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ARTICLE

BLACK BOARDING ACADEMIES AS A PRUDENTIAL REPARATION: *FINIS ORIGINE PENDET*¹

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“The past is never dead. It’s not even past.”

– William Faulkner, *Requiem for a Nun* 85 (1951)

With billions of dollars pledged and trillions of dollars demanded to redress slavery and Jim Crow (“Black Reparations”) the question of how best to use these funds has moved into the forefront of the ongoing campaign for racial justice in our post-civil rights society. Reparatory strategies typically target the norms and structures that sustain racial disadvantage wrought by slavery and Jim Crow. The goal of such transitional reparations is to extinguish the menace of white supremacy and systemic racism across the board. Restructuring in housing, education, employment, voting, law enforcement, health care, and the environment—social transformation—is absolutely needed in the United States if the race problem is ever to be resolved. That much is clear beyond peradventure. The hard question, however, is whether Black Reparations can take us there. Are Black Reparations (or reparations in general) powerful enough to engineer social transformation, or what in this case would be “transitional racial justice”? Unfortunately, I do not believe they can. The American race problem is simply too big for reparations to fix. It would take decades of massive amounts of government spending and the sustained moral commitment of the American people to achieve transitional racial justice in this country. The inflationary impact of the requisite spending (estimated at \$6.4 trillion to \$59.2 trillion) would give opponents of reparations an easy target. Moreover, transitional reparations have rarely been

¹ “The end depends upon the beginning.” This is the motto of Phillips Academy Andover, one of the great New England boarding academies. *The Surest Foundation*, ANDOVER, <https://www.andover.edu/about/history> [<https://perma.cc/XW8K-HJCE>] (last visited Mar. 27, 2023). The motto is a loose translation of “finisque ab origine pendet,” a line written by Roman poet Manilius in the first century. See Mark Langley, *In Education, the End Depends On the Beginning*, LION & OX (Oct. 17, 2017), <https://lionandox.com/2017/10/17/in-the-education-of-the-young-the-end-depends-on-the-beginning/> [<https://perma.cc/UXR9-6845>].

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attempted in other countries and when tried it has never succeeded to my knowledge. South Africa attempted to use reparations for social transformation. While there has been a transformation of political power, giving Black South Africans a strong voice in the government, economic power remains in the hands of White South Africans and racial discrimination in housing and education continues. Although at one time I was among scholars who had hoped Black Reparations could deliver a much-needed Third Reconstruction, I would be remiss as a passionate supporter of Black Reparations for many decades to ignore the cold facts—reparations have never successfully reconstructed a society.

*But the perfect should not be the enemy of the good. While Black Reparations may not be sufficient for transitional racial justice, they can still play an important role in moving toward that goal. This Article attempts to show one way of doing so. It argues that the initial payment of Black Reparations should take the shape of an education reparation. Education can, as it has in the past with *Brown v. Board of Education*, provide a foundation for significant racial progress. The type of education reparation broached in this Article gives African American (or Black American) parents or guardians a unique choice for educating their children—Black Boarding Academies (BBAs). Kick started with public reparations, BBAs would begin with PK-3 low-income Black children, giving special attention to those at risk of falling into the dreadful foster care system, and would expand to accommodate other classes of Black students once financially stable with post-reparations funding. Like most public boarding schools, BBAs will have to be sustained with both public and private funds. Fortunately, there is a wide range of available sources. Historically, boarding schools have a poor reputation in educating children of color, especially Indigenous Americans. The few primary and secondary schools that board Black students have not experienced such problems. Neither have Historically Black Colleges and Universities (HBCUs) at the postsecondary education level. Following in this rich tradition, BBAs will provide a safe and nurturing environment for Black students. Pedagogically, BBAs will prepare students not just to survive but to thrive. Students will be prepared to assume positions of leadership in our society whether they go directly into the job market or matriculate at HBCUs or predominantly white institutions. One of the most effective instructional models in the country for leadership-oriented teaching can be found in elite New England Prep Schools. They have been doing this for centuries. Using a modified version of their pedagogy—one self-consciously infused with a racial sensibility—BBAs will be able to extend the pipeline*

to leadership, normally available to upper-income and even middle-income African American students, to low-income African American students. Indeed, the latter are the most vulnerable descendants of the enslaved.

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I. INTRODUCTION

How should reparations for slavery and Jim Crow, commonly referred to as “Black Reparations,” be structured? This is a difficult question to answer, but one that must be faced not only by federal and state governments, the prime perpetrators of slavery and Jim Crow,² but also by private entities asked to pay Black Reparations.³ Demands for public reparations typically attempt to transform the American social order, changing the relationship between race and power in our society. Transitional reparations—reparations that seek “transitional racial

² Demands for Black Reparations and other forms of redress have been made against the federal government, starting at the end of the Revolutionary War. See ROY L. BROOKS, *ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS* 4–19 (2004) [hereinafter BROOKS, *ATONEMENT AND FORGIVENESS*]. A bill, H.R.40, calling for the creation of a commission to study the reparations issue has been introduced in Congress almost without interruption each year since 1989. See *H.R.40 - Commission to Study and Develop Reparation Proposals for African Americans Act*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/40> [<https://perma.cc/BMZ8-KPPP>] (last visited Mar. 27, 2023). Some states and localities have also passed reparations legislation. For example, Florida provided reparations for African Americans who suffered property damage during the Rosewood race massacre of 1921. Rosewood Compensation Act of 1994, ch. 94-359, 1994 Laws of Fla. 3296–98. More recently, mayors of at least eleven cities have agreed to pay Black Reparations to small groups of their Black residents. See, e.g., *11 U.S. Mayors Commit To Developing Pilot Projects For Reparations*, NPR/NATIONAL (June 18, 2021, 7:16 PM), <https://www.npr.org/2021/06/18/1008242159/11-u-s-mayors-commit-to-developing-pilot-projects-for-reparations> [<https://perma.cc/KRV4-C2EP>]. Los Angeles, Chicago, and other cities have also responded to demands for redress by requiring companies doing business in their cities to investigate and disclose any profits derived from slavery. BROOKS, *ATONEMENT AND FORGIVENESS*, *supra* note 2, at 15–16. These local laws expose private businesses to demands for private reparations.

Professor Boris Bittker, a leading tax scholar, wrote one of the most detailed legal arguments in favor of Black Reparations. See generally BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973) (making the case for black reparations, while exploring the history of such claims, national and international precedents for such claims, and obstacles to a national reparations policy). For an excellent economic analysis of Black Reparations, see generally WILLIAM A. DARITY JR. & A. KIRSTEN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* (2020) (arguing that black reparations are a solution for racial economic inequality). For an international study of redress, see *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* (Roy L. Brooks ed., 1999) [hereinafter *WHEN SORRY ISN'T ENOUGH*] (collecting international claims seeking redress for numerous human injustices).

³ Private institutions with ties to slavery have considered paying Black Reparations. For example, Harvard University has pledged \$100 million in Black Reparations. See Michela Moscufo, *Harvard Sets up \$100 Million Endowment Fund for Slavery Reparations*, REUTERS (Apr. 26, 2022, 1:33 PM), <https://www.reuters.com/world/us/harvard-sets-up-100-million-endowment-fund-slavery-reparations-2022-04-26/> [<https://perma.cc/P8KU-TUY6>]. Georgetown University has promised to pay \$1 billion, but descendants of the enslaved and Georgetown students raise concern about how the money is going to be spent. See Jesse Washington, *Amid Push for Reparations, Jesuits and Georgetown to Spend \$1 Billion on Racial Reconciliation and Education*, ANDSCAPE (May 19, 2022), <https://andscape.com/features/amid-push-for-reparations-jesuits-and-georgetown-to-spend-1-billion-on-racial-reconciliation-and-education/> [<https://perma.cc/2GUT-DDTP>]; Gigi De La Torre, *Slave Descendants Question Georgetown's \$1 Billion Reparations Fund*, THE COLLEGE FIX (May 25, 2022), <https://www.thecollegefix.com/slave-descendants-question-georgetown-1-billion-reparations-fund/> [<https://perma.cc/J8C3-NTMH>]. For a discussion of private reparations, see, e.g., Courtenay Brown, *Corporations Grapple with Slavery Reparations*, AXIOS (June 26, 2020), <https://www.axios.com/2020/06/26/corporations-slavery-reparations> [<https://perma.cc/XF5R-BJFN>].

justice”⁴—are on full display in what is arguably the most important study of Black Reparations to date: the 500-page Interim Report issued by the California Task Force to Study and Develop Reparation Proposal for African Americans.⁵

The Task Force consists of California politicians, community leaders, lawyers, and academicians. Aided by the considerable resources of lawyers in the California Department of Justice, the Task Force is charged by the state legislature with “synthesiz[ing] documentary evidence of the capture, procurement, and transportation of Africans for the purpose of enslavement; the domestic trade of trafficked African Americans; the treatment of enslaved people; the denial of humanity and the abuse of African Americans; and the discrimination and lingering negative effects that followed in the colonies that eventually became the United States, and the United States of today.”⁶ Assembly Bill 3121, the authorizing legislation written by college professor turned politician, Dr. Shirley Weber, also charged the Task Force with recommending reparations that are:

[A]ppropriate remedies of compensation, rehabilitation, and restitution for African-Americans, with a special consideration for African-Americans who are descendants of persons enslaved in the United States. The Task Force recommendations must address how they comport with international standards and how the State of California will apologize for its role in perpetuating gross human rights violations and crimes against humanity on enslaved Africans and their descendants. The Task Force must address the role of California laws and policies in continuing the negative lingering effects on African Americans as a group and how these injuries can be reversed. The recommendations must include how to calculate compensation, what form it will take, and who should be eligible.⁷

⁴ “Transitional racial justice” can be understood as a specific, racialized way of thinking about transitional justice. Cf. Colleen Murphy, *Transitional Justice and Redress for Racial Justice*, in RECONCILIATION AND REPAIR: NOMOS LXV, at 181, 181–82 (Melissa Schwartzberg & Eric Beerbohm eds., forthcoming May 2023) (describing a transitional model of redress grounded in critical race theory, institutional reform, and truth seeking). See also COLLEEN MURPHY, *THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE 2* (2017) (exploring “the moral evaluation of the choices transitional communities make in dealing with wrongdoing”); RUTI G. TEITEL, *TRANSITIONAL JUSTICE 4* (2000) (evaluating “the role of law in periods of radical political transformation”).

⁵ CALIFORNIA TASK FORCE TO STUDY AND DEVELOP REPARATION PROPOSALS FOR AFRICAN AMERICANS, INTERIM REPORT (2022) [hereinafter INTERIM REPORT] (reporting California’s failures to ensure racial equity in numerous areas and evaluating proposals for reparations). Other studies have been conducted by private organizations. See, e.g., *What are Reparations*, NAT’L COAL. OF BLACKS FOR REPARATIONS IN AM., <https://www.officialncobraonline.org/home-page> [<https://perma.cc/S676-UEWC>] (last visited Mar. 28, 2023); *Institute of the Black World 21st Century*, INST. OF THE BLACK WORLD 21ST CENTURY <https://ibw21.org/about/> [<https://perma.cc/V79S-B5ZE>] (last visited Mar. 28, 2023).

⁶ INTERIM REPORT, *supra* note 5, at 37.

⁷ *Id.*

Pursuant to this charge, the Task Force issued an Interim Report in 2022 so honest in its description of government-sanctioned or -mandated persecution of African Americans under slavery and Jim Crow that it came with a “Graphic Content Warning.”⁸ Following the “atonement model,”⁹ the Task Force recommends a state apology and various forms of reparations—monetary and non-monetary compensatory and rehabilitative reparations¹⁰—designed to effectuate transitional racial justice.¹¹ For example, non-monetary rehabilitative reparations (institutional or community-wide programs or services¹²) include establishing (1) a “state-subsidized mortgage system that guarantees low interest rates for qualified California Black mortgage applicants;”¹³ (2) “free healthcare programs;”¹⁴ and (3) the creation of The California African American Freedmen Affairs Agency, a cabinet-level secretary position tasked with, *inter alia*, implementing mandated reparations, processing eligibility claims, coordinating free legal services (“including criminal defense attorneys”), and providing business grants.¹⁵ Two noteworthy monetary rehabilitative reparative policies are the creation of “a fund to support the development and sustainment of Black-owned businesses” and raising the minimum wage.¹⁶

Monetary compensatory reparations (money paid to victims individually with or without restrictions¹⁷) are quite extensive. They include the state of California: (1) paying restitution for the theft or destruction of Black-owned businesses and property in California and making “housing grants, zero-interest business and housing loans available to Black Californians;”¹⁸ (2) compensating “individuals forcibly removed from their homes due to state action, including but not limited to park construction, highway construction, and urban renewal;”¹⁹ (3) funding “free tuition to California colleges and universities;”²⁰ (4) compensating “families who were denied familial inheritances by way of racist anti-

⁸ The front material of the INTERIM REPORT states: “This report contains discussions of racial discrimination, sexual assault, torture, lynching and other forms of extreme violence. The report contains unedited historical quotations and photographs of white supremacist hatred, torture, lynching, autopsy, and other forms of graphic violence.”

⁹ The “atonement model” calls for a perpetrator apology backed by sufficient reparations. It is to be distinguished from the “tort model,” which seeks no perpetrator apology, and includes no interest in racial reconciliation. For a more detailed discussion, see BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 98–179.

¹⁰ For a discussion of the forms of reparations, see *infra* Part II.A.

¹¹ Although the Task Force’s interim reparations are presented with the expectation that the legislature is unlikely to accept all of them, the vast array of proposed reparations might suggest to lawmakers, especially those on the fence, that Black Reparations is too large a subject to try to tackle. Hence, the need for a prudential approach such as the one presented in this Article. My intention is not to criticize the Interim Report—it is magnificent—but to offer an alternative approach: transitional reparations vs. prudential reparations.

¹² For a discussion of these terms, see *infra* Part II.A.

¹³ INTERIM REPORT, *supra* note 5, at 20.

¹⁴ *Id.* at 23.

¹⁵ *Id.* at 24.

¹⁶ *Id.* at 22.

¹⁷ See *infra* Part II.A.

¹⁸ INTERIM REPORT, *supra* note 5, at 19.

¹⁹ *Id.* at 20.

