slavery were abolished, suggesting that enslaved Africans in the United States would not be considered equal to whites.<sup>86</sup> The expectation that the freed Africans could be equal partners in forging a democratic society was met with the reality that whites in the South and North were unwilling to embrace this partnership. “[W]hite Southerners were still concerned about regaining control over blacks, while many Northerners were afraid blacks would overrun their communities.”<sup>87</sup> In response to this concern, Black Codes became law in the South.<sup>88</sup> These Codes restricted the movement of

80. *Id.* at 75–83.

81. JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM* 248 (8th ed. 2000) (describing how many former slaves were homeless).

82. ERIC FONER & OLIVIA MAHONEY, *AMERICA’S RECONSTRUCTION: PEOPLE AND POLITICS AFTER THE CIVIL WAR* 32 (1995).

83. See, e.g., Abraham Lincoln, *AL to Orville H. Browning*, in *LINCOLN ON RACE & SLAVERY* 218, 222 (Henry Louis Gates, Jr. ed., 2009).

84. U.S. CONST. amend. XIII, § 1.

85. MARABLE, *supra* note 3, at 68.

86. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 350, 366–67, 372 (1835).

87. LEARY, *supra* note 77, at 83.

88. *Id.* at 83–84; MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 28 (2010).

African descendants, including their right to own land, vote, and participate as equals in the courts; they also recreated a system of forced labor.<sup>89</sup> The Codes forced African descendants to live in a segregated society, and the Codes, along with the newly passed vagrancy laws, resulted in a disproportionate number of African descendants entering the penal system.<sup>90</sup> There was also racial segregation in the North.<sup>91</sup> After a few years, federal courts overturned these laws.<sup>92</sup> The Thirteenth Amendment, the Civil Rights Act of 1866, the Fourteenth Amendment (granting citizenship to the newly freed Africans who then officially became African Americans) and the Fifteenth Amendment held out the promise to African descendants of becoming equal partners in the U.S. democracy.

Reconstruction seemed to implement that promise, as in 1867, fifteen percent of the elected officials from the South were black.<sup>93</sup> However, it did not fulfill the promise of integrating African descendants in the United States into the fabric of the U.S. democracy.

In the South, Reconstruction laid the foundations for more democratic living by sweeping away all qualifications for voting and holding office and by establishing a system of universal free public education. In failing to provide adequate economic security for former slaves, Reconstruction left them no alternative but to submit to their old masters, a submission that made easier the efforts of Southern whites to overthrow Reconstruction and restore a system based on white supremacy.<sup>94</sup>

Actually, the emancipation of Africans did not end their bondage to whites who created a sharecropping system that chained Africans to the land.<sup>95</sup>

[Sharecropping] became a mechanism to chain Blacks to certain

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89. LEARY, *supra* note 77, at 83–84; ALEXANDER, *supra* note 88, at 28.

90. See FRANKLIN & MOSS, *supra* note 81, at 64–105, 290; ALEXANDER, *supra* note 88, at 30–35.

91. FRANKLIN & MOSS, *supra* note 81, at 447–48 (referring to segregation in educational institutions), LEARY, *supra* note 77, at 84–85 (explaining how some northern states passed laws that limited the number of blacks that could live in the state and denied them suffrage).

92. LEARY, *supra* note 77, at 84.

93. ALEXANDER, *supra* note 88, at 29. See generally FRANKLIN & MOSS, *supra* note 81, at 246–71.

94. FRANKLIN & MOSS, *supra* note 81, at 271. See also, ALEXANDER, *supra* note 88, at 30 (explaining that many of the Reconstruction Laws appear to be “largely symbolic” because of limitations on what was prohibited by these laws. Southern whites crafted laws that avoided direct conflict with the Reconstruction Amendments, and most blacks did not have the financial resources to enforce their civil rights).

95. WALTERS, *supra* note 3, at 91.

plantations under the guise of hiring them, extending them credit to work the fields with the promise of a wage at the end of their term, but making certain they were in debt to the plantation owners. This debt became a legal obligation, which had to be worked off before the sharecroppers were permitted to leave the employ of the farmers, plantation owners, mine owners, and so on. While in the employ of these individuals, they were often in old-styled slavery, treated as little more than chattel and brutalized to deliver productive work.<sup>96</sup>

This sharecropping system, chaining Africans and, after the passage of the Fourteenth Amendment to the U.S. Constitution, African Americans, to the land, lasted in some form until 1950,<sup>97</sup> and did not actually end until the 1960s Civil Rights Movement interceded.<sup>98</sup>

After the failure of Reconstruction to make good on the promise of inclusion of African descendants in the U.S. democracy, their inequality was further enforced by Jim Crow laws in the South and laws approving segregation in the North. In the South these laws disenfranchised blacks and mandated the separation of whites and blacks in virtually every sphere of life: education, transportation, and public accommodations including hotels, restaurants, barbershops, and theaters.<sup>99</sup> The Supreme Court upheld Jim Crow laws in *Plessy v. Ferguson*.<sup>100</sup> The draconian criminal law statutes, such as vagrancy laws, were reinstituted.<sup>101</sup> This led to the incarceration of many blacks and the creation of the convict lease system, whereby incarcerated blacks were leased to whites to perform labor—all protected by the exception in the Thirteenth Amendment, which allows slavery as punishment for a crime.<sup>102</sup> This segregated living was for the purpose of maintaining the inferior status of African descendants as recognized by Justice Harlan in his dissent in *Plessy v. Ferguson*.<sup>103</sup>

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96. *Id.*

97. *Id.* (recounting evidence of instances of bondage to 1950).

