

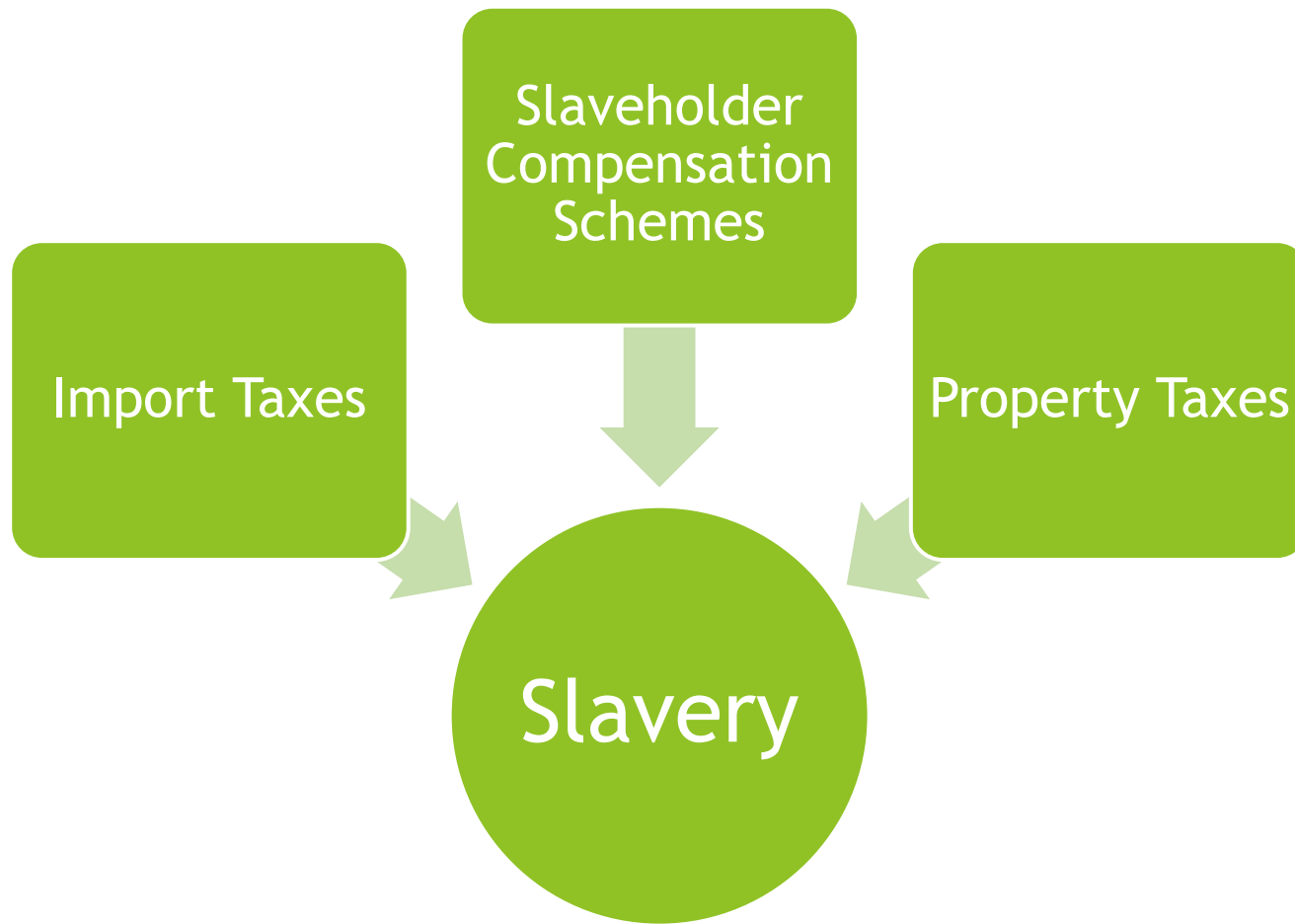
Reparations in Historical Perspective

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Taxation and Slavery in Colonial America