²⁰ *Id.*

miscegenation statutes, laws, or precedents, that denied Black heirs resources they would have received had they been white;”²¹ (5) providing “financial restitution and compensation to athletes or their heirs for injuries sustained in their work if those injuries can be linked to anti-Black discrimination policies;”²² compensating “individuals who have been deprived of rightful profits for their artistic, creative, athletic, and intellectual work;”²³ and (7) compensating “individuals whose mental and physical health has been permanently damaged by anti-Black healthcare system policies and treatment.”²⁴

Two excellent scholars, William Darity Jr. and A. Kirsten Mullen, also appear to favor transitional racial justice. They propose a “portfolio of reparations” that includes a wide range of rehabilitative reparations and compensatory (both unrestricted and restricted²⁵) for each documented Black descendant of the enslaved.²⁶ Darity and Mullen calculate the cost of transitional racial justice based on the costs of justice denied to Black people since the end of the Civil War.²⁷

If I had my druthers, I would prefer to use Black Reparations as a means to effectuate transitional racial justice. But reality cannot be ignored. The inflationary cost of transitional racial justice is prohibitive.²⁸ More broadly, transitional racial justice has never been achieved in a developed country. South Africa is one of the few countries that has attempted to use reparations as a means to social transformation. With the election of the legendary Black activist Nelson Mandela as president in 1994, the country successfully transitioned from Apartheid to democratic government, but economic power did not transition.²⁹ Overwhelmingly, economic power remains to this day in the hands of White South Africans.³⁰ In addition, racialized conditions in housing, employment, and education have not changed since the end of Apartheid in 1994:

During colonialism and structured apartheid from the late 1940s, Black South Africans were largely denied economic opportunities. More than a quarter century of democratic rule has seen the growth of a Black middle class and a Black business and political elite. Yet, most South Africans still suffer from a woeful education system that leaves them ill prepared for jobs, while townships, built for Blacks during apartheid, leave them far away from workplaces. . . . Laws ranging from affirmative action to mandating minimum

²¹ *Id.*

²² *Id.* at 22.

²³ *Id.*

²⁴ *Id.* at 23.

²⁵ For a discussion of these terms, see *infra* Part II.A.

²⁶ DARTY & MULLIN, *supra* note 2, at 264–65.

²⁷ *Id.* at 28–47, 256–70.

²⁸ For a more detailed discussion, see *infra* Part III.D.

²⁹ Anthony Sguazzin, *South Africa Wealth Gap Unchanged Since Apartheid, Says World Inequality Lab*, TIME (Aug. 5, 2021, 7:05 AM), <https://time.com/6087699/south-africa-wealth-gap-unchanged-since-apartheid/> [<https://perma.cc/5WAU-UJ5Z>] (“There is no evidence that wealth inequality has decreased since the end of apartheid. Asset allocations before 1993 still continue to shape wealth inequality.”).

³⁰ *Id.*

Black-owned stakes in businesses have done little to narrow inequality.³¹

Clearly, expectations regarding Black Reparations may have to be changed. Without abandoning the ultimate goal of social transformation, it may be necessary to view Black Reparations in a more limited way. It benefits no one (except opponents of Black Reparations) to position Black Reparations for failure by asking it to do something that is unprecedented in the annals of international human rights.

Taking a prudential approach, this Article argues that Black Boarding Academies (“BBAs”) should be the first Black Reparation. Given the country’s limited moral and financial capital, BBAs may end up being the only truly significant reparation the federal government or state governments provide for slavery and Jim Crow. That is even more reason to pursue BBAs with great gusto right now.

This Article is organized as follows. Part II provides a general discussion of the forms of reparations, to which I add a new wrinkle (Section A), a brief review of the case for Black Reparations (Section B), and an argument for prioritizing Black Boarding Academies (Section C). Part III sketches the contours of Black Boarding Academies. It touches upon the academies’ mission statement (Section A), structure (Section B), living arrangements (Section C), finances (Section D), and their constitutionality (Section E). My ambition is to place enough food for thought on the table to create a foundation for further reflection about BBAs and, more generally, the best way to structure Black Reparations—transitional reparations or prudential reparations?

II. UNDERSTANDING REPARATION AND BLACK REPARATIONS

A reparation is a tangible act of restitution provided by the perpetrator of an atrocity to its victims.³² Roundly denounced in international circles following World War I,³³ reparations gained respectability when Germany paid reparations to the victims of the Holocaust.³⁴ Reparations are viewed today in a much more favorable light. They are typically deployed within one of two larger strategies for civil redress of past atrocities. Each of these “models of redress” pursues a particular purpose and has a particular endgame. One model, the “tort

³¹ *Id.* See also, *Unpicking Inequality in South Africa*, THE ECONOMIST (Sept. 23, 2021), <https://www.economist.com/middle-east-and-africa/2021/09/23/unpicking-inequality-in-south-africa> [<https://perma.cc/76TR-ZGVG>] (“The racial income gap has narrowed since 1994. But the gains went largely to the black elite.”). South Africa deployed both compensatory and rehabilitative reparations. See BROOKS, *What Price Reconciliation?*, in WHEN SORRY ISN’T ENOUGH, *supra* note 2, at 443, 446.

³² Though reparations can be retributive, they usually are compensatory or restorative. They are, in other words, a form of civil redress in the aftermath of an atrocity where it is believed that criminal prosecution serves the interest of the state more than the interest of the victims of the atrocity. See Roy L. Brooks, *Reparations*, in ENCYCLOPEDIA OF RACE AND RACISM 490, 490–93 (Patrick L. Mason ed., 2d ed. 2013).

³³ “The punitive nature of the regime of reparations the Allies visited upon Germany under the Treaty of Versailles made this form of redress [reparations] the scorn of the international community.” BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at xiv.

³⁴ “The Holocaust . . . marks the beginning of the modern redress movement. *Id.* at xv.

model,” prioritizes victim compensation.³⁵ The other model, the “atonement model,” seeks reconciliation between the perpetrator and victims.³⁶ The latter approach imbibes a post-Holocaust spirit of heightened morality, egalitarianism, identity, and post-conflict justice.³⁷ Whether used under the tort or atonement model, reparations have rather distinct forms.

A. The Forms of Reparations

Importantly, reparations are structurally different from garden-variety civil or human rights laws. The latter are *symmetrical* in nature. They apply to all classes protected under such laws, such as any “race,” “color,” “sex” or “citizen.”³⁸ In contrast, reparations are necessarily *asymmetrical* because they are tendered only to the victims of the atrocity.

Whether in the context of the Holocaust, South African Apartheid, the sexual enslavement of Korean, Chinese, Filipino, Malaysian, and other women by the Japanese Imperial Army in the Pacific Theater of World War II (the “Comfort Women”) or the United States government’s internment of Japanese Americans during World War II,³⁹ reparations come in two basic forms. They can be victim-directed (“compensatory reparations”) or community-directed (“rehabilitative reparations”). Within these forms, reparations can be issued as cash (“monetary reparations”) or as services, programs, laws, museums or commemorations (“nonmonetary reparations”).⁴⁰

Problems arise when one confronts reparatory measures that fall between monetary and nonmonetary reparations; in other words, cash-equivalents such as scholarships or housing and school vouchers. Are these measures monetary because they serve the purpose of cash or have a cash value? Or are they non-monetary because they do not have the liquidity of cash? This Article argues that this issue can be resolved without constructing a new classification. Refining monetary reparations is all that is needed.

Reparations consisting of scholarships or vouchers for housing or education are monetary, but not in the way unrestricted cash payments are. They are restricted cash payments. The victims have conditional use of the money. Hence, one could distinguish between two types of monetary, or cash, reparations, whether compensatory or rehabilitative: 1) unrestricted payments (“UP”), and 2) restricted, or conditional, payments (“RP”). The former would allow victims to spend money as the victims see fit. The latter would limit how the victims could spend the money. Issuing a reparation in the form of a scholarship or a voucher is one way to ensure that the money is used for the intended purpose. The distinction between

³⁵ *Id.* at 98 (introducing the tort model).

³⁶ *Id.* at 141 (introducing the atonement model).

³⁷ *Id.*

³⁸ *See id.* at 155, 192–93.

³⁹ For a discussion of these and other atrocities, see generally WHEN SORRY ISN’T ENOUGH, *supra* note 2 (compiling claims for international claims for redress after such atrocities).

⁴⁰ *See* BROOKS, *The Age of Apology*, in WHEN SORRY ISN’T ENOUGH, *supra* note 2, at 3, 9. *See also*, BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 155–56.

UP and RP helps explain why compensatory reparations are problematic, and why one might prefer rehabilitative reparations.

UP function as income supplements paid to the victims, either as one-time cash payments or as incremental payments. Either way, the payments would have to be substantial to be meaningful. For example, an annual \$30,000 per household member, lasting for one or two generations, would be substantial and, hence, sufficient unrestricted cash payments. A family of four would receive \$120,000 in cash every year.

But UP are rather risky, for they could be spent at the victims' discretion. They could, for example, be gambled away at a Las Vegas casino. Such use of reparations certainly undercuts the moral justification for Black Reparations, particularly under the atonement model. There is also the problem of what scholars refer to as "predatory inclusion."⁴¹ This problem occurs when unscrupulous vendors (e.g., insurance companies or investment schemers) or greedy relatives take advantage of unsophisticated recipients of reparative income.⁴²

Restricting the purposes for which reparations can be spent certainly resolves these problems. RP can only be used for designated purposes, such as to pay college tuition, establish school booster clubs that finance after-school activities in public schools, to pay for private tutors or tuition at private schools, to purchase a home or pay rent in a better school district, or to start up or expand a small business. But RP are not problem-free. They deny agency to the victims of the atrocity. We do not place restrictions on the plaintiff's use of a jury award in a personal injury case. So why should we treat reparations any differently? Are the victims not being disrespected, treated like children? Also, victims who have received UP have, in fact, made responsible choices. For example, I have personally spoken with one Japanese American who used her \$20,000 internment reparation to help put her grandchildren through Berkeley.

The power of this agency argument cannot be gainsaid. However, that argument is off the table when rehabilitative reparations are deployed. Rehabilitative reparations can only be used for legitimate institutional purposes, such as for educating Black children or providing loans to Black businesses. Because rehabilitative reparations are necessarily RP, agency is not an issue in this context. That is reason enough to prefer rehabilitative reparations over compensatory reparations.

There are two additional reasons for preferring rehabilitative reparations. First, rehabilitative reparations, such as Black Boarding Academies, are asset-building reparations. For that reason, they serve the best long-term interests of the African Americans community. Second, compensatory reparations are difficult to calculate and distribute when dealing with millions of victims. There were only 82,219 Japanese Americans who received reparations for their internment during World

⁴¹ Roy L. Brooks, *Racial Reconciliation Through Black Reparations*, 63 HOW. L. J. 349, 358 (2020).

⁴² *Id.*

War II.⁴³ Payments to institutions like Black Boarding Academies do not invite this administrative nightmare. There are fewer recipients. In addition, payment amounts are calculated based on the costs associated with running an institution. Rehabilitative reparations are an essential component of a prudential reparative program.

The forms of reparations beg a threshold question: do reparations, in any form, make sense? There is, in fact, a strong argument in support of reparations regardless of form—compensatory, rehabilitative, monetary (UP or RP) or nonmonetary. My primary focus in this Article will be on Black Reparations.

B. The Case for Black Reparations

Black Reparations are designed to help undo centuries of Black oppression wrought by slavery and Jim Crow. These reparations are justified on moral rather than legal grounds as legal recourse for slavery or Jim Crow is generally not available.⁴⁴ The most powerful moral argument for Black Reparations can be summarized as follows:

When a government commits an atrocity against an innocent people, it has, at the very least, a moral obligation to apologize and to make that apology believable by doing something tangible called a ‘reparation.’ The government of the United States committed atrocities against [B]lack Americans for two and one-quarter centuries in the form of chattel slavery and for an additional one hundred years in the form of Jim Crow—what Supreme Court Justices Ruth Bader Ginsburg and Stephen Breyer refer to as ‘a law-enforced racial caste system’—and it has not even tendered an apology for either. The U.S. government should, in fact, atone—that is, both apologize and provide reparations—for racial slavery and apartheid.⁴⁵

⁴³ By 1992, the U.S. government had disbursed more than \$1.6 billion (equivalent to \$3.67 billion in 2021) in reparations to 82,219 Japanese Americans (of the 120,000 who were interned). Marnie Mueller, *WWII Reparations: Japanese-American Internees*, DEMOCRACY NOW! (Feb. 18, 1999), https://www.democracynow.org/1999/2/18/wwii_reparations_japanese_american_internees [<https://perma.cc/T4G6-ZSN7>]. These payments were conducted under the Civil Liberties Act of 1988, Pub. L. 100-383, § 105, 102 Stat. 93, which authorized a payment of \$20,000 (equivalent to \$46,000 in 2021) to each former internee who was still alive at the time the Act was passed.

⁴⁴ Legal problems in prosecuting past atrocities, including issues with statutes of limitations, sovereign immunity, and cognizable rights of action, take reparations out of the legal realm. See BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 99. Legislatures can, however, pass new laws that effectively overcome these legal problems. Congress did this for Japanese Americans interned during World War II, with the passage of the Civil Liberties Act of 1988, *see supra* note 43, and Florida did so for African Americans who experienced property damage during the Rosewood race riot of 1921. Rosewood Compensation Act of 1994, ch. 94-359, 1994 Laws of Fla. 3296–98. *See also* BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 12, 14–15 (describing legislative steps toward Black Reparations).

⁴⁵ BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at ix. This argument views reparations as a feature of the atonement model rather than the tort model. These models for redressing past atrocities are discussed in note 32 *supra*.

This argument imbibes the post-Holocaust spirit of heightened morality.⁴⁶ It frames Black Reparations as redemptive acts that solidify the government's apology for past racial atrocities. Black Reparations make the apology believable, more than just words. They turn the rhetoric of apology into a meaningful, material reality.⁴⁷ "Saying 'I'm sorry' just isn't enough."⁴⁸

The moral argument is often buttressed by socioeconomic arguments. The latter refer to the lingering effects of slavery and Jim Crow, conditions that announce the presence of current victims of these past atrocities.⁴⁹ Continuing effects are subjects of redress. Darity and Mullen state: "We submit that the bill of particulars for Black Reparations also must include contemporary, ongoing injustices—injustices resulting in barriers and penalties for the Black descendants of persons enslaved in the United States."⁵⁰ The ongoing injustices, or lingering effects, of slavery and Jim Crow are manifested as capital deficiencies—mainly financial and human capital deficiencies—within the African American community.