98. *Id.* at 92.

99. FRANKLIN & MOSS, *supra* note 81, at 290; *see also* ALEXANDER, *supra* note 88, at 35.

100. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

101. ALEXANDER, *supra* note 88, at 31.

102. *Id.*

103. *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting). Yet Justice Harlan, although articulating the view that the Constitution should not treat people differently based on color, also believed in black inferiority and white superiority. *Id.* at 559.

### III. INDICIA OF INEQUALITY

The process of establishing who would be included in “We the People” exposed the contradiction between Abraham Lincoln’s elegant description at Gettysburg of a nation “conceived in Liberty, and dedicated to the proposition that all men are created equal,” and James Baldwin’s imaginary first encounter when white men decided that “black men were not really men but cattle.”<sup>104</sup>

There are modern examples of black inequality that stem from the past instances of oppression. The persistence of the effects of the past creates structural racism, which serves as a barrier to substantive democracy. There were movements that resisted this *de jure* and *de facto* discrimination in an effort to achieve equality. There will continue to be modern movements that address the inequality, maintained by structural racism, that exists in today’s society.

#### *A. The Continuing Stigma of Inferiority*

Equality of value cannot exist for African descendants in the United States as long as the vestiges of slavery and Jim Crow continue to be prominent in the United States. The primary vestige remaining is the badge of inferiority worn by African descendants in the United States due to the myth of white superiority that is attached to whites.<sup>105</sup> African descendants’ perceived inferiority pervades every aspect of their life experiences.

Inferiority is one of the “Ten Precepts of American Slavery Jurisprudence,” which A. Leon Higginbotham developed to analyze how the government “put on hold” the promise of equality for Africans in the United States.<sup>106</sup> These precepts were legal constructs that defined the status of Africans and their descendants in the United States. The ten precepts are:

1. “Inferiority,”
2. “Property,”
3. “Powerlessness,”
4. “Racial ‘Purity,’”
5. “Manumission and Free Blacks,”
6. “Family,”
7. “Education and Culture,”

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104. HIGGINBOTHAM, *supra* note 71, at xxiii (citations omitted).

105. *Id.* at 7–17. Of course, Higginbotham is not the only scholar and activist that attests to the badge of inferiority as a continuing legacy of slavery. “But what happened in the past is indeed profoundly material, in part because organic components of the institution of slavery—the most persistent of them being the inferiority of Black people—poisoned Black communities long after the legal regime of slavery ended.” WALTERS, *supra* note 3, at 4.

106. HIGGINBOTHAM, *supra* note 71, at xxv.

8. "Religion,"

9. "Liberty—Resistance," and

10. "By Any Means Possible."<sup>107</sup>

With the exception of the precept of inferiority, they "defined or enforced certain tangible rights of the slave master or obligations of the slaves."<sup>108</sup>

Higginbotham opined that all the precepts ended with the Civil War and the Emancipation Proclamation, except the precept of inferiority.<sup>109</sup>

Higginbotham "define[s] the precept of inferiority as: presume, protect, and defend the ideal of superiority of whites and the inferiority of blacks."<sup>110</sup>

The precept is pervasive. It was born during the enslavement of Africans and continues to this day in virtually every aspect of living. The precept of inferiority holds on tenaciously because it was created by the state of mind that blacks were inferior; this belief also justified slavery, Jim Crow, and their continuing vestiges.<sup>111</sup>

The myth of African descendants' inferiority has gone from a conscious perspective to being the unconscious motivation for the differential treatment of African descendants in the United States that continues to this day.<sup>112</sup> For example, the disparate representation of blacks in certain jobs may be attributed to unconscious racism or, what some scholars refer to as implicit bias.<sup>113</sup> A significant percentage of whites continue to view blacks as inferior to whites although only twenty-five percent say so in polls.<sup>114</sup> The badge of inferiority and the maintenance of the myth of white superiority is the underlying reason for the unequal values placed on whites and blacks in the United States, with blacks being significantly undervalued as compared to whites or conversely that whites have been overvalued as compared to blacks.

107. *Id.* at 195–96.

108. *Id.* at 9.

109. *Id.* at 10.

110. *Id.* at xxv (emphasis omitted).

111. *Id.* at 9.

112. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1986) (Lawrence's seminal piece on unconscious racism describes how unconscious racism developed from conscious racism and is responsible for the continuation of disparate treatment of blacks.).

113. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004). See also Lawrence, *supra* note 112, at 343, 368–73 (1986); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283 (2005).

114. WALTERS, *supra* note 3, at 85.

Efforts to end this inequality of value began in the abolition movement and continued in the Civil War, Reconstruction, and the long struggle to end Jim Crow, which culminated in the Civil Rights Movement. These efforts continue in the work of many individuals and organizations that work to expose and dismantle structural racism and end the disparate treatment of African descendants in virtually every aspect of life, e.g., criminal punishments, health care, jobs, income, education, and community structures.