Present-Day Movement for Reparations

- ▶ Debate over reparations was rekindled by the Black Lives Matter movement and Ta-Nehisi Coates's 2014 essay "The Case for Reparations."
- ▶ Reparations have garnered attention on the campaign trail from US House, Senate, and presidential candidates.
- ▶ In 2019, the US House of Representatives held a hearing on a bill to create a commission to study reparations, and in 2021 the bill made it out of committee but died on the House floor.
- ▶ Movement at the state and local level has made more headway:
 - ▶ Evanston, IL: restorative housing program (2019)
 - ▶ California: task force to study reparations (2020)
 - ▶ Asheville, NC: reparations program aimed at increasing homeownership and business and career opportunities (2020)
 - ▶ Providence, RI: \$10 million reparations program (2022)

Importance of Design

- ▶ Evanston rejected calls for cash payments and chose to provide housing vouchers out of its (mis)understanding of the tax consequences.
- ▶ Evanston funded the vouchers out of revenue from a newly enacted cannabis tax, which has provided much less revenue than anticipated.
 - ▶ Expected \$500K-\$750K of revenue per year.
 - ▶ To date, have only provided \$400K of vouchers to 16 individuals (among hundreds of applicants and with reports of some having died while on the waiting list for vouchers).
- ▶ Nearly three years after its creation, Asheville is still debating the precise form its reparations program will take.
- ▶ Providence's program is mired in controversy because it was funded with federal dollars for COVID-19 recovery efforts and had to be race-neutral in its design.
 - ▶ Black and Native American city residents automatically qualify.
 - ▶ Separate income criteria also exist that could include about half of the city's White residents too.

Limitations

- ▶ When designing these programs, governments are not free to adopt whatever program happens to be best suited to achieving their stated goals.
- ▶ Rather, they are constrained by the US Supreme Court's reactionary "colorblind" interpretations of the equal protection guarantee under the Fifth and Fourteenth Amendments to the US Constitution.
- ▶ By applying strict scrutiny to racial classifications and requiring those classifications to be narrowly tailored to achieve compelling government interests, the Supreme Court has effectively limited the universe of workable reparations proposals. See 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).
- ▶ The limits only become more confining after their uncertain contours are factored in, because designers of reparations programs may eschew constitutionally questionable options to diminish the possibility of a successful legal challenge.
- ▶ And with much of the analysis rooted in the Supreme Court's treatment of affirmative action, the pending cases against Harvard and UNC portend even tighter constitutional constraints on reparations programs in a matter of months.

Contrast: Colonial Tax Imagination Unleashed

- ▶ South Carolina engaged in a high degree of experimentation with funding slaveholder compensation schemes before settling on its preferred approach
 - ▶ Out of general colonial revenues
 - ▶ A tax on local slaveholders
 - ▶ A tax on county property holders (i.e., land and enslaved persons)
 - ▶ The colony-wide property taxes through a tightly controlled, centralized vetting process.
- ▶ Pennsylvania created a closed loop, dedicating the revenue from taxes on the importation of enslaved persons to funding slaveholder compensation.
- ▶ South Carolina dedicated the revenue from tax on the importation of enslaved persons to paying bounties for White settlers as a means of rebalancing its population with an eye toward controlling its enslaved Black majority.
- ▶ New York used its import tax rate structure to encourage local participation in the slave trade and to shape slaveholder preferences.
- ▶ New York and South Carolina ignored royal instructions regarding the structure of import taxes on enslaved persons to allow them to profit from the slave trade while using the power of taxation to shape the racial composition of their populations.

Taking a Lesson From History: Reshaping the Supreme Court

- ▶ While making the case for reparations, proponents should consider taking a page from the conservative movement that worked for decades not only to make the case against abortion but also to seed the federal courts with judges who shared their views, culminating in the 2022 US Supreme Court decision overturning *Roe v. Wade*.
- ▶ Reparations proponents could similarly work to transform the federal courts through the appointment of judges who are open to readings of the Equal Protection Clause that are in keeping with the roots of the Reconstruction Amendments in the abolition of slavery and protection of the rights of the formerly enslaved.
- ▶ If successful, these efforts would truly permit those fashioning reparations programs to unleash their legal imaginations in the way that colonial legislators did when laying the legal foundations for the systems of racial slavery and racial discrimination that underpin reparations programs.

A 3D white figure stands in a thinking pose, with its hand on its chin, looking at a large, vibrant red question mark. The scene is set against a white background with green geometric shapes on the left and right sides.

Questions?