1. Financial Capital Deficiencies

Sample Pervasive and systemic racial inequities born of slavery and Jim Crow are still at work in our society.⁵¹ For generations, racial discrimination has prevented African Americans from acquiring valuable financial assets (*e.g.*, homes, land, investments, savings⁵²) and passing those assets on to future generations.⁵³ Economists estimate that for the vast majority of Americans, who are not of the likes of billionaires Jeff Bezos or Bill Gates, "up to 80 percent of lifetime wealth accumulation results from gifts from earlier generations, ranging from the down payment

⁴⁶ See *supra* text accompanying notes 36–37.

⁴⁷ "African Americans, like any self-respecting people, can never forgive or fully trust our government on racial matters until it signals a clear understanding of the magnitude of the atrocities it committed against an innocent people. The past is the future." BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at ix.

⁴⁸ *Id.*

⁴⁹ In addition to socioeconomic conditions, these lingering effects may include psychological and political conditions.

⁵⁰ DARITY & MULLEN, *supra* note 2, at 5.

⁵¹ See, *e.g.*, BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 47–48; Lincoln Quillian & Arnfinn H. Midtboen, *Comparative Perspectives on Racial Discrimination in Hiring: The Rise of Field Experiments*, 47 ANN. REV. SOCIO. 391, 391 (2021) (noting that "racial and ethnic discrimination [in hiring] is a pervasive international phenomenon that has hardly declined over time"); Shayanne Gal et al., *26 Simple Charts to Show Friends and Family Who Aren't Convinced Racism is Still a Problem in America*, INSIDER (July 8, 2020, 1:04 PM), <https://www.businessinsider.com/us-systemic-racism-in-charts-graphs-data-2020-6> [<https://perma.cc/US8F-TFTJ>].

⁵² In 2020, only forty-four percent of African American families owned homes, compared to seventy-five percent of white families. Liz Mineo, *Racial Wealth Gap May Be a Key to Other Inequities: A Look at How and Why We Got There and What We Can Do About It*, THE HARV. GAZETTE (June 3, 2021), <https://news.harvard.edu/gazette/story/2021/06/racial-wealth-gap-may-be-a-key-to-other-inequities/> [<https://perma.cc/RU69-ZCXL>]. In 2018, roughly twice as many African American mortgage applicants were denied loans from banks than White applicants. Gal et al., *supra* note 51.

⁵³ Mineo, *supra* note 52 ("Most scholars agree that the legacy of slavery and other subsequent forms of legal discrimination against African Americans have hindered their ability to accumulate wealth.").

on a home to a bequest by a parent.”⁵⁴ The result is a staggering wealth gap: the net worth of a typical white family (\$100 to \$200,000) is currently ten times that of a typical African American family (\$10 to \$20,000).⁵⁵ “[T]he racial wealth gap [is] the most robust indicator of the cumulative economic effects of [slavery and Jim Crow].”⁵⁶

In addition to wealth, income and occupational disparities are major lingering effects of past racial atrocities.⁵⁷ African Americans are more than twice as likely as Whites to fall below the poverty line.⁵⁸ African

⁵⁴ Dalton Conley, *The Cost of Slavery*, N.Y. TIMES (Feb. 15, 2003), <https://www.nytimes.com/2003/02/15/opinion/the-cost-of-slavery.html> [<https://perma.cc/Z5HR-HZB7>].

⁵⁵ Mineo, *supra* note 52. “Today, black Americans constitute approximately 13 to 14 percent of the nation’s population, yet possess less than 3 percent of the nation’s wealth.” *H.R. 40 and the Path to Restorative Justice: Hearing on H.R. 40 Before the Subcomm. on the Const., C.R., & C.L. of the H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of William Darity Jr., Professor, Duke University) [hereinafter Darity, *H.R. 40*]. Steven S. Rogers, retired Harvard Business School professor, explained how the government’s housing policies contributed to the racial wealth gap:

After World War II, there was a housing boom in America, fueled by the Federal Housing Administration (FHA), which was part of the New Deal. At the time the country had a miniscule middle class. Citizens were either poor or rich. Suburbia did not exist. Most home mortgages were amortized over five years with a balloon payment at the end. For the mortgages that existed during the Depression, almost half were in default. The foreclosure rate was almost 1,000 per day. People primarily lived in cities, but, most significantly, prior to 1934, 20- and 30-year home mortgages did not exist. Therefore, only the wealthy could afford to own homes.

This dynamic changed for White citizens with the creation of the FHA, which allowed mortgages to be refinanced and guaranteed for new buyers. Banks could issue mortgages because the federal government was assuming the risk. The results were that White banks issued millions of loans to White citizens, helping them create wealth. However, access to this capital was not available to Black Americans. In fact, the federal government forbade it.

STEVEN S. ROGERS, A LETTER TO MY WHITE FRIENDS AND COLLEAGUES: WHAT YOU CAN DO RIGHT NOW TO HELP THE BLACK COMMUNITY 63 (2021). The government’s discriminatory housing policies included the imposition of restrictive covenants on White homeowners, preventing them from legally selling their homes to Blacks, as well as redlining laws, preventing private lenders from issuing mortgages to Black neighborhoods. *Id.* Richard Rothstein discusses the current impact of the government’s Jim Crow housing policies:

By the time the federal government decided finally to allow African Americans into the suburbs, the window of opportunity for an integrated nation had mostly closed. In 1948, for example, Levittown homes sold for about \$8,000, or about \$75,000 in today’s [2016] dollars. Now, properties in Levittown without major remodeling (i.e., one-bath houses) sell for \$350,000 and up. White working-class families who bought those homes in 1948 have gained, over three generations, more than \$200,000 in wealth.

RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 182 (2017). Student loan debt contributes to this inequality: on average, African American students owe \$52.7 thousand, whereas White students owe \$41.8 thousand. Gal et al., *supra* note 51.

⁵⁶ DARITY & MULLEN, *supra* note 2, at 263 (emphasis omitted). “[T]oday’s differential in wealth captures the cumulative effects of racism on living black descendants of American slavery.” *Id.* at 264 (emphasis omitted).

⁵⁷ MORITZ KUHN ET AL., INCOME WEALTH INEQUALITY IN AMERICA, 1949-2016, at 3 (OPPORTUNITY & INCLUSIVE GROWTH INST., 2018).

⁵⁸ Gal et al., *supra* note 51.

American unemployment is relatively high, and African American wages are relatively low, on average paying approximately 62% of what White employees made in 2018.⁵⁹ African Americans are unlikely to hold high-paying management and professional positions, and are dramatically underrepresented in positions of prominence: only four Fortune 500 companies had an African American CEO in 2020.⁶⁰

African Americans are far more likely than Whites to live in poorer, racially segregated neighborhoods, which corresponds to a long list of disadvantages.⁶¹ Residents of these neighborhoods have access to fewer public amenities such as transportation, libraries, and police and fire protection. They also pay more for inferior commercial services such as in housing, food, healthcare, and insurance.⁶² These neighborhoods are plagued by pollution, environmental toxins, crime, homicide, drug and alcohol use, family turmoil, chronic illness, death, infant mortality, and high levels of antagonistic, often excessive policing.⁶³ Predictably, these living conditions impact African American health, especially the health of the most vulnerable African Americans. Low-income African Americans are more likely to smoke and drink, eat unhealthy foods, and are less likely to exercise.⁶⁴ In a 2017 report, the CDC reported that African Americans have a higher death rate than white Americans for all causes of death in all age groups below sixty-five years-old.⁶⁵ Additionally, racial disparities in rates of death from heart disease, cancer, diabetes, and cirrhosis have gotten worse since 1950.⁶⁶

2. Human Capital Deficiencies

A lack of opportunities for gainful employment and an unconscionable incarceration rate for African American males, in

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ For example, in 2020, only 3.9 percent of the white population in the United States lived in high-poverty neighborhoods, compared to 18.9 percent of the Black population. *Neighborhood Poverty: All Neighborhoods Should be Communities of Opportunity*, NAT'L EQUITY ATLAS, https://nationalequityatlas.org/indicators/Neighborhood_poverty [<https://perma.cc/5PCJ-3SVP>] (last visited Mar. 29, 2023).

⁶² David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REPS. 404, 410 (2001). See also LEILA FIESTER, ANNIE E. CASEY FOUND., EARLY WARNING CONFIRMED: A RESEARCH UPDATE ON THIRD-GRADE READING 8–10 (2013) (describing the links between poverty, poor health outcomes, and poor educational outcomes).

⁶³ See Michael R. Kramer et al., *Getting Under the Skin: Children's Health Disparities as Embodiment of Social Class*, 36 POPULATION RSCH. & POL'Y REV. 671, 678–79 (2017). African Americans are much more likely than Whites to be victims of crime—especially homicide; Williams & Collins, *supra* note 62, at 411.

⁶⁴ Williams & Collins, *supra* note 62, at 410–11. Residents of segregated neighborhoods are less likely to exercise due to a lack of recreation facilities and neighborhood safety. *Id.* at 411. They are also disproportionately preyed upon by alcohol and tobacco companies who heavily advertise in poor minority communities. *Id.* at 410. Food deserts and inadequate public transportation mean that a majority of residents only have access to low-quality junk food, which leads to poor nutrition, diabetes, and obesity. *Id.* at 410–11.

⁶⁵ Timothy J. Cunningham et al., Ctrs. for Disease Control & Prevention, *Vital Signs: Racial Disparities in Age-Specific Mortality Among Blacks or African-Americans—United States, 1999–2015*, 66 MORBIDITY & MORTALITY WEEKLY REP. 444, 444 (2017).

⁶⁶ Williams & Collins, *supra* note 62, at 405.

particular,⁶⁷ have led to an immense increase in single-mother households among poor and working-class African Americans. For example, in California in 2019, sixty-two percent of African American families were headed by single mothers.⁶⁸ The poverty rate for African American single-mother households is seventy-three percent higher than African American married-couple households.⁶⁹ These cash-strapped single mothers, who bear the brunt of raising low-income African American children, often spend most of their time working long hours at multiple low-wage jobs which typically do not offer parental leave or even basic benefits like healthcare and paid sick leave.⁷⁰ They also spend an inordinate amount of time commuting, searching for housing, and navigating convoluted social assistance bureaucracies.⁷¹ Consequently, African American single mothers are unable to devote sufficient time and money toward the intellectual stimulation of their children during critical developmental ages.⁷²

When children spend less time talking to their parents face-to-face, have less access to thought-provoking books, enriching toys, and other stimulating activities in the home, when they make few trips, if any, to museums and libraries, they experience slow cognitive development and, thus, have less school readiness.⁷³ By the age of four, when the brain is disproportionately receptive to stimulation, a low-income child will have heard two words for every seven spoken to a high-income child.⁷⁴ Low-income kindergartners are twelve to fourteen months behind high-income kindergartners in pre-reading and language skills.⁷⁵ And by first grade, middle-class first-graders have experienced 1,000-1,700 hours of one-on-one reading time, whereas low-income first-graders have an average of

⁶⁷ In 2006, one in every fourteen black men was incarcerated, as were one in every nine black men between twenty and thirty-five years old. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 100 (2012). African American men are nearly six times more likely to be incarcerated than white men, and African American men aged eighteen to nineteen are nearly thirteen times more likely to be incarcerated. E. ANN CARSON, U.S. DEP'T OF JUST., *PRISONERS IN 2018*, at 1, 17 (2020).

⁶⁸ This figure compares to forty-nine percent of American Indian, forty percent of Latino, and twenty-two percent of white families that were single-parent households. *Children in Single-Parent Families by Race and Ethnicity in California*, KIDS COUNT DATA CTR., <https://datacenter.kidscount.org/data/tables/107-children-in-single-parent-families-by-race?loc=1&loc2=2#detailed/2/6/false/1729/10,11,9,12,1,185,13/431> [<https://perma.cc/6WG5-AUT9>] (last updated Dec. 2022).

⁶⁹ Ian Rowe, *The Power of the Two-Parent Home is Not a Myth*, AM. ENTERPRISE INST. (Jan. 8, 2020), <https://www.aei.org/articles/the-power-of-the-two-parent-home-is-not-a-myth/> [<https://perma.cc/MGC3-3WEQ>].

⁷⁰ James Heckman, *The Economics of Inequality: The Value of Early Childhood Education*, 35 AM. EDUCATOR 31, 33 (2011).

⁷¹ ANNIE E. CASEY FOUND., *THE FIRST EIGHT YEARS: GIVING KIDS A FOUNDATION FOR LIFETIME SUCCESS* 6 (2013) [hereinafter *FIRST EIGHT YEARS*].

⁷² *Id.* at 5–7.

⁷³ *Id.*; ANNIE E. CASEY FOUND., *THE 30 MILLION WORD GAP: THE ROLE OF PARENT-CHILD VERBAL INTERACTION IN LANGUAGE AND LITERACY DEVELOPMENT 1–3* (2014) (describing the effects of quality parent-child verbal interactions on a child's cognitive and literacy development) [hereinafter *30 MILLION WORD GAP*].

⁷⁴ *FIRST EIGHT YEARS*, *supra* note 71, at 6.

⁷⁵ *Id.*

twenty-five hours.⁷⁶ Intellectual stimulation at an early age is vitally important to a child's capacity for lifetime learning.

These human capital deficiencies combine with other conditions to seal the educational fate of low-income African American children. Poor nutrition, exposure to home toxins such as mold and lead, undiagnosed and untreated disabilities and illnesses, frequent absenteeism, and the chronic stress of financial instability, familial strife, and dangerous neighborhoods all conspire to inhibit the academic achievement of low-income African American children.⁷⁷ The result is clear beyond peradventure: these children are generally at a significant disadvantage *before* they ever step through the schoolhouse door. This is not the worst of it. The scholastic disadvantages poor and working-class African American children bring to school on Day One are exacerbated by the quality of education offered by the schools they are forced to attend.⁷⁸ These disadvantages place low-income children in a perpetual catch-up posture throughout primary and secondary education, which lowers their prospects for a college education. In my view, the case for Black Reparations is strongest for this cohort.⁷⁹

C. The Case for Prioritizing Black Boarding Academies

The initial payment of Black Reparations by federal and state governments should be used to finance the operation of schools designed to meet the special needs of low-income African American children. Black Boarding Academies should be established not just to care for the most vulnerable victims of slavery and Jim Crow but to put them on the path to leadership positions in our society. Thus, the early roll out of Black Reparations should be rehabilitative rather than compensatory, and monetary as well as non-monetary.⁸⁰ Cash and services should go to the institutions themselves and used for educating low-income Black children enrolled in these institutions. The African American community rather than African Americans individually is the intended beneficiary of this educational reparation.