### *B. The Persistence of the Badge of Inferiority*

Society acts upon and perpetuates the idea that blacks are inferior. The criminal justice system is used to continue to oppress blacks and there continues to be discriminatory treatment in other areas. This is a form of structural racism that must be removed in order to obtain a true democracy in the United States.

The law treated African descendants as second-class citizens until 1965 after the passage of the Civil Rights Act and the Voting Rights Act.<sup>115</sup> There continues to be legal support for the inequality of African descendants, however, in the criminal punishment system. The Federal Sentencing Guidelines for crack cocaine and powder cocaine initially had a 100-to-1 ratio, meaning that a person caught and prosecuted for possession of powder cocaine would have to possess 100 times more powder cocaine than crack cocaine to get the same sentence.<sup>116</sup> In 2010, Congress reduced that ratio to 18 to 1, continuing a built-in bias against those convicted of crack cocaine possession.<sup>117</sup> The data consistently indicated that those charged with powder-cocaine-related crimes were disproportionately white and those charged with crack-cocaine-related crimes were disproportionately black.<sup>118</sup> The evidence presented to the United States Sentencing Commission (USSC) and subsequently provided to Congress indicated that there was no substantial difference between these two forms of cocaine, that the initial rationale for the difference did not exist, and the USSC recommended to

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115. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (July 2, 1964); Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965).

116. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. §§ 841, 841 (b)(1)(A) (1994)).

117. *United States v. Clary*, 846 F. Supp. 768, 770 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8<sup>th</sup> Cir. 1994), *cert. denied*, 513 U.S. 1182 (1995); *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991); Jason Gillmer, Note, *United States v. Clary: Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497 (1995) (discussing racial disparities that attend to the crack cocaine and powder cocaine sentencing guidelines and the analysis of Judge Cahill in finding that the guidelines disproportionately impact blacks).

118. Gillmer, *supra* note 117.

Congress that the sentences be equalized.<sup>119</sup> The 100-to-1, and now, 18-to-1 ratio negatively impacts the black community in a number of ways.

This sentencing scheme is a legalization of the precept of inferiority. Since the government charges significantly more African descendants than whites with crack cocaine violations and significantly more whites than African descendants with powder cocaine offenses, the outcome is a sentencing differential for basically the same drug, another form of devaluing the black community. Although the government convicts both the white offender and the black offender of a criminal act, the government treats the black defendant with a crack cocaine offense more harshly than the white defendant with a powder cocaine offense.<sup>120</sup> This is reminiscent of the criminal punishment system during slavery where whites received no punishment or significantly less punishment than Africans and their descendants for the same offense.<sup>121</sup> This disparity supports the myth that black people are more criminal and irresponsible than whites, thus encouraging the continuation of conscious and unconscious racism in the treatment of blacks.<sup>122</sup>

Although many of the laws that allowed for unequal treatment of black people have been abolished, with at least one notable exception discussed above, the disparities between blacks and whites continue, feeding the view that the problem lies with the people and not with the system.<sup>123</sup> In addition to the criminal punishment system where the black imprisonment rate per 100,000 in 2005 was 2,290 and the white imprisonment rate per 100,000 was

119. Toni Locy, *Reno Assails Parity in Drug Crime Penalties: Punishment Depends on Form of Cocaine*, WASH. POST, Apr. 16, 1995, at A17; see also Ricardo H. Hinojosa, Acting Chair, U.S. Sentencing Comm'n, Statement Before the Senate Comm. on the Judiciary, Subcomm. on Crime & Drugs (Apr. 29, 2009), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Testimony/20090428\\_Hinojosa\\_Testimony.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Testimony/20090428_Hinojosa_Testimony.pdf). Congress passed the significantly higher penalties for crack cocaine because of its view that crack cocaine was more dangerous than powder cocaine. *Id.* at 2. The statement also notes that the Sentencing Commission concluded that "the disparity between the treatment of crack cocaine and powder cocaine offenses 'fails to meet the sentencing objectives set forth by Congress.'" *Id.* at 11.

120. See *supra* notes 115–18 and accompanying text.

121. See HIGGINBOTHAM, *supra* note 71, at 128 (discussing the "legal order of the colonial and antebellum periods, with its patent racism and unequal justice"). See generally A. LEON HIGGINBOTHAM JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978) [hereinafter *IN THE MATTER OF COLOR*] (discussing the prevalence of racism in the colonial legal system in the United States).

122. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 13–18 (1998) (discussing prosecutorial decision making and the unconscious bias that is frequently reflected in decisions to charge and how to charge); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 *N.Y.U. L. REV.* 803, 861–63 (2004) (discussing the criminalization of blackness).

123. See MARABLE, *supra* note 3, at 13–14. See generally AMY L. WAX, *RACE, WRONGS, AND REMEDIES: GROUP JUSTICE IN THE 21ST CENTURY* (2009) (discussing the harsher realities blacks face in comparison to their white counterparts in addition to other race-related problems in the United States).

412 (a 5.6:1 black/white ratio),<sup>124</sup> significant disparities exist in employment and income,<sup>125</sup> and infant mortality.<sup>126</sup> Additional disparities in the treatment of black and white communities are common knowledge in black communities, at least. Several studies found that insurance companies charge higher rates to black homes that are identical to white homes.<sup>127</sup> Similar disparities were found in mortgages.<sup>128</sup> These disparities, despite the elimination of laws that created or supported them, continue because of what has come to be known as “structural racism.”

The fundamental problem for the viability of American democracy . . . is that of “structural racism”: whether the majority of American people, along with their leaders, political organizations, and institutions, have the capacity and vision to dismantle the complex institutional barriers that continue to severely curtail the democratic rights and socioeconomic opportunities of millions of their fellow citizens.<sup>129</sup>

Structural racism is a continuation of racial barriers that were once required or allowed by the law, even when the law has been dismantled, because of the myth of white superiority and black inferiority or because of the validation of the methods of assessment on whites. Examples include discrimination in sentencing, once allowed by law,<sup>130</sup> and now seen in the Sentencing Guidelines; the discrimination found in the health care

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124. *National Data for Corrections Population*, SENTENCING PROJECT, <http://www.sentencingproject.org/map/statedata.cfm?abbrev=NA&mapdata=true> (last visited Mar. 5, 2010).

125. THE STATE OF BLACK AMERICA 2009: MESSAGE TO THE PRESIDENT 26–27 (Stephanie J. Jones et al. eds., 2009) (Median income for blacks was \$33,916 and for whites was \$52,115. The unemployment rate for blacks in 2008 was 10.1% and for whites, 5.2%).

126. MARABLE, *supra* note 3, at 4 (indicating that the black infant mortality rate in 1995 was higher than the infant mortality rate in Taiwan, Cuba, Portugal, Chile, or Bulgaria). The average infant mortality rate for whites in the sixty largest cities between 1995 and 1998 was 6.4 deaths per 1,000 live births; blacks for that same period had an infant mortality rate of 13.9 deaths per 1,000 live births. U.S. Dep’t of Health & Human Servs., Ctr. for Disease Control & Prevention, *Racial and Ethnic Disparities in Infant Mortality Rates—60 Largest U.S. Cities, 1995–1998*, 51 MORBIDITY & MORTALITY WKLY REP. 321, 330 (2002), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5115a4.htm>. In 2006 the white infant mortality rate per 1,000 live births was 5.6 compared to 13.4 for blacks. T.J. Mathews & Marian F. MacDorman, *Infant Mortality Statistics From the 2006 Period Linked Birth/Infant Death Data Set*, NAT’L VITAL STAT. REP., Apr. 2010, at 17 tbl.2, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58\\_17.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_17.pdf). Blacks had 2.4 times the infant mortality rate of whites and were four times more likely to die as a result of low birth weight as compared to whites. *Id.*

127. MARABLE, *supra* note 3, at 5.

128. SHAPIRO, *supra* note 39, at 13, 103–25.

129. MARABLE, *supra* note 3, at 23.

130. See generally IN THE MATTER OF COLOR, *supra* note 121 (chronicling the disparate treatment of blacks in colonial times).



system;<sup>131</sup> and the determination of unemployability based on signals that the applicant is of African descent.<sup>132</sup> These are modern examples of badges of inferiority that maintain the inequality of blacks in the United States and tarnish the claim that the United States is a true democracy.<sup>133</sup> African descendants and their allies have not accepted the continuing oppression of structural racism. Much like the almost 250-year battle to remove the bonds of slavery,<sup>134</sup> there has been significant resistance to the imposition of unequal status on African descendants.

### *C. Resistance to the Denials of Equal Status*

This resistance to oppression and its consequences is a continuing demand on the part of African descendants to be equal participants in the United States “democracy.” From after Reconstruction (approximately 1877) to 1940, black people lived in an age of terror, particularly fearful of the lawless lynch mobs often sanctioned by the law.<sup>135</sup> Lynching was a frequent occurrence during that period and continued to be reported until 1965.<sup>136</sup> Ida B. Wells Barnett was prominent in the campaign to expose and end these brutal murders of black people and reported graphically on lynchings that took place throughout the South.<sup>137</sup> Marable reports that in a forty-five-year period from 1882 to 1927, approximately 3,515 African descendants were lynched, 95% of them in the South.<sup>138</sup> African descendants attempted to use the “democratic” structures of the government to protect themselves from this reign of terror. The black community and its supporters unsuccessfully reached out to Congress on a number of occasions to pass anti-lynching legislation.<sup>139</sup>

There are numerous examples of African descendants organizing to

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131. WANG, *supra* note 34, at 115–34. *See generally* ROBINSON, *supra* note 6 (describing the ways in which black health has been impacted by race discrimination both in society and in the health care system).

132. Bertrand & Mullainathan, *supra* note 113 at 992.

133. *See* HIGGINBOTHAM, *supra* note 71, at 7–17.

134. *See, e.g.,* HERBERT APTHEKER, AMERICAN NEGRO SLAVE REVOLTS (Int’l Publ’rs, Inc. 1974) (1943) (describing enslaved Africans’ rebellions against slavery between 1710 and 1860).

135. WALTERS, *supra* note 3, at 91.

136. *Id.* at 94.