Identifying BBAs as the first Black Reparation makes eminent sense. It has long been the case that education is the key to success in our society. In 1848, Horace Mann, the legendary education reformer, observed that “[e]ducation, . . . beyond all other devices of human origin, is the great equalizer of the conditions of men, [and women]—the balance-wheel of the social machinery.”⁸¹ Mann was reporting on the reality of education as much as positing a philosophy of education. From the inception of our

⁷⁶ 30 MILLION WORD GAP, *supra* note 73, at 2.

⁷⁷ See generally FIESTER, *supra* note 62 (evaluating various factors that contribute to racial disparities in educational outcomes); ANNIE E. CASEY FOUND., RACE MATTERS: UNEQUAL OPPORTUNITIES FOR SCHOOL READINESS 1 (2006) (describing barriers to equal educational opportunities).

⁷⁸ See *infra* text accompanying notes 89–98.

⁷⁹ Other problems facing low-income families or individuals can be dealt with in subsequent rounds of reparations or outside of reparations through extant social service programs. Reparations are necessarily *asymmetrical* measures as they go only to the victims of the atrocity. They do not negate the need for ongoing *symmetrical* social services on which low-income households can draw regardless of race.

⁸⁰ See *supra* Part II.A.

⁸¹ Horace Mann, *Report for 1848*, in 3 LIFE AND WORKS OF HORACE MANN 640, 669 (Mary Mann ed., 1868).

country, education has played an important role in one's ability to move up the social ladder, save, of course, the enslaved and women. Born at the lower end of the socioeconomic ladder, Alexander Hamilton and Benjamin Franklin used education to climb to the top.⁸²

It is, therefore, not difficult to understand why the NAACP lawyers who fought segregation in the courts in the 1930s, 40s, and 50s started with education.⁸³ They saw education as essential to personal success as well as racial success. Quality education creates more employment opportunities, secures a higher income, builds stable and safe communities, and provides for a prosperous and happy life.⁸⁴ Quality education also increases mental agility and, hence, the ability to make the right decisions and spring into action when needed. In other words, it builds a type of racial agency, one that is needed today more than at any other time during this post-civil rights period. The current pushback against racial progress—from racial amnesia, avoidance, and denial to misinformation about Critical Race Theory (CRT) and systemic racism,⁸⁵ to the belief, held even at the

⁸² See, e.g., RON CHERNOW, ALEXANDER HAMILTON 4–5 (2005); BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 41–42, 47–49 (1791).

⁸³ Three of the most significant victories came in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), *McLaurin v. Oklahoma State Regents of Higher Education*, 339 U.S. 637 (1950), and *Sweatt v. Painter*, 339 U.S. 629 (1950). In *Gaines*, the Supreme Court held that the state of Missouri, which did not have a separate law school for African Americans, must admit an African American resident of the state to its all-white law school rather than forcing the student to attend an out-of-state law school. *Gaines*, 305 U.S. at 349–50. In *McLaurin*, the Court held that compelling the lone black graduate student in the otherwise all-white state graduate school to sit in a section of the classroom “surrounded by a rail on which there was a sign stating, ‘Reserved For Colored,’” and “to sit at a designated table and to eat at a different time from the other students in the school cafeteria” offended the Equal Protection Clause. *McLaurin*, 339 U.S. at 640, 642. Finally, in *Sweatt*, the Supreme Court came closest to invalidating the separate-but-equal doctrine. The Court held that the all-white University of Texas Law School must admit an African American student, because the state law school established for African Americans was so inferior as to the quality of the facilities, education, and prestige of its faculty that it denied blacks equal educational opportunity. *Sweatt*, 339 U.S. at 635–36. For a discussion of the NAACP litigation campaign, see, e.g., ROY L. BROOKS ET AL., THE LAW OF DISCRIMINATION: CASES AND PERSPECTIVES 45–74 (2011) [hereinafter BROOKS, LAW OF DISCRIMINATION].

⁸⁴ Hence, the parental push, sometimes unethical, to get their children into the best schools. See, e.g., Sophie Kasakove, *The College Admissions Scandal: Where Some of the Defendants Are Now*, N.Y. TIMES (Oct. 9, 2021), <https://www.nytimes.com/2021/10/09/us/varsity-blues-scandal-verdict.html> [<https://perma.cc/E9MY-S9XX>].

⁸⁵ See, e.g., Seth Cohen, *Say Her Name: Breonna Taylor And America's Deadly Case Of Racial Amnesia*, FORBES (Aug. 10, 2020, 6:09 PM), <https://www.forbes.com/sites/sethcohen/2020/08/10/say-her-name-breonna-taylor-and-americas-deadly-case-of-racial-amnesia/?sh=79a8564f6caf> [<https://perma.cc/7YZB-ZESZ>]; *How racial amnesia helped Trump win*, CNN (Dec. 27, 2016), <https://www.cnn.com/videos/us/2016/12/27/awkward-racial-amnesia-orig.cnn> [<https://perma.cc/E2LV-UMHR>]; Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUCATIONWEEK, <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [<https://perma.cc/PP57-ATAS>] (last updated Mar. 23, 2023); Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, THE NEW YORKER (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory> [<https://perma.cc/2P4Z-V53A>]; Marisa Iati, *What is Critical Race Theory, and Why Do Republicans Want to Ban it in Schools?*, THE WASH. POST (May 29, 2021, 8:00 AM), <https://www.washingtonpost.com/education/2021/05/29/critical-race-theory-bans-schools/> [<https://perma.cc/57VH-6X6L>]. A widely respected conservative commentator, Charlie Sykes, called the attacks on CRT by the right-wing media “Shark Attack Politics,” meaning that rather than looking at data, these media organizations choose

Supreme Court, that race no longer matters,⁸⁶ to, most alarmingly, the mainstreaming of White Supremacy⁸⁷—makes it imperative that the representative Black voice is heard.⁸⁸

Low-income African American children have little access to quality education and, hence, the prospect of contributing to racial agency in the future. While *Brown v. Board of Education*⁸⁹ and its progeny have given Black children a constitutional right to attend desegregated schools, these cases have simultaneously made it nearly impossible for Black children to receive a quality education.⁹⁰ Consequently, the education of African American children, most especially low-income children, is “now limited by class status and neighborhood locations.”⁹¹ Shockingly, “[s]chool districts where the majority of students enrolled are students of color receive \$23 billion *less* in education funding than predominantly white school districts, despite serving the same number of students—a dramatic discrepancy that underscores the depth of K-12 funding inequities in the U.S.”⁹² Stated

to capitalize on “fear and outrage.” Charlie Sykes, *The Shark Attack Party*, BULWARK+ (June 23, 2021), <https://morningshots.thebulwark.com/p/the-shark-attack-party?s=r> [https://perma.cc/VP7E-5SPM].

⁸⁶ See, e.g., Gal et al., *supra* note 51 (challenging the idea that racism in the United States is over). On the belief by Supreme Court justices (called “traditionalists”) that race no longer matters, see ROY L. BROOKS, *THE RACIAL GLASS CEILING: SUBORDINATION IN AMERICAN LAW AND CULTURE* 39–40 (2017) [hereinafter BROOKS, *THE RACIAL GLASS CEILING*].

⁸⁷ Stephen Miller was President Donald Trump’s senior adviser for policy and chief speechwriter. In emails to the then-president and others, Miller “advocated many of the most extreme white supremacist concepts. These included the ‘great replacement’ theory, fears of white genocide through immigration, race science, and eugenics; he also linked immigrants with crime, glorified the Confederacy, and promoted the genocidal book, *The Camp of the Saints*, as a roadmap for U.S. policy. Anti-Semitism was the only missing white nationalist trope in the emails—perhaps unsurprisingly, as Miller himself is Jewish.” Simon Clark, *How White Supremacy Returned to Mainstream Politics*, CAP (Jul. 1, 2020), <https://www.americanprogress.org/article/white-supremacy-returned-mainstream-politics/> [https://perma.cc/EU99-JBJJ]. See also Gene Demby, *When White Extremism Seeps Into The Mainstream*, NPR (Jan. 15, 2021, 5:57 PM), <https://www.npr.org/sections/codeswitch/2021/01/15/957421470/when-white-extremism-seeps-into-the-mainstream> [https://perma.cc/DPT3-3MDR].

⁸⁸ The Black voice is not monolithic. There is a voice that is representative of African Americans (the “rep”) and the one that is an outlier (the “non-rep”). For a full discussion, see ROY L. BROOKS, *DIVERSITY JUDGMENTS: DEMOCRATIZING JUDICIAL LEGITIMACY* 39–41 (2022) [hereinafter BROOKS, *DIVERSITY JUDGMENTS*].

⁸⁹ 347 U.S. 483 (1954).

⁹⁰ The Court has, *inter alia*, struck down race-conscious student assignment plans voluntarily adopted by school boards to integrate *de facto* segregated schools. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709–11 (2007), blocked inter-district remedies that integrated racially isolated school districts within the state. *Milliken v. Bradley*, 418 U.S. 717, 744–48 (1974), created the untenable distinction between *de jure* and *de facto* segregation that keeps schools racially isolated. See also *Parents Involved*, 551 U.S. at 821–22 (Breyer, J., dissenting). And, most importantly, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 15–18, 36–39 (1973), upheld school financing systems that favor wealthy school districts.

⁹¹ Sonya Ramsey, *The Troubled History of American Education after the Brown Decision*, THE AM. HISTORIAN, <https://www.oah.org/tah/issues/2017/february/the-troubled-history-of-american-education-after-the-brown-decision/> [https://perma.cc/S3NZ-DJXY] (last visited Mar. 28, 2023).

⁹² Lauren Camera, *White Students Get More K-12 Funding Than Students of Color: Report*, U.S. NEWS (Feb. 26, 2019, 12:01 AM) (emphasis added), <https://www.usnews.com/news/education-news/articles/2019-02-26/white-students-get-more-k-12-funding-than-students-of-color-report>.

differently, African American K-12 school districts receive an average of \$2,226 less per student than predominantly white school districts.⁹³ Because of this funding deficit, African American school districts have fewer qualified teachers, larger teacher-to-student ratios, fewer AP classes, fewer field trips and extracurricular offerings, less equipment and classroom furniture, fewer books, overcrowding, and more dangerous environments than white school districts.⁹⁴ Consequently, the racial gap in learning outcomes is quite large.⁹⁵ African American students have lower reading scores, math scores, school attendance, high school graduation rate, and college or career-readiness scores than white students.⁹⁶ Their college participation rate is also lower than that of their white peers, and only twenty percent of African American college students earn a bachelor's degree compared to forty percent of white college students.⁹⁷

These educational inequalities are deep and persistent. For decades, they have defied solutions advanced by reformers. Though well-intended, these professionals have largely looked for solutions in school integration, fighting against the Supreme Court all the way.⁹⁸

But even if the legal constraints placed on school integration were removed, quality education would still elude the vast majority of low-income African American students. They would likely have access to a dearth of educational resources once they left school for home. It is likely that they would not have access to a high-powered computer or strong Wi-Fi signal at home. Nor would they likely be able to afford the best tutors or have exposure to mainstream cultural events like visiting museums or Washington, D.C. Also, there would probably be little parental knowledge and flexibility for directing intellectual stimulation. Most importantly,

⁹³ Gal et al., *supra* note 51.

⁹⁴ See Ivy Morgan & Ary Amerikaner, *Funding Gaps: An Analysis of School Funding Equity Across the U.S. and Within Each State*, THE EDUC. TR. (Feb. 27, 2018), <https://edtrust.org/resource/funding-gaps-2018/> [<https://perma.cc/UVW4-K5BJ>]; Joe W. Bowers, Jr., *Black Kids Deserve Great Schools, Too*, L.A. SENTINEL (Feb. 13, 2020), <https://lasentinel.net/black-kids-deserve-great-schools-too.html> [<https://perma.cc/2J4S-VTKH>]; Emily DeRuy, *Where Calculus Class Isn't an Option*, THE ATLANTIC (June 7, 2016), <https://www.theatlantic.com/education/archive/2016/06/where-calculus-class-isnt-an-option/485987/> [<https://perma.cc/VGK6-5J7B>]; U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., *Data Snapshot: Teacher Equity* (2014) (evaluating racial disparities in teacher quality).

⁹⁵ For one of the most important studies on this point, see David R. Francis, *Black-White Test Scores: Neighborhoods, Not Schools, Matter Most*, NAT'L BUREAU OF ECON. RSCH. (Nov. 2006), <https://www.nber.org/digest/nov06/black-white-test-scores-neighborhoods-not-schools-matter-most> [<https://perma.cc/NF5L-CT6W>].

⁹⁶ GABRIEL PETEK, LEGIS. ANALYST'S OFF., NARROWING CALIFORNIA'S K-12 STUDENT ACHIEVEMENT GAPS 1 (2020) (reporting lower test scores, graduation rates, attendance, and college readiness for low-income students); THE EDUC. TR.-W., AT A CROSSROADS: A COMPREHENSIVE PICTURE OF HOW AFRICAN-AMERICAN YOUTH FARE IN LOS ANGELES COUNTY SCHOOLS 1 (2013) (describing California's "separate and unequal education system" for African-American children); THE EDUC. TR., THE STATE OF EDUCATION FOR AFRICAN AMERICAN STUDENTS 3-15 (2014) (gathering national data on unequal educational opportunities for African American students in the United States).

⁹⁷ THE EDUC. TR., THE STATE OF EDUCATION, *supra* note 96, at 11, 12; BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 88-89 (describing the "large and growing racial differential in college completion rates").

⁹⁸ For a discussion of the Supreme Court's rejection of some of these reforms, see *supra* note 90.

many low-income Black students live in unsafe environments, a constant distraction certainly not conducive to learning.