137. *See generally id.* at 93–94; IDA B. WELLS-BARNETT, SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES (Project Gutenberg E-Book 2005) (1894).

138. MARABLE, *supra* note 3, at 41.

139. *See, e.g.,* Anti-lynching Bill, 56 Cong., 2 CONG. REC. 151 (1900); 2 S. REP. NO. 67-7951, at 33–34 (1921); 3 S. Res. 39, 109th Cong. (2005) (senate resolution apologizing for failure to enact an anti-lynching bill).

resist oppression and obtain equality. For example, the National Bar Association worked to end the exclusion of blacks from judgeships in the United States.<sup>140</sup> In 1919 in Elaine, Arkansas, African descendant sharecroppers attempted to organize a union to obtain fair prices for their produce.<sup>141</sup> In Tulsa, Oklahoma, African descendant men went to the courthouse jail to protect a young man from lynching.<sup>142</sup> These attempts to protect their economic and physical interests were met with violent reactions from whites, including some in law enforcement, resulting in the massacre of African descendants.<sup>143</sup> When the Tulsa National Guard deployed, it failed to protect black people; rather, it seemed to act in collusion with white people.<sup>144</sup>

The most noted form of resistance was the use of the courts to obtain equal rights. The NAACP Legal Defense Fund led this effort, culminating in *Brown v. Board of Education*, which overturned the separate-but-equal holding in *Plessy v. Ferguson*.<sup>145</sup> This legal “victory” and the explosion of the Civil Rights Movement manifested a national and an internationally prominent resistance movement. Ronald Walters opines that the Civil Rights Movement “broke the back of old-styled slavery.”<sup>146</sup>

Many scholars attribute the beginning of the Civil Rights Movement to *Brown*, although the NAACP had pursued a litigation strategy to end segregation, particularly in education, since its founding in 1909.<sup>147</sup> The Civil Rights Movement challenged the Jim Crow laws and segregation practices that demeaned the humanity of African descendants—subjecting them to conditions that impaired their quality of life. The Civil Rights Movement, which incorporated litigation, mass demonstrations, and civil

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140. ELMER C. JACKSON, JR. & JACOB U. GORDON, *A SEARCH FOR EQUAL JUSTICE BY AFRICAN-AMERICAN LAWYERS: A HISTORY OF THE NATIONAL BAR ASSOCIATION* 26–27 (1999) (quoting an excerpt from a speech by Judge A. Leon Higginbotham delivered at the Summit of Black Lawyers in America in 1983 in which he stated: “In terms of access to the federal judiciary, there was only one steady voice speaking with clarity, tenacity and often with muted anger. It was the National Bar Association.”).

141. GRIF STOCKLEY, *RULED BY RACE: BLACK/WHITE RELATIONS IN ARKANSAS FROM SLAVERY TO THE PRESENT* 159–61 (2009).

142. ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION* 26, 29 (2002).

143. STOCKLEY, *supra* note 141, at 163–65 (describing a massacre of blacks in Elaine, Arkansas); Scott Ellsworth, *The Tulsa Race Riot*, in *TULSA RACE RIOT: A REPORT BY THE OKLAHOMA COMMISSION TO STUDY THE TULSA RACE RIOT OF 1921* 37, 66–76 (2001).

144. Ellsworth, *supra* note 143, at 66–67.

145. See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), *overruling* *Plessy v. Ferguson*, 163 U.S. 537 (1896).

146. WALTERS, *supra* note 3, at 92.

147. See STEWART BURNS, *SOCIAL MOVEMENTS OF THE 1960S: SEARCHING FOR DEMOCRACY* 3 (1990).

disobedience, was primarily focused in the South, but there were demonstrations to end segregation and employment discrimination in the North as well.<sup>148</sup>

Equality was not achieved after the passage of the Civil Rights and Voting Rights Acts. The legal dockets of organizations such as the NAACP Legal Defense Fund<sup>149</sup> and the Lawyers' Committee for Civil Rights Under Law<sup>150</sup> will attest to the continuation of racism—now most frequently, structural racism. The continuing evidence of inequality depicted, *inter alia*, in the National Urban Leagues Equality Index, also attests to it. Grassroots organizing, “building democracy from below,”<sup>151</sup> has expanded in many communities to join with, supplement or replace litigation as a strategy to obtain equal rights. For example, after police murdered black laborer Timothy Dewayne Thomas, grassroots organizing grew to successfully implement a national boycott of Cincinnati, leading to a resolution of the demands of a number of grassroots organizations that had worked together in coalition.<sup>152</sup>

#### IV. REPARATIONS AS THE ESSENTIAL INGREDIENT FOR EQUALITY AND DEMOCRACY

Reparations are the essential ingredient for equality and true democracy, as reparations will remedy the lingering effects of slavery and Jim Crow. The resistance movement is making some progress in addressing the equality gap. Yet the movement is subject to rules of law and processes that prevent the elimination of the equality gaps. Constitutional democracy and representative democracy do not act to close the gaps. These forms of democracy are forward thinking; however, reform must start in the present. The claim of equal opportunity does not produce equality at all since whites,

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148. *Id.* at 3–21 (describing the protest movement in the South); see generally D'ARMY BAILEY & ROGER EASSON, *THE EDUCATION OF A BLACK RADICAL: A SOUTHERN CIVIL RIGHTS ACTIVIST'S JOURNEY 1959–1964* (2009) (Bailey describes his development into a civil rights activist, beginning with his involvement in and leadership of black students' resistance to Jim Crow in Louisiana. Bailey also describes the problem of segregation and racial discrimination in the North, particularly in Massachusetts, and his leadership in developing demonstrations to challenge it.).