Finally, prioritizing low-income Black children has strategic value. As there will likely be a constitutional challenge to Black Reparations,⁹⁹ the Supreme Court ought to be presented with a sympathetic defendant—children. Here one finds yet another lesson in the NAACP lawyers’ campaign against segregation. Focusing on children is the least controversial battleground on which to fight and has proven to be the most effective way to fight. *Brown v. Board of Education*¹⁰⁰ sparked widespread racial progress in this country. As Judge Louis Pollak has observed:

[E]ven though it was a decision about schools, [*Brown*] became a precedent for, in the next half-dozen years, a series of Supreme Court decisions where they didn’t even have to write opinions, where they knocked out segregation in buses, in parks, in swimming pools and the whole array of public institutions that had been blanketed with Jim Crow for half a century.¹⁰¹

Similarly, Judge Robert Carter, the most creative of the NAACP lawyers who worked on the *Brown v. Board of Education*, has noted that *Brown* changed the legal status of African Americans from mere supplicants “seeking, pleading, begging to be treated as full-fledged members of the human race” to persons entitled to equal treatment under the law.¹⁰² Indeed, the 1964 Civil Rights Act, the legislation that largely brought an end to Jim-Crow laws,¹⁰³ would not have been possible without *Brown* as it is doubtful that a racially skittish Congress would have passed a civil rights statute in contravention of the Supreme Court’s view about the Constitution’s racial mandate. An education reparation like Black Boarding Academies can have a major impact on the ongoing struggle for civil rights.

The editorial staff of a prominent newspaper recently remarked, “[f]or decades, evidence has shown that disadvantaged students mired in poverty face huge obstacles to success.”¹⁰⁴ Steering a critical mass of low-income African American children to the very top of society by giving them an exceptional, leadership-oriented education from a young age invests in the future of poor Black children. It gives agency to a segment of the Black population that even some middle- and upper-income Black Americans are inclined to write off. Changing the trajectory of these Black lives can make

⁹⁹ On the constitutionality of Black Reparations, see *infra* Part III.E. See also *infra* text accompanying note 329.

¹⁰⁰ 347 U.S. 483 (1954).

¹⁰¹ BROOKS, THE RACIAL GLASS CEILING, *supra* note 86, at 30 (discussing Judge Pollak’s 2004 NPR interview).

¹⁰² *Id.* (citing Robert Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 246–47 (1968)).

¹⁰³ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as at 42 U.S.C. § 1971 et seq. (2006)).

¹⁰⁴ The San Diego Union-Trib. Ed. Bd., *Opinion: San Diego Unified’s New Grading Policy Has Noble Intent, but Rollout Raises Hard*, THE SAN DIEGO UNION-TRIB. (JULY 8, 2022, 6:00 AM), <https://www.sandiegouniontribune.com/opinion/editorials/story/2022-07-08/san-diego-unified-standards-based-reform-retake-tests-homework-can-be-late> [https://perma.cc/783P-UR8V].

major advances toward racial justice in our society. This, indeed, is the promise of Black Boarding Academies.

III. BLACK BOARDING ACADEMIES (BBAS)

An innovative way of educating African American students, Black Boarding Academies are a network of world-class, non-profit, publicly financed, and African-American-directed pre-kindergarten to twelfth grade (“PK-12”) boarding schools designed primarily for low-income students.¹⁰⁵ Impending constitutional constraints coming from the Supreme Court will likely preclude the use of race-conscious admissions standards at these academies.¹⁰⁶ This limitation on admissions is similar to the one the Supreme Court has placed on Historically Black Colleges and Universities (“HBCUs”). Thus, though identified as Black institutions, HBCUs cannot employ race-conscious admissions policies. In fact, approximately twenty-five percent of the students attending HBCUs in 2021 were non-Black.¹⁰⁷

One way to satisfy the constitutional command is to base admission to a BBA on an applicant’s connection to slavery or Jim Crow rather than race per se. A connection to either of these past atrocities is broadly race-neutral. However, for pragmatic reasons explained in Part III.E, BBAs may have to limit admissions to students who are descendants of at least one person enslaved in the U.S. *and* at least one person oppressed by Jim-Crow laws or practices. Hence, any student who meets this eligibility criterion is a *qualified descendant*. An applicant who identifies as Latinx, Native American, Asian, White, or multiracial can theoretically be a qualified descendant.

¹⁰⁵ The proposed focus is on disadvantaged students, similar to institutions such as the Milton Hershey School and Girard College. See *Milton Hershey School Facts*, MILTON HERSHEY SCH., <https://www.mhskids.org/about/mhs-fast-facts/> [https://perma.cc/7FCE-5U6N] (last visited Mar. 28, 2023); *About: Quality Education For All*, GIRARD COLL., <https://www.girardcollege.edu/about/> [https://perma.cc/ZGD8-UXPS]. Applicants who are not “qualified descendants,” as defined in this Article, including poor, working-class, and middle-class African Americans, are not eligible for admissions.

¹⁰⁶ See *infra* Part III.E.

¹⁰⁷ Nat’l Ctr. for Educ. Stat., *Fast Facts: Historically Black Colleges and Universities*, <https://nces.ed.gov/fastfacts/display.asp?id=667> [https://perma.cc/UP5H-M5C2] (last visited Mar. 28, 2023). HBCUs “are institutions that were established prior to 1964 with the principal mission of educating Black Americans.” *Id.* Founded as Jim-Crow institutions, HBCUs have contributed substantially to the progress of Black Americans by providing access to higher education in a safe and supportive environment. *Id.* “In 2021, there were 99 HBCUs located in 19 states, the District of Columbia, and the U.S. Virgin Islands. Of the 99 HBCUs, 50 were public institutions and 49 were private nonprofit institutions.” *Id.* (internal citations omitted). Constituting only three percent of America’s higher education institutions, HBCUs educate around ten percent of all Black college students. MIRIAM HAMMOND ET AL., *HBCUS TRANSFORMING GENERATIONS: SOCIAL MOBILITY OUTCOMES FOR HBCU ALUMNI 4* (2021). See also Michael L. Lomax, *Six Reasons HBCUs Are More Important Than Ever*, UNCF (Dec. 14, 2015), <https://uncf.org/the-latest/6-reasons-hbcus-are-more-important-than-ever> [https://perma.cc/5J9U-GWA5]. On the constitutional constraints placed on HBCU admissions, see *United States v. Fordice*, 505 U.S. 717, 742–743 (1992) (requiring the State of Mississippi to take affirmative steps to integrate higher education).

Establishing the requisite ancestry will be a difficult task. Although federal records can help in this effort,¹⁰⁸ low-income individuals and families will not have sufficient money, time or genealogical training to track their ancestry. This challenge is not entirely unique. In Hawaii, the Kamehameha Schools, a network of independent schools for children with at least one native Hawaiian ancestor, operates an ancestry verification program for its applicants. Ho’oulu Verification Services enters an applicant’s name, social security number, and names of registered relatives to search a comprehensive database of the Hawaiian population.¹⁰⁹ Black Boarding Academies could operate a similar program, perhaps employing a genealogical staff or partnering with genealogical companies such as Ancestry, FamilySearch, or LegacyTree. The necessary documentation could be submitted automatically to BBAs.

As a practical matter, most qualified descendants will be individuals who identify in whole or in part as African American.¹¹⁰ For that reason, this Article uses the term “African American” or “Black American” rather than “qualified descendant” at certain key points throughout this Article. The former terms also emphasize the racial dimensions of the educational problem BBAs attempt to resolve. Black Reparations are meant to address the many harms African Americans suffer because of their race.¹¹¹ Were it not for the unfortunate constitutional constraints imposed by the Supreme Court,¹¹² this Article would use the term “African American” or “Black American” throughout.

A. Mission

The main mission of BBAs is to give qualified descendants, primarily low-income African Americans, a highly participatory, leadership-oriented education on safe and supportive campuses away from cities and other distractions.¹¹³ These students will receive advantages

¹⁰⁸ See Claire Kluskens, Nat’l Archives & Recs. Admin., *Federal Records that Help Identify Former Enslaved People and Slave Holders* (Dec. 2021), <https://www.archives.gov/files/calendar/genealogy-fair/2018/2-kluskens-handout.pdf> [<https://perma.cc/PML6-Z5ZV>].

¹⁰⁹ See *Ho’oulu Verification Services*, KAMEHAMEHA SCHS., <https://www.ksbe.edu/verification/> [<https://perma.cc/PPR5-UAJC>] (last visited Mar. 28, 2023).

¹¹⁰ See Lizzie Wade, *Genetic Study Reveals Surprising Ancestry of Many Americans*, SCI. (Dec. 18, 2014), <https://www.science.org/content/article/genetic-study-reveals-surprising-ancestry-many-americans> [<https://perma.cc/67PN-FGM3>] (finding that the average African American’s genome is 73.2 percent African, the average Latino carries 6.2 percent African ancestry, and as few as four percent of European Americans carry any African ancestry).

¹¹¹ See *supra* Part II.B.

¹¹² See *infra* Part III.E.

¹¹³ The basic idea is to remove students from the congeries of deprivations that plague predominantly poor or working-class African American communities, including: segregation; redlining and other discriminatory housing policies; high levels of police surveillance and brutality, arrest rates, and incarceration alongside negligible police protection from crime; high murder rates; gang activity; increased exposure to pollution and toxins such as lead; food and transportation deserts; lack of funding for basic public institutions and resources; underemployment; disincentives to businesses and investment; and so on. See Williams & Collins, *supra* note 62, at 406–12 (describing the harmful effects of racial segregation on Black communities); Sarah Catherine Williams, *State-Level Data for Understanding Child Welfare in the United States*, CHILD TRENDS (Feb. 28, 2022), <https://www.childtrends.org/publications/state-level-data-for-understanding-child-welfare->

usually reserved for wealthy students who attend elite New England boarding schools. The former will also gain a deep appreciation for, and connection to, the legacy and living culture of African Americans as well as other historically disadvantaged groups in the United States. Each academy will recognize the true potential of their students, equip them for leadership positions in our society and then usher them to the top. The ultimate goal is to empower a critical mass of mostly low-income African American children descendant of the enslaved or the racially oppressed during Jim Crow to author a more equitable future for themselves and, hence, the African American community.

Educating a critical mass of mostly low-income African American children in this high-powered way helps the United States government to make amends for slavery and Jim Crow. The government moves in the direction of atoning for these past atrocities by taking tangible, measurable action to close the stubborn scholastic achievement gap separating Black and White students.¹¹⁴ If these schools are successful in addressing this human capital deficiency, they will not only raise the level of education in the African American community, but also augment other socioeconomic metrics within this community, including income, wealth, employment, environment, health, social mobility, and nonlethal interactions with law enforcement.¹¹⁵ It is in this way that education is the key to success in the African American community as it is in our society as a whole.¹¹⁶ For that

in-the-united-states [<https://perma.cc/8K54-Y8GA>] (showing child maltreatment data by race for each state).

¹¹⁴ See *supra* Section II.B.2.

¹¹⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), has had a similar socioeconomic impact on racial disadvantage in our society writ large. See *supra* text accompanying notes 100–103.

¹¹⁶ See Mineo, *supra* note 52 (discussing the racial wealth gap as due, in part, to educational discrimination); Anna Zajacova & Elizabeth M. Lawrence, *The Relationship Between Education and Health: Reducing Disparities Through a Contextual Approach*, 39 ANN. REV. PUB. HEALTH 273, 274 (2018) (“During the past several generations, education has become the principal pathway to financial security, stable employment, and social success.”). Employment and income prospects improve at each level of education. For example, the unemployment rate was nearly three times higher for individuals with a bachelor’s degree than it was for those with only a high school degree in 2017. ROBERT C. FELLMETH & JESSICA K. HELDMAN, *CHILD RIGHTS & REMEDIES* 168 (Clarity Press, Inc., Atlanta, GA, 4th ed. 2019). “High skill” jobs requiring analytical abilities and postsecondary education have grown significantly over the past several decades as the number of “low skill” jobs has stalled. *Id.* Between 2021 and 2031, jobs requiring only a high school degree are projected to increase by less than three percent, jobs requiring a bachelor’s degree by 8.2 percent, jobs requiring a master’s degree by 13.6 percent, and jobs requiring a professional degree by 9.1 percent. *Employment Projections*, U.S. BUREAU OF LAB. STAT. (Sept. 8, 2022), <https://www.bls.gov/emp/tables/education-summary.htm> [<https://perma.cc/E67C-PFV3>]. Jobs requiring no postsecondary education are not only failing to keep pace, but many are disappearing. An increasing number of middle-skill jobs that have not traditionally required postsecondary education (e.g., supervisors, administrators, secretaries, and sales representatives) are demanding a bachelor’s degree as a minimum requirement. JOSEPH B. FULLER & MANJARI RAMAN, *DISMISSED BY DEGREES: HOW DEGREE INFLATION IS UNDERMINING U.S. COMPETITIVENESS AND HURTING AMERICA’S MIDDLE CLASS 2* (2017) (describing the process of “degree inflation”). The fact that these professional and management jobs have proven to be considerably more recession-proof is another reason for the likely increase in high skill jobs in the future. Mineo, *supra* note 52.

Differences in income levels are just as dramatic. In 2017, an individual without a high school degree earned a median weekly income of \$520 and a high school graduate earned \$712. That number significantly increased with a bachelor’s degree (\$1,173/week)

reason, African Americans should regard Black Boarding Academies as the most important reparation at this time.¹¹⁷

Black Boarding Academies, in short, will not only focus on the Three Rs (three basic skills taught in schools: reading, “riting,” and “rithmetic”) but also on leadership training. Students will be prepared to assume leadership positions in mainstream society as well as in the African American community. Leadership training means that students must be taught to see themselves as leaders as well as understand the responsibilities of leadership.¹¹⁸ BBAs must be structured in a way that facilitates this reparative mission.

B. Structure

1. Prioritizing PK-3 Grades Initially

Rather than trying to offer a full PK-12 grade range at the beginning, the academies should initially limit themselves to teaching grades PK-3. Additional teachers and resources could be added as needed each year to accommodate one higher grade level for the oldest group of students. For example, an academy would accept a certain number of students for each grade ranging from preschool to third grade in Y1. In Y2, the academy would expand to offer a fourth-grade curriculum for its Y1 third grade class, and so on.

Though BBAs will be public schools, it is worth noting that many private Black schools, like W.E.B. DuBois Academy in Louisville, Kentucky, offered only lower grade levels when they first opened, then expanded to primary and secondary education. It opened with a sixth-grade class of 150 students and expanded its grade-level capacity annually as the original class progressed. Two years later, the Academy was teaching 450 students in grades six to eight.¹¹⁹

and continued to increase at each ascending degree level. A master’s degree earned \$1,401/week; a doctoral degree earned \$1,743/week; and a professional degree earned \$1,836/week. FELLMETH & HELDMAN, *supra* note 116, at 168. Jobs requiring a postsecondary degree were also more likely to provide employees with health insurance and pension benefits. SANDY BAUM ET AL., *EDUCATION PAYS: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY* 5 (2010).

With higher income levels and greater financial security, individuals with postsecondary educational attainment can accumulate wealth and transfer that wealth to their descendants, creating intergenerational gains over time. Educational achievement is, in fact, the single biggest predictor of African American social mobility. FIESTER, *supra* note 62, at 9. Individuals with better employment prospects can afford to live (and eventually purchase homes) in better neighborhoods. They can expect better health and longer lives, are more likely to enjoy a successful long-term marriage, and have much lower chances of arrest and incarceration. See Zajacova & Lawrence, *supra* note 116, at 277; BAUM, *supra* note 116, at 10–33 (demonstrating the social benefits of education). The children of better-educated parents are wealthier and better educated themselves, creating a multigenerational upward trajectory. Zajacova & Lawrence, *supra* note 116, at 281.

¹¹⁷ See *supra*, Part II.C.

¹¹⁸ Accomplishing these educational goals will advance the ultimate goal of Black Reparations—racial reconciliation See *supra*, Part II.A.

¹¹⁹ Olivia Krauth, *JCPS May Extend W.E.B. DuBois Academy Into a High School. Here’s How It Would Work*, COURIER J. (Dec. 3, 2019, 12:38 PM), <https://www.courier-journal.com/story/news/2019/12/03/jcps-could-add-high-schools-grades-web-dubois-academy/2596291001/> [https://perma.cc/PB35-GZKB].

There are several important financial benefits to expanding up and out over time rather than immediately offering a full PK-12 range. First, a smaller school with fewer students and staff costs would require less money up front to establish and operate. More students require more of everything—staff, housing, services, and infrastructure. Older students require more advanced teachers, a wider range of facilities and extracurricular activities, and a different set of rules and policies. Academies would, therefore, take longer to open if they were to offer a full PK-12 program at the beginning. Second, incremental growth could act as a sustainability control mechanism, allowing academies to cultivate larger reserves of assets and funding before expanding the number of academies and their operations. Post-reparations funding is an issue Black Boarding Academies as well as other reparative programs must confront.¹²⁰ Third, beginning with several manageably sized lower grades would make the model more attractive to potential funding sources. This is because high-quality early education yields larger visible gains in student performance than remedial education with older students. Prospective donors are more inclined to support a project if it looks like a good investment by the numbers. Finally, building an excellent PK-elementary program would be a better investment than creating a lower-quality PK-12 program.

Beginning at the PK-3 level removes the most vulnerable African American children from poor and often dangerous learning environments at a critical time in their young lives. The comprehensive care and instruction these at-risk children would receive prepares them for a rigorous middle and high school curriculum. Middle and high school teachers could then focus on making strong students exceptional rather than devoting their energies to remedial or behavioral matters.¹²¹ What is at stake, then, is the child's long-term intellectual potential.¹²²

¹²⁰ See *infra* Part III.D.2.

¹²¹A good example of the problem Black Boarding Academies must avoid can be seen in the experience of SEED Schools, a network of public charter boarding schools for low-income middle and high school children. SEED students in Washington, D.C., the first established SEED school, have higher reading and math scores than other African American students in the city and significantly higher college participation and graduation rates than the national average for African American students. However, “reading is still a weakness for many SEED students and, not coincidentally, the school’s SAT scores have been unimpressive. Part of the blame, according to Charles Barrett Adams, the head of the school, lies with the public elementary schools: students arrive at SEED typically two to three grade levels behind and spend much of the next years playing catch-up.” Maggie Jones, *The Inner-City Prep School Experience*, N.Y. TIMES MAG. (Sept. 25, 2009), <https://www.nytimes.com/2009/09/27/magazine/27Boarding-t.html> [https://perma.cc/4VY9-H5FM]. SEED students also return to their homes on weekends, which might be an option for Black boarding schools. For a general discussion of SEED Schools, see THE SEED FOUND., OUR NETWORK, <https://www.seedfoundation.com/seed-in-action> [https://perma.cc/EB5S-X7K5] (last visited Mar. 28, 2023).

¹²² Univ. of Tex. at Austin, *Being Poor Can Suppress Children’s Genetic Potentials*, *Study Finds*, SCI. DAILY (Jan. 11, 2011), <https://www.sciencedaily.com/releases/2011/01/110110142004.htm> [https://perma.cc/4N9R-CMQK] (“[c]hildren from poorer families, who already lag behind their peers . . . show almost no improvements that are driven by their genetic makeup); “Supportive environments and rich learning experiences generate positive epigenetic signatures that activate genetic potential . . . result[ing] in epigenetic changes that establish a foundation for more effective learning capacities in the future.” *Sources of Influence: Part III*, THE TRUTH SOURCE, <https://thetruthsource.org/sources-of-influence-part-iii/> [https://perma.cc/6S7Y-A39A] (last

Prioritizing PK-3 students intervenes in a child's life at just the right moment as the first eight years of life are a uniquely crucial period in a child's development. These are the years, especially the PK years, that shape the child's future more than any other phase of life.¹²³ Brain development is most rapid and, hence, disproportionately receptive to learning. Critically, gaps in a child's academic ability and life's potential manifest along socioeconomic lines as early as two years of age.¹²⁴ These consequences last into adulthood.¹²⁵ Children who receive high-quality P-K care and enter school with the social, mental, and motor skills that prepare them for classroom learning are more engaged in education, learn more quickly, and, hence, are more likely to succeed educationally, professionally, and financially.¹²⁶ On the other hand, children who enter school without these experiences tend to lag behind in critical skills throughout their education. They have much dimmer prospects for graduation and success in later life.¹²⁷

Take reading, for example. One study measured the difference between the reading tests of children from the highest and lowest socioeconomic quartiles and found a gap equivalent to approximately three to six years of learning.¹²⁸ Kindergarten children at low reading competence levels not only fail to catch up in later years, they fall further and further behind their peers throughout elementary school.¹²⁹ Early intervention is essential, as children who do not read at grade-level by the end of third grade are four times less likely to earn their high school diploma than proficient readers.¹³⁰ The problem is especially serious for low-income African American children, *eighty percent of whom are not proficient readers for their grade level*,¹³¹ and who are more than twice as

visited Mar. 28, 2023). On the other hand, persistent negative experiences caused damaging chemical modifications. *Id.* See also J. David Sweatt, *Experience-Dependent Epigenetic Modifications in the Central Nervous System*, 65 *BIOLOGICAL PSYCHIATRY* 191, 191 (2009) (noting the links between experience and biological psychology).

¹²³ FIRST EIGHT YEARS, *supra* note 71, at 1 (“What happens to children during those critical first years will determine whether their maturing brain has a sturdy foundation or a fragile one.”).

¹²⁴ Univ. of Tex. at Austin, *supra* note 122 (finding *no* difference in cognitive development between wealthy and impoverished ten-month-old children but finding a *significant* difference by age two).

¹²⁵ Heckman, *supra* note 70, at 34.

¹²⁶ *Id.* at 32.

¹²⁷ THE EDUC. TR.-W., *supra* note 96, at 13 (noting that African American students face so many various obstacles that many “disengage from school, both academically and emotionally”).

¹²⁸ Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *INEQUALITY IN THE 21ST CENTURY* 177, 179 fig.28.2 (Davidy Grusky & Jasmine Hill eds., 2018) (showing a gap of over one standard deviation—representing three to six years of learning—between students at the ninetieth percentile of wealth and students at the tenth).

¹²⁹ John K. McNamara et al., *A Longitudinal Study of Kindergarten Children at Risk for Reading Disabilities: The Poor Really Are Getting Poorer*, 44 *J. LEARNING DISABILITIES* 421, 421 (2011).

¹³⁰ DONALD J. HERNANDEZ, ANNIE E. CASEY FOUND., *DOUBLE JEOPARDY: HOW THIRD-GRADE READING SKILLS AND POVERTY INFLUENCE HIGH SCHOOL GRADUATION* 4 (2012).

¹³¹ FIRST EIGHT YEARS, *supra* note 71, at 1.

*likely as their white peers to leave school without graduating when they are not reading proficiently by the end of third grade.*¹³²

In addition to reading, other educational inequities follow these well-worn racial lines across the board. Young African American children are consigned to the bottom rung of every major area of educational development.¹³³ For example, only fourteen percent of African American third graders scored at or above the national average on math, reading, and science performance tests, compared to thirty-six percent of all United States third graders and forty-eight percent of White third graders.¹³⁴

There is hope; high-quality early education does as much good for young children as its absence harms them. Numerous studies have demonstrated meaningful, long-lasting benefits for participants in highly rated PK education programs. Among these benefits are stronger cognitive and behavioral scores in higher grades,¹³⁵ increase in the likelihood (four times more likely) of obtaining a college degree,¹³⁶ and a lower likelihood of involvement in the criminal justice system.¹³⁷ Learning how to learn and how to think from a young age is like learning a language at a young age: it gives students an exponential advantage over children who start later because it fundamentally hardwires a young brain for these skillsets.¹³⁸ Starting early is important because children get better at learning and become more motivated to learn with every educational experience. In a few short years, young children in high-quality early education programs become “fluent” in the language of learning, whereas children in substandard learning environments are forever catching up. Laying a solid educational foundation from the beginning is scholastically more effective than attempting to close progressively larger achievement and opportunity gaps as children age.¹³⁹

Finally, focusing on PK-3 academies will do the most good where it is most needed. It will save many at-risk children, catching them at an early age. Indeed, Black Boarding Academies will prioritize the most

¹³² HERNANDEZ, *supra* note 130, at 13.

¹³³ FIRST EIGHT YEARS, *supra* note 71, at 3 fig.1 (showing that African American third graders have lower rates of average or above average scores than all other third graders in cognitive knowledge and skills, social and emotional development, engagement in school, and physical well-being). Sixty-one percent of African American third graders scored at or above average in school engagement (i.e., taking interest and participating in learning activities), compared to seventy-four percent of all third graders. *Id.* Fifty-six percent of African American third graders scored at or above average on physical well-being (i.e., maintaining a healthy weight and demonstrating excellent or very good health), compared to a national average of fifty-six percent. *Id.*

¹³⁴ *Id.*

¹³⁵ Kathy Sylva et al., *Pre-School Quality and Educational Outcomes at Age 11: Low Quality Has Little Benefit*, 9 J. EARLY CHILDHOOD RSCH. 109, 110 (2011) (finding that higher quality care is correlated to cognitive development as well as to “higher social competence, positive skilled peer interaction, and lower levels of impulsiveness”).

¹³⁶ Frances A. Campbell et al., *Adult Outcomes as a Function of an Early Childhood Educational Program: An Abecedarian Project Follow-Up*, 48 DEV. PSYCH. 1033, 1040 (2012).

¹³⁷ Arthur J. Reynolds et al., *School-Based Early Childhood Education and Age-28 Well-Being: Effects by Timing, Dosage, and Subgroups*, 333 SCI. 360, 360 (2011).

¹³⁸ See *Sources of Influence*, *supra* note 122 (describing how “rich learning experiences” create “a foundation for more effective learning capacities in the future”).

¹³⁹ FIESTER, *supra* note 62, at 15 (advocating for the prevention of “new cycles” of inequality).

vulnerable of low-income children; thus, filling an important societal need.¹⁴⁰

2. Prioritizing At-Risk Children

Family stability and close connections to supportive caretakers, community, and culture are critical to a young child's development.¹⁴¹ Hence, it may do more harm than good to remove young, qualified descendants from their families. But if faced with an impending placement in the foster care system, a parent, guardian or case worker may opt for an alternative placement, perhaps a BBA. In writing for the California Reparations Task Force, the California Department of Justice recognized the horrors of the foster care system and, hence, the need to "[a]ddress the severely disparate involvement of Black families within the child welfare and foster care systems."¹⁴²

Offering an alternative to foster care for children placed in foster care or in danger of entering foster care (collectively, "at-risk children") does not pathologize Black families. To the contrary, it responds to racial discrimination. It recognizes that Black children are more likely than white children to be removed from their families and placed in a terrible system. To quote extensively from the Interim Report:

Scholars have found that racial discrimination exists at every stage of the child welfare process. The data show that when equally poor Black and white families are compared, even where both families are considered to be at equal risk for future abuse, state agencies are more likely to remove Black children from their families than white children. As of 2019, Black children make up only 14 percent of American children, and yet 23 percent of children in foster care. Studies have shown that this is likely not because Black parents mistreat their children more often, but rather due to racist systems and poverty.

In the 2015-16 school year, Black students were arrested at three times the rate of white students, while only comprising 15 percent of the population in schools. This disparity widens for Black girls, who make up 17 percent of the school population, but are arrested at 3.3 times the rate

¹⁴⁰ Despite the obvious importance of high-quality early education, public spending on children is lowest for young ages and is continuing to decline. See FIRST EIGHT YEARS, *supra* note 71, at 1.

¹⁴¹ Vilsa E. Curto & Roland G. Fryer, *The Potential of Urban Boarding Schools for the Poor: Evidence from SEED*, 32 J. LAB. ECON. 65, 7-71 (2014). Children who are sent to boarding schools at a young age can suffer from homesickness, stress, and/or loss of support from parents and guardians. *Id.* at 71. African American children can experience a type of identity loss called "double marginalization" when removed from their "Black" communities and forced too carelessly into a culturally "white" mainstreaming environment, such as a typical predominantly white elite educational environment. *Id.* Children experiencing double marginalization can develop a hostile attitude toward academic achievement, mischaracterizing such achievement as "white." *Id.* Academy faculty and staff must be predominantly African American to foster a love of learning and high academic achievement in African American children. This is the only way to ensure that academy students can be who they are at school and feel they have a place in the world of education.

¹⁴² INTERIM REPORT, *supra* note 5, at 21.

of white girls. Meanwhile, the criminal and juvenile justice systems have intensified these harms to Black families by imprisoning large numbers of Black children, thereby separating Black families. . . .