149. *Program Search*, NAACP LDF, <http://naacpldf.org/program-search> (last visited Mar. 5, 2011) (documenting current cases in education, political participation and economic justice where the rights of blacks are adversely affected); see also *Significant Cases*, NAACP LDF, <http://naacpldf.org/cases/significant> (last visited Apr. 26, 2011) (documenting significant recent cases that attempted to obtain equality for blacks).

150. LAW. COMMITTEE FOR C.R. UNDER L., <http://www.lawyerscommittee.org> (last visited Mar. 5, 2011) (discussing current cases in education and other civil rights claims).

151. MARABLE, *supra* note 3, at 195.

152. *Id.* at 195–205; see also *id.* at 206–11 (describing grassroots organizing efforts in a number of cities).

particularly white males, have at least a 300-year advantage.<sup>153</sup> Indeed, the slow pace of positive response from the government to the resistance movement has exacerbated the problem of inequality. There are a number of disparities that have been identified but not addressed, and a number that have only been addressed minimally. There continues to be significant disparities in sentencing, including the disparity between sentencing for crack cocaine and powder cocaine.<sup>154</sup> There also continues to be a disparity in many areas of life, such as employment, income and wealth, and health care.<sup>155</sup> These are disparities, among others, that are the continuing consequences of slavery and Jim Crow and persist due to the enduring precept of inferiority.<sup>156</sup> Reparations are the way to close these gaps. Distinctions in treatment based on race, many which have continued despite the dismantling of policies that supported a distinction between whites and blacks, result in less-favorable treatment of African descendants.

#### *A. The History of Reparations*

Demands for reparations began during slavery as demands to end the race-based distinctions between blacks and whites and the disabilities legally placed on blacks. The first recorded demand for reparations came during slavery from David Walker, a free African man.<sup>157</sup> In his book *David Walker's Appeal*, Mr. Walker demanded that enslavers, their facilitators, and their apologists end African enslavement and provide some recompense for enslavement.<sup>158</sup> Mr. Walker urged that the white man must end slavery and lift the enslaved from their inferior condition that was born of slavery.<sup>159</sup> "The Americans may say or do as they please, but they have to raise us from the condition of brutes to that of respectable men, and to make a national

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153. The first enslaved Africans arrived in the colonies in 1619 and were presumed inferior by whites and their legal processes from the Africans' arrival onward; however, it was not until 1662 that this presumption became enshrined in the law. HIGGINBOTHAM, *supra* note 71, at 15. The Civil Rights Acts, which ended de jure discrimination, became law in 1964 and 1965. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965).

154. *See supra* Part III.B.

155. *See supra* Part III.B.

156. *Supra* Part III.A. (This precept endures because of the internalization of the myth of white superiority and black inferiority. Policies and practices that continue to make a distinction between similarly situated African descendants and whites can only be explained by the continuation of this precept that was so necessary to the peculiar institution of slavery and Jim Crow. ).

157. DAVID WALKER, *DAVID WALKER'S APPEAL: TO THE COLOURED CITIZENS OF THE WORLD, BUT IN PARTICULAR, AND VERY EXPRESSLY, TO THOSE OF THE UNITED STATES OF AMERICA* 90 (Black Classic Press 1993) (1830).

158. *Id.*

159. *Id.*

acknowledgement to us for the wrongs they have inflicted on us.”<sup>160</sup>

Since then, demands for reparations have come in a number of forms. Proponents have sought the passage of legislation granting a pension to “ex-slaves” and their descendants.<sup>161</sup> More recently, proponents have urged the passage of H.R. 40, a reparations study bill introduced in every legislative session since 1989.<sup>162</sup> There is also support for “Back to Africa” movements and other repatriation demands.<sup>163</sup> Other supporters have sought the establishment of funds by the government to provide for education, community development, and other supports for African descendants in the United States, sometimes defined specifically as descendants of enslaved Africans.<sup>164</sup> Another group of proponents has used the courts and sought funds from the private sector for its role in the enslavement of African peoples.<sup>165</sup>

As the reparations movement evolved, the demand has focused on money for unpaid labor and the development of government-funded projects all for the purpose of closing the gaps and ending the disparities that took African descendants from the status of legally demeaned and humiliated non-citizens to legally demeaned and humiliated second-class citizens to illegally demeaned second-class citizens. Reparations are thus seen as a method to equalize blacks and whites and usher in true democracy.<sup>166</sup> This equalization is not to eliminate any naturally acquired benefits or detriments born of hard work or illicit purpose. Rather, the equalization is to remedy the disparities created by slavery and Jim Crow and continued by structural

160. *Id.*

161. See generally MARY FRANCES BERRY, *MY FACE IS BLACK IS TRUE: CALLIE HOUSE AND THE STRUGGLE FOR EX-SLAVE REPARATIONS* (2005) (discussing the Ex-Slave Mutual Relief, Bounty and Pension Association and Callie House’s leadership).