A 2015 study ranked California among the five worst states in foster care racial disparities. Black children in California make up approximately 22 percent of the foster population, while only *six percent* of the general child population. far higher than the national percentages. Some counties in California—both urban and rural—have much higher disparities compared to the statewide average. In San Francisco County, which is largely urban and has nearly 900,000 residents, the percentage of Black children in foster care in 2018 was more than 25 times the rate of white children.¹⁴³

Efforts have been made to purge racism from the system, but to no avail.¹⁴⁴ Parents, guardians, and case workers need to have an alternative placement—BBAs.

To understand the significance of the BBA alternative for at-risk children, one must appreciate the extent to which the foster care system is broken. Most Americans, including Black Americans, have no experience with the system. It may, therefore, be useful to discuss in greater details the foster care system, details that certainly informed the Interim Report's recommendations.

An ethic of care and commitment is strikingly absent from the foster care system. Children in the system are generally treated very poorly. Many attribute this state of affairs not to nefarious individuals but to meager funding.¹⁴⁵ Payments to foster parents, programs, and staff are frequently cut and have not kept pace with inflation.¹⁴⁶ Many children, particularly children of color, end up in unsuitable environments, such as, hotels, crowded homeless shelters, and even youth prisons.¹⁴⁷ Supervision of the care these children receive, which takes place at the state level, is quite abysmal. For example, a recent report by the U.S. Department of Health and Human Services found that California's foster care officials were slow to investigate seventy-eight of one hundred complaints of child

¹⁴³ *Id.* at 12–13 (citations omitted).

¹⁴⁴ Hence, the need for the Interim Report to recommend that reparations be used, in some unspecified way, to respond to racial disparities in the foster care system. *Id.* at 21.

¹⁴⁵ CAROLINE DANIELSON & HELEN LEE, PUB. POL'Y INST. OF CAL., FOSTER CARE IN CALIFORNIA: ACHIEVEMENTS AND CHALLENGES 2 (2010); OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION, U.S. DEP'T OF HEALTH & HUM. SERVS., FEDERAL FOSTER CARE FINANCING: HOW AND WHY THE CURRENT FUNDING STRUCTURE FAILS TO MEET THE NEEDS OF THE CHILD WELFARE FIELD 2 (2005) ("The current funding structure has not resulted in high quality services The financing structure has not kept pace with a changing child welfare field The result is a funding stream seriously mismatched to current program needs.").

¹⁴⁶ DANIELSON & LEE, *supra* note 145 at 2.

¹⁴⁷ Naomi Schaefer Riley, *Op-Ed: Good Intentions Are Forcing Foster Kids into Bad Places*, L.A. TIMES (Jan. 23, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-01-23/foster-children-congregate-care-group-homes-california-continuum-of-care-act> [<https://perma.cc/B856-UG5W>].

abuse or neglect in foster placements, in some cases taking up to fifteen months to investigate.¹⁴⁸ The report also found that officials failed to notify investigators of serious sexual abuse allegations and that where adequate notification was given there was no adequate follow up.¹⁴⁹

Given these circumstances, it is unsurprising that children in the foster care system have less chances for success than children outside the system. Indeed, an increasing number of foster children age out of the system with uncertain futures.¹⁵⁰ Adults who spent time in foster care as children are more likely to be homeless, struggle with addiction, and face incarceration.¹⁵¹ African Americans who spend time in foster care are more likely to be impoverished and less likely to be employed.¹⁵² Shockingly, seven out of every ten girls who age out of foster care are pregnant by age twenty-one.¹⁵³

Based on these facts, one would expect educational outcomes for children in foster care to be especially bleak, and they are. Foster children are more likely than their non-foster peers to have academic and behavioral problems in school, experience absences or tardiness, be assigned to special education classes, and repeat a grade.¹⁵⁴ A major contributor to these academic conditions is high mobility. Many foster children move several times during the school year, often changing schools each time they move. As a result, children miss large parts of the school year, lose academic credits, must repeat classes, and have incomplete education and attendance records or missing transcripts. For these reasons, many fall farther and farther behind in school over time.¹⁵⁵ Thus,

¹⁴⁸ Kaiser Health News, *California Earns Poor Marks on Monitoring the Welfare of Foster Children*, L.A. DAILY NEWS (Sept. 28, 2017, 7:14 AM), <https://www.dailynews.com/2017/09/28/california-earns-poor-marks-on-monitoring-the-welfare-of-foster-children/> [<https://perma.cc/WZ85-ANKC>].

¹⁴⁹ *Id.* To repair a deeply flawed foster care system, California has recently spearheaded a nationwide movement of prioritizing family placements while defunding residential congregate-care homes. The latter (group care institutions and residential treatment facilities) have received a good deal of bad press, in some cases justly. Bethany Lee & Rick P. Barth, *Residential Education: An Emerging Resource for Improving Educational Outcomes for Youth in Foster Care?*, 31 CHILD. & YOUTH SERVS. REV. 155, 155 (2008). However, group care options are not uniform in quality or outcomes. A recent survey of former children of one orphanage found that only 2.3% of alumni had a negative experience there, while eighty-five percent reviewed it very favorably and showed better outcomes in education, employment, income, criminal activity, and health than the general population. Riley, *supra* note 147. Done right, congregate residential settings can be an especially positive environment for children who need a stable home and a reliable, supportive social environment. However, whether family or congregate, the quality of foster care depends in large part on the quality of spending and the quality of oversight.

¹⁵⁰ DANIELSON & LEE, *supra* note 145, at 2.

¹⁵¹ Toni Watt & Seoyoun Kim, *Race/Ethnicity and Foster Youth Outcomes: An Examination of Disproportionality Using the National Youth in Transition Database*, 102 CHILD. & YOUTH SERVS. REV. 251, 252 (2019).

¹⁵² Jennifer L. Hook & Mark E. Courtney, *Employment Outcomes of Former Foster Youth as Young Adults: The Importance of Human, Personal, and Social Capital*, 33 CHILD. & YOUTH SERVS. REV. 1855, 1857 (2011).

¹⁵³ JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, ISSUE BRIEF: COST AVOIDANCE: THE BUSINESS CASE FOR INVESTING IN YOUTH AGING OUT OF FOSTER CARE 5 (2013) [hereinafter COST AVOIDANCE].

¹⁵⁴ Andrea Zetlin et al., *Problems and Solutions to Improving Education Services for Children in Foster Care*, 48 PREVENTING SCH. FAILURE 31, 31–32 (2004).

¹⁵⁵ *Id.* at 32.

although seventy percent of foster children want to attend college and half aspire to earn a master's degree, twenty-three percent neither graduate from high school nor earn a GED; this is more than twice the national average for non-foster children.¹⁵⁶ Furthermore, only twenty percent of foster children who graduate from high school attend college, and *only two to nine percent* of that group earns a bachelor's degree.¹⁵⁷

As the Interim Report indicates, African American children are disproportionately represented in the foster care system both nationally and in California. While the Report explains this racial disparity by pointing to the fact that child welfare agencies disproportionately target African American families for investigation and child removal, it fails to mention another reason scholars have identified—child abuse or neglect. High abuse and neglect rates correlate to high poverty for every ethnic group.¹⁵⁸ There is, however, a racial component at play here. The African American poverty rate is three times the rate for Whites.¹⁵⁹ Three times as much poverty means three times the circumstances that can trigger child removal—low-birth-weight babies, infant mortality, unemployment, substance abuse, physical and mental illness, and violence.¹⁶⁰

Clearly, at-risk African American children can benefit the most from Black Boarding Academies.¹⁶¹ BBAs can give this cohort of acutely disadvantaged children precisely what they need most at a critical juncture in their development: a safe, stable, communal environment with round-the-clock attention from experts in young child care; excellent nutrition and comprehensive physical and (trauma-informed) psychological healthcare; intellectual, emotional and social development through dormitory living and group-centered activities; and an exceptional leadership-oriented

¹⁵⁶ Lee & Barth, *supra* note 149, at 156–57.

¹⁵⁷ ANNIE E. CASEY FOUND., YOUTH IN FOSTER CARE SHARE THEIR SCHOOL EXPERIENCES 2 (2014).

¹⁵⁸ Watt & Kim, *supra* note 151, at 252.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 251–52; see also Alan J. Dettlaff et al., *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare*, 33 CHILD. & YOUTH SERVS. REV. 1630, 1630 (2011) (exploring “the relationship between poverty and child maltreatment”).

¹⁶¹ For those moved only by numbers, it should be noted that BBAs offer a better use of societal resources for young at-risk children than the current foster care system. For example, in 2018, California's foster care system spent over \$2 billion. CHILD TRENDS, CHILD WELFARE AGENCY SPENDING IN CALIFORNIA IN SFY 2018 (2021). This amounted to about \$39,000 spent per child. *Children in Foster Care in the United States*, KIDS COUNT DATA CTR., <https://datacenter.kidscount.org/data/tables/6243-children-in-foster-care?loc=1&loc=1#detailed/2/2-53/true/37/any/12987> [<https://perma.cc/54QH-N8VN>] (last updated Apr. 2022) (showing a total of 52,337 children in foster care in California in 2018). This amount is over \$10,000 more than the annual per student expenditure at a SEED boarding.

THE SEED FOUND., 2021 ANNUAL REPORT: CELEBRATING FIRSTS 7, 26 (2021) (showing total expenses of \$32,342,532 in 2021 for 1,410 students) [hereinafter 2021 ANNUAL REPORT]. If every foster child in the United States graduated from high school at the same rate as non-foster children, their average annual income would be approximately \$61 million higher than it is now. COST AVOIDANCE, *supra* note 153, at 6. Lowering the number of unplanned teenage pregnancies to non-foster levels will save society at least \$250 million annually. *Id.* at 8. Finally, reducing the number of young adults involved in the criminal justice system to non-foster levels will save at least \$5.2 billion in one cohort year. *Id.* at 9.

education that will not only eliminate achievement gaps, but also help young academy students excel *beyond* other children in their age group.¹⁶²

3. Administrators

African Americans will make the macro-level managerial decisions regarding the academy's mission statement, organizational standards, projects, resource allocations, hiring of high-level staff such as superintendents and fundraising czars, and, of course, teachers. Though the leadership of the Black Boarding Academies should be predominantly African American, the selection criteria must be racially neutral to sidestep the constitutional briar patch.¹⁶³ Perhaps the best way to reconcile these conflicting imperatives is to select administrators based on their connection to slavery and Jim Crow, similar to the selection of the student body.¹⁶⁴ Hence, school administrators, or at least most of them, should be descendants of at least one person enslaved in the United States and at least one person oppressed by Jim-Crow laws. Such persons can be referred to as "qualified administrators" or "qualified leaders."¹⁶⁵ It may, however, be necessary to hire non-Black American administrators if not enough excellent qualified leaders are available. Indeed, it may be desirable to do so for the sake of diversity.¹⁶⁶ Ideally, the academy executive boards should consist of a coalition of African American community leaders, parents, education organizations, and other stakeholders.¹⁶⁷

There are many reasons why African Americans and not others should manage Black Boarding Academies. The most important reason relates to the reparative mission itself. To be meaningful, reparations should be supportive of Black agency. They should seek to empower the African American community and increase its autonomy. Too often, African American parents, teachers, and communities have no consequential influence over the ways in which the education system treats their children or what it teaches them. As a result, African American parents have not been able to shape their children's future. Nothing demonstrates this point more clearly than the appallingly disproportionate levels of extreme disciplinary action often taken against African American students for minor violations of school rules. A Department of Education study of schools serving about eighty-five percent of the nation's students shows

¹⁶² For a discussion of leadership-oriented education, see *infra* Part III.B.5. Black Boarding Academies will not seek to replace or sever young students' connection to their families. Rather, the academies will help strengthen these bonds in several ways. Teachers and administrators will work hard to keep parents and guardians involved in their child's life and education by scheduling regular phone and video chats between parent and child, remote parent-teacher conferences, livestreaming activities and performances, setting up on-campus visiting days, and coordinating off-campus home visits during holidays or for emergencies. Struggling parents will benefit immensely from the excellent, cost-free childcare and education their children would not otherwise receive.

¹⁶³ See *infra* Part III.E.

¹⁶⁴ See *supra* text accompanying notes 107–110.

¹⁶⁵ This term tracks the definition of a "qualified descendant." See *supra*, text accompanying notes 107–108.

¹⁶⁶ Diversity in general is acceptable as long as BBAs do not compromise the academies' mission discussed in Part III.A, *supra*.

¹⁶⁷ See TEACH PLUS & CTR. FOR BLACK EDUCATOR DEV., TO BE WHO WE ARE: BLACK TEACHERS ON CREATING AFFIRMING SCHOOL CULTURES 31 (2021) (discussing the stakeholders in creating diverse communities in schools) [hereinafter TO BE WHO WE ARE].

that, although Black students comprise only eighteen percent of the students enrolled in the schools sampled, they accounted for “35 percent of those suspended once, 46 percent of those suspended more than once and 39 percent of all expulsions. . . . Over all, Black students were three and a half times as likely to be suspended or expelled than their white peers.”¹⁶⁸ In addition, African American children are significantly more likely to be arrested and face criminal consequences.¹⁶⁹ For example, after being called to the school by administrators, a police officer arrested a six-year-old girl in a Georgia elementary school for throwing a tantrum. She was handcuffed, driven to a police station in a squad car, and charged with battery and criminal damage to property.¹⁷⁰ Children tend to fulfill the expectations of adults around them, and many administrators running our public schools expect African American children to fail so badly that they believe police action is proper for what would otherwise be considered a minor, child-appropriate infraction. Academies must be run by adults who expect nothing short of personal and academic excellence from their students.

A recent study of the sixteen highest-performing majority African American public schools in California confirmed the importance of autonomous African American leadership in educating Black students. Fifteen of these schools were founded and led by African Americans.¹⁷¹ Administrators and teachers at all sixteen schools demonstrated confidence in their students’ ability to succeed and a commitment to realizing that goal.¹⁷² Administrators and teachers at this school also played an important role in inspiring students, encouraging parental involvement in children’s education, and engaging the community’s support.¹⁷³

Finally, academy students should be surrounded by African American role models. The arc of a student life is rarely discernible within the moment. Surrounded by successful individuals who look like them, African American students will be able to envision themselves in similar positions of leadership and authority within their communities. African American teachers are especially important role models.¹⁷⁴ Their presence in the classroom signals to students a sense of belonging and an expectation

¹⁶⁸ Tamar Lewin, *Black Students Face More Discipline, Data Suggests*, N.Y. TIMES (Mar. 6, 2012), <https://www.nytimes.com/2012/03/06/education/black-students-face-more-harsh-discipline-data-shows.html> [https://perma.cc/W888-CYXK].