162. John Conyers & Jo Ann Watson, *Reparations: An Idea Whose Time Has Come, in SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS* 16 (Raymond A. Winbush ed., 2003).

163. Robert Johnson, Jr., *Repatriation as Reparations for Slavery and Jim Crow, in REDRESS, supra* note 6, at 402, 405.

164. See, e.g., BROOKS, *supra* note 6, at 161–63 (suggesting an atonement trust fund for education and business development).

165. See *In re African-American Slave Descendants Litigation*, 304 F. Supp. 2d 1027 (N.D. Ill. 2004), *aff’d in part*, 471 F.3d 754 (7<sup>th</sup> Cir. 2006) (stating that descendants of enslaved Africans filed lawsuits against corporations with predecessor entities that profited from the enslavement of the descendants ancestors); *Alexander v. Oklahoma*, No. 03-C-E, 2004 U.S. Dist. LEXIS 5131 (D. Okla. March 19, 2004), *aff’d*, 382 F.3d 1206 (10<sup>th</sup> Cir. 2004); Aiyetoro & Davis, *supra* note 6, at 712; *National Black Economic Development Conference (1969): The Black Manifesto, in REDRESS, supra* note 6, at 593, 593–99 (James Forman, speaking on behalf of the Black Economic Development Conference, interrupted the services at Riverside Church in New York on May 4, 1969 and read the Black Manifesto, which demanded reparations from churches and synagogues.).

166. See, e.g., MARABLE, *supra* note 3, at 223–53 (making the “case for black reparations”); WALTERS, *supra* note 3, at 162–88 (discussing reparations as effective in achieving equality).

racism, eliminating the benefits accrued by whites through forced non-competitiveness<sup>167</sup> and sustained by the consciously created and unconsciously maintained precept of inferiority.<sup>168</sup>

The reparations movement has had a continuing presence in the United States since *David Walker's Appeal*. Freed African slaves, supported by Sojourner Truth and Frederick Douglass, sought land and money as reparations for enslavement; General Sherman, on behalf of the federal government, promised land to formerly enslaved Africans via Field Order 15, as did Congress through the Act establishing the Freedmen's Bureau.<sup>169</sup> Callie House and Isaiah Dickerson formed the Ex-Slave Mutual Relief, Bounty and Pension Association in the 1890s calling on the federal government to pass legislation to create pensions for ex-slaves and their descendants.<sup>170</sup> In 1915, a lawsuit organized by the Association unsuccessfully sought the distribution of the "southern cotton tax" collected by the federal government to ex-slaves and their descendants.<sup>171</sup> In 1955, Queen Mother Audley Moore began a campaign for reparations by writing a pamphlet titled *Why Reparations? Money for Negroes*.<sup>172</sup>

The modern day reparations movement began in 1987 with the founding of the National Coalition of Blacks for Reparations in America (N'COBRA), whose demands included financial payments to the black community as well as program development.<sup>173</sup> The formation of N'COBRA was followed by the publication of *The Debt* by Randall Robinson, which articulates that the U.S. government and private companies owe a debt to African descendants and supports a reparations model that requires all responsible parties that have unjustly benefited from slavery to pay the debt.<sup>174</sup> There have been several lawsuits demanding reparations in the form of money. Deadria Farmer-Paellman filed a lawsuit against corporations for unjust enrichment based on the use of enslaved Africans.<sup>175</sup> The Reparations Coordinating Committee filed a lawsuit demanding

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167. WANG, *supra* note 34.

168. HIGGINBOTHAM, *supra* note 71, at 3–10.

169. See MARABLE, *supra* note 3, at 225–27; Aiyetoro & Davis, *supra* 6, at 707.

170. BERRY, *supra* note 161, at 50–51.

171. *Johnson v. McAdoo*, 45 App. D.C. 440 (1916).

172. See Aiyetoro & Davis, *supra* note 6, at 707.

173. *Id.* at 728; NATIONAL COALITION OF BLACKS FOR REPARATIONS IN AMERICA, REPARATIONS AND THE NATIONAL COALITION OF BLACKS FOR REPARATIONS IN AMERICA (N'COBRA): AN INFORMATION SHEET 2 (2002), available at <http://www.ncobra.org> (last visited Mar. 4, 2011) [hereinafter N'COBRA].

174. ROBINSON, *supra* note 6, at 244–47.

175. *In re African-American Slave Descendants Litigation*, 304 F. Supp. 2d 1027, 1033 (N.D. Ill. 2004).

financial reparations for the survivors and descendants of the destruction of the Greenwood District in Tulsa, Oklahoma (known as “Black Wall Street”) in 1921 by a white mob.<sup>176</sup>

N’COBRA and others have called on federal and state governments to develop programs that would address the inequality that flows from slavery and Jim Crow. Programmatic demands such as community development, ending the discrimination in health care, development of education funds, creation of monuments and literature, and the elimination of disparities “that maintain dual systems in the major areas of life including the punishment system, health, education and the financial/economic system.”<sup>177</sup> Indeed, reparations paid to African descendants for the massacre in Rosewood, Florida in 1923 included the development of a scholarship fund for “minorities” and the creation of a fund for Florida A&M to continue research of this historic event.<sup>178</sup>

### *B. The Role of Reparations in Creating Equality*

Providing reparations to African descendants is not an attempt to make them *equal* to whites in financial status or other resources independent of the harm caused to African descendants because of slavery, Jim Crow, and the continuing consequences. The “equality” which must exist is in the stature of the groups. The benefits whites received from slavery and its brutality, Jim Crow, and the continuing worse treatment afforded blacks in every major dimension of life including employment, health care, and the criminal punishment system, must be eliminated.

Monetary and other material reparations, often called collective reparations,<sup>179</sup> are given as a repair for the damage done to the group. Monetary reparations, such as those given in Florida to the descendants of blacks whose community of Rosewood was destroyed by a white mob,<sup>180</sup> are related to the price assessed in symbolic terms for African descendants’ loss as a result of government action or inaction. Reparations are not an attempt to “equalize” African descendants’ resources with whites but to estimate the value lost and restore that value or an approximation of it to the injured group. Examples of reparations that would repair the injury and remove the detriment caused by government action or inaction, including the

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176. *Alexander v. Oklahoma*, No. 03-C-133- E, 2004 U.S. Dist. LEXIS 5131, at \*1–5 (D. Okla. Mar. 19, 2004).

177. N’COBRA, *supra* note 173.

178. Kenneth B. Nunn, *Rosewood*, in *WHEN SORRY ISN’T ENOUGH*, *supra* note 6, at 435–36.

179. Lisa Magarrell, *Reparative Justice Series: Reparations in Theory and Practice*, INT’L CTR. FOR TRANSN’L JUSTICE 5 (2010), available at <http://www.ictj.org/static/Reparations/0710.Reparations.pdf>.

180. Nunn, *supra* note 178.

creation and continuation of the myth of white superiority and black inferiority, include:

A symbolic monetary grant of some significance, much like that given to Japanese-Americans interned during WWII, to every African descendant who is a descendant of an enslaved African, suffered through Jim Crow, or is a descendant of an African descendant who suffered through Jim Crow.

The development of a trust fund or trust funds to provide funds to African descendants for:

- Education to a terminal degree such as a Ph.D., M.D., or J.D.
- Community development to upgrade housing and facilities in predominantly African-descendant communities that are suffering from blight.
- Grants for down payments on homes within financial capabilities of particular African descendants.
- The standardization and validation of treatment modalities on African descendants for ailments such as heart disease and HIV/AIDS.
- A provision of health care to uninsured African descendants and guarantees of funding for treatment not covered by health insurance for all African descendants.
- The required training of medical professionals, law enforcement personnel, employers, and other state-certified providers in unconscious racism and ways to combat such racism.
- The passage of Racial Justice Acts in states and the federal government such as that passed recently in North Carolina,<sup>181</sup> which requires a finding that there is no disparity between African descendants and whites in the imposition of a punishment. If a disparity is found, these laws require a race-neutral explanation for that disparity before the punishment can be imposed.
- Put an end to felony disfranchisement laws in states where the disparity in sentencing cannot be explained absent race.
- The release of political prisoners jailed since the 1970s and 1980s for involvement in radical movements for black liberation.
- Further research on the continuing consequences of slavery and Jim Crow and development of remedies to address the findings.
- The development of museums depicting slavery and Jim Crow and its continuing consequences, as well as the

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181. N.C. GEN. STAT. §§ 15A-2010–12 (2010).



- contributions of African descendants to society.
- The revision of books provided for public education to include the perspective of African descendants in the telling of the history of slavery and Jim Crow and its continuing consequences.

## V. CONCLUSION

Government-created disabilities maintain African descendants' subordination to whites in the United States, maintaining the myth of white superiority and black inferiority. These government-created disabilities began in slavery, continued through Jim Crow, and have continuing consequences today. The myth of black inferiority lives on in structural racism that one can detect in various life experiences of African descendants—for example, the continuing discrimination in the health care and the criminal punishment systems, despite the elimination of laws that expressly allow for discrimination between blacks and whites. The continuation of these disparities results in an inequality that prevents African descendants in the United States from being truly included in the project of democracy. For African descendants to be included—given equal status in the U.S. democracy—reparations must be provided.

Reparations would allow African peoples, who so desire, to be full participants in the democratic process, not constrained to participate in a government where the great benefits are concentrated in one group. Democracy must ensure equality of treatment in order to include the voices of all people. If democracy is to include the voices of all people and follow the will of the people, the inequalities born of state-sanctioned oppression must be remedied.

If the United States wants to make true the claim that it is a democracy, it has the obligation to repair the damage done to African descendants that resulted in their unequal status in society. The United States cannot allow majoritarian rule, the imposition of the will of the majority on the minority, to continue to serve as the understanding of democracy when the minority is not simply a number (fewer African descendants than whites), but reflective of a lesser quality of life created by the acts and omissions of the government. Reparations to repair the injury that continues and that is born of the myth of inferiority that was the foundation for legal disabilities are essential if the promise of democracy is to be fulfilled.