¹⁶⁹ Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, CTR. FOR AM. PROGRESS (Mar. 13, 2012), <https://www.americanprogress.org/article/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/> [https://perma.cc/8VKS-4MSP] (“African American youth have higher rates of juvenile incarceration and are more likely to be sentenced to adult prison.”).

¹⁷⁰ Antoinette Campbell, *Police Handcuff 6-Year-Old Student in Georgia*, CNN (Apr. 17, 2012), <https://www.cnn.com/2012/04/17/justice/georgia-student-handcuffed/> [https://perma.cc/DZ7D-G9S3].

¹⁷¹ REX & MARGARET FORTUNE SCH. OF EDUC. & NAT’L ACTION NETWORK, AFRICAN AMERICAN LEADERS HOLD THE ROADMAP TO BLACK STUDENT ACHIEVEMENT 2 (2020).

¹⁷² *Id.* at 8.

¹⁷³ *Id.* at 7–8.

¹⁷⁴ TO BE WHO WE ARE, *supra* note 167, at 2, 31 (highlighting the importance of African American teachers to Black students’ success).

of fair, compassion, and respectful treatment.¹⁷⁵ It is not surprising, then, that under the tutelage of African American teachers, African American students' standardized test scores and college aspirations improve, they have fewer disciplinary problems, and they are less likely to drop out of high school.¹⁷⁶ African American teachers can create an affirming, motivating learning environment by making meaningful connections between course material and students' cultural identity, lived experiences, and real-world events.¹⁷⁷ They can tailor their teaching to African American student strengths, needs, and learning styles.¹⁷⁸ They can make African American culture a central part of the curriculum and do so in a personal way by telling stories from their own lives.¹⁷⁹ This will make students feel welcome in academic and professional worlds that often feel alienating and inaccessible.¹⁸⁰

4. Teachers

Teacher quality may be the single most important factor in nurturing student learning. Highly effective teachers produce average learning gains of fifty-three percentile points in a school year, compared to just fourteen percentile points for less effective teachers.¹⁸¹ In one study, having ineffective teachers year after year actually decreased student reading scores by eighteen percentage points and math scores by thirty percentile points.¹⁸² On the other hand, highly effective teachers typically have advanced verbal and math skills as well as expertise in their subjects.¹⁸³

African American students are significantly less likely than white students (even low-income white children) to be taught by highly effective teachers.¹⁸⁴ In fact, predominantly African American schools are magnets for the country's least qualified and least experienced teachers.¹⁸⁵ Doing nothing more than providing African American students with teachers of the same quality as white students would erase about half of the academic achievement gap; if schools assigned the *best* teachers to African American

¹⁷⁵ See, e.g., Richard H. Milner, *The Promise of Black Teachers' Success with Black Students*, 20 J. EDUC. FOUNDS. 89, 100–01 (2006) (describing how Black teachers' cultural knowledge encourages Black students' success and positive educational experiences); Shareefah Mason, *I Had A Teacher Who Looked Like Me*, TRIBTALK (Oct. 7, 2019), <https://www.tribtalk.org/2019/10/07/i-had-a-teacher-who-looked-like-me/> [<https://perma.cc/R5VK-LLC9>] (“[H]aving teachers who looked like me enhanced my educational experience exponentially.”).

¹⁷⁶ TO BE WHO WE ARE, *supra* note 167, at 2–3.

¹⁷⁷ See *id.* at 20 (advocating for teachers and curriculums that “elevate and embed students’ social and emotional development as part of their learning experience”).

¹⁷⁸ See Janice Hale, *Learning Styles of African American Children: Instructional Implications*, 5 J. CURRICULUM & TEACHING 109, 110–15 (2016) (describing dominant learning styles of African American children in literacy, mathematics, and science).

¹⁷⁹ Imagine a United States History class that begins in Africa rather than England, for example.

¹⁸⁰ TO BE WHO WE ARE, *supra* note 167, at 3, 6.

¹⁸¹ KATI HAYCOCK, THE EDUC. TR., GOOD TEACHING MATTERS: HOW WELL-QUALIFIED TEACHERS CAN CLOSE THE GAP, 3 THINKING K-16, at 3 (1998).

¹⁸² *Id.* at 4–5.

¹⁸³ *Id.* at 6.

¹⁸⁴ *Id.* at 7.

¹⁸⁵ *Id.* at 10.

students, the academic achievement gap would likely disappear entirely.¹⁸⁶ If such progress is possible in disadvantaged public-school districts, imagine what top teachers in world-class boarding academies could do.

Not only excellent teachers but Black teachers. BBA students should be surrounded by as many African American role models as possible.¹⁸⁷ In the company of successful individuals who look like them, BBA students will be able to envision themselves in similar positions of leadership within and beyond their communities. They will imbibe a sense of hope for the future, an understanding that the arc of any student's life is rarely discernible within the moment no matter the setback.¹⁸⁸

Given the importance of teachers, BAAs will have to devote a substantial amount of their resources attracting top teachers, especially, consistent with constitutional standards, Black teachers. The government could help academies attract and retain excellent teachers by offering incentives such as loan forgiveness, reduced loan repayments, service scholarships, on-the-job certification programs, and reimbursements of relocation expenses.¹⁸⁹ Administrators must follow up these benefits by nurturing a culture of respect and solidarity among faculty and staff. This requires paying attention to the physical side of the job (such as maintaining small teacher-to-student ratios¹⁹⁰) as well as the emotional side (such as reminding teachers that they are making a difference in students' lives every day).

Academy teachers will have teaching credentials. They will have a teaching degree and certification, either a state certification or an acceptable alternative certification designed for professionals from other career areas.¹⁹¹ In addition, they will be highly qualified to teach within a particular subject area. Elementary grade teachers will have at least a bachelor's degree in their general subject area (e.g., a teacher with a bachelor's in biology could teach elementary science classes), and middle and high school teachers will have at least a master's degree.¹⁹²

Above all, academy teachers will have a particular persona. They will share the academy's conviction that all students have boundless potential and that a teacher's job is to give it wings. They will do simple, obvious things when a student struggles emotionally. They will come to class each day prepared to be amazed and delighted by how much their

¹⁸⁶ *Id.* at 2.

¹⁸⁷ African American teachers are increasingly underrepresented in the profession due to historical inequities and higher turnover rates. See TO BE WHO WE ARE, *supra* note 167, at 2.

¹⁸⁸ See *supra* text accompanying 171–179.

¹⁸⁹ See TEACH PLUS, THE EDUC. TR., IF YOU LISTEN, WE WILL STAY: WHY TEACHERS OF COLOR LEAVE AND HOW TO DISRUPT TEACHER TURNOVER 27 (2019).

¹⁹⁰ Lowering class size from twenty-four to sixteen students, for example, raises student math and reading scores nearly as much as improving teacher quality. Curto & Fryer, *supra* note 141, at 84.

¹⁹¹ HAYCOCK, *supra* note 181, at 13 (referring to the large number of highly effective teachers in “alternate certification programs that cater to young or mid-career professionals from other fields”).

¹⁹² It might also be a good idea for high school teachers to have a doctorate degree or significant professional experience in their area of expertise in addition to a master's degree.

students can do. And they will implement a curriculum that is oriented toward leadership.

5. Pedagogy

Specific names of the courses taught at Black Boarding Academies are less important than the pedagogy that animates teaching schoolwide. This pedagogy, call it “leadership-oriented teaching,” is the hallmark of the top New England boarding academies.¹⁹³ Exposure to this instructional model will provide qualified descendants with an elite educational experience ordinarily reserved for the nation’s most privileged families.¹⁹⁴ Changes to the pedagogy will, however, have to be made to turn the academies into racially literate communities that can accommodate Black lives.¹⁹⁵

a. The Elite Model

Passively absorbing information, rote memorization, non-analytical thinking. There is little substantive, inquiry-based engagement with complex material or dialogue between teachers and students in that type of pedagogy. Students do not learn how to ask good questions or find reliable answers to those questions. They do not learn to argue or negotiate. This is the pedagogy of the oppressed.¹⁹⁶ It is not the pedagogy of the future leader taught at elite boarding schools.¹⁹⁷

At elite boarding schools, students advance beyond learning *how* the world is to learning to ask *why* the world is that way. They learn to identify patterns of causation across events and critically evaluate competing explanations. They learn to formulate and test hypotheses and

¹⁹³ These boarding academies include Phillips Academy Andover, Phillips Exeter, and Deerfield. See *Get to Know Us*, ANDOVER, <https://www.andover.edu/about> [<https://perma.cc/68UW-6NLC>] (last visited Mar. 28, 2023) (describing the academy’s efforts to promote “intellectual curiosity, engagement, leadership, and service”); *The Exeter Difference. Be Inspired by a Purpose-Driven Education*, PHILLIPS EXETER ACAD., <https://www.exeter.edu/exeter-difference> [<https://perma.cc/MEV6-3ZTB>] (last visited Mar. 28, 2023) (noting the academy’s focus on “intellectual creativity and independence while celebrating good citizenship and empathy as a way of life”); *About Deerfield*, DEERFIELD, <https://deerfield.edu/about/> [<https://perma.cc/9BNN-2K4Y>] (last visited Mar. 28, 2023) (declaring the academy’s commitment to “high standards of scholarship, citizenship, and personal responsibility”).

¹⁹⁴ I am indebted to my research assistant, Kristen Gilleon, for much of the information about the New England boarding school experience as it comes from her first-hand knowledge. She is a graduate of Phillips Academy Andover. Ms. Gilleon grew up on a cattle ranch in rural Montana where she attended a small, low-income public school until grade nine. In grade ten, she was offered a full financial aid scholarship to Phillips Academy Andover. She survived an extreme learning curve similar to what qualified descendants will have to do at Black Boarding Academies.

¹⁹⁵ African American students who have attended elite boarding schools have had uneven experiences. Basically ignored by other students, except for their race, many of these students report a lonely existence. Yet some report developing deep friendships and most found the education to be an enormous boost to their careers. See KENDRA JAMES, *ADMISSIONS: A MEMOIR OF SURVIVING BOARDING SCHOOL* (2022).

¹⁹⁶ See PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 49 (Myra Ramos trans., 2005) (noting that “what characterizes the oppressed is their subordination to the consciousness of the master”).

¹⁹⁷ See Patrick J. Finn, *Preparing for Power in Elite Boarding Schools and in Working-Class Schools*, 51 *THEORY INTO PRACTICE* 57, 58 (2012) (“Elite boarding schools are intended to produce America’s power elite”) (internal citations omitted).

find reliable answers. Students become creators and sources of knowledge, rather than passive recipients of information. A good student is a good analyst.

A good student learns to ask, “how should the world be changed?” They learn to imagine and innovate, to design strategies and think of ways to implement them. Their stance moves beyond reaction and toward active participation—toward creation. They begin to focus on changing the world to suit their own values and interests rather than changing themselves to suit the world. A good student is a good strategist—a good designer.¹⁹⁸

Though learning to be a good analyst and strategist are necessary components of a leadership pedagogy, they are not sufficient. Students must also imbibe the expectation of being a difference-maker and be well-equipped to execute. Elite boarding schools provide students with a toolbox that empowers them to effectuate change. The most important tools in this toolbox are leadership *mindset* and leadership *skills*.

Leadership mindset is confidence that one will occupy a position of power and importance and be good at it. This mindset starts externally; it comes from the administrators and teachers. The academies wholeheartedly believe their students will be running the “show” one day, and constantly communicate to their students—both implicitly and explicitly—that they are brilliant, strong, innovative, and needed. Students come to feel that they will rise to the top and hold power, and that the best and most capable have a responsibility to take the reins, to use their power to make the world what it ought to be. This “duty to prevail”¹⁹⁹ is the lifeblood of top-rung students. Being a leader in society and in one’s own community is not so much an aspiration as it is an expectation.

Students attending top-rung academies believe this message because the instructional model from which they are taught teaches this to them. The school’s pedagogy allows students to prove it to themselves and, in so doing, build confidence. Using a teaching style that is dialectic and investigative, teachers convey respect for their students as moral and intellectual equals and full confidence in their abilities. Basically, the teacher covers the foundational information students will need to know and then poses a hard question or complicated problem (ideally one the teacher does not already have an answer to). The class then approaches the challenge together as a team. The teacher does not only teach, but they also learn from students through mutual exploration and constant dialogue. Students are not passive recipients of knowledge, but rather “critical co-investigators,” meaning they actively contribute to collective progress.²⁰⁰ Everyone is responsible for collective problem-solving and identifying the person with the best explanations, ideas or solutions. This process gives

¹⁹⁸ This pedagogy of strategizing and designing translates to the workplace quite well. “Design-led companies such as Apple, Pepsi, Procter & Gamble and SAP have outperformed the S&P 500 over a 10-year period by an extraordinary 211%.” Linda Naiman, *Design Thinking as a Strategy for Innovation*, THE EUROPEAN BUSINESS REV. (May 20, 2019), <https://www.europeanbusinessreview.com/design-thinking-as-a-strategy-for-innovation/> [https://perma.cc/R84D-4KMJ].

¹⁹⁹ Finn, *supra* note 197, at 58.

²⁰⁰ FREIRE, *supra* note 196, at 81.

every student the opportunity to lead the class and influence the direction in which the class is moving. As a result, students not only learn that knowledge is power, but also discover what they can do with knowledge and intelligence. Students at top-rung schools become confident in their leadership ability. They take enthusiastic ownership of their intellectual growth.

Leadership skills, the other shining tool in the toolbox, inculcate in students a portfolio of abilities that empower them as changemakers. The first is argumentation and persuasion. Teachers expect students to question information and critically assess the source. They encourage students to challenge arguments by unearthing hidden assumptions, locating logical errors, identifying inconsistencies, suggesting counterexamples, and testing propositions against facts and hypotheticals. Students also learn to develop their own arguments, marshal supportive evidence and reasoning, and anticipate counterarguments.²⁰¹ In addition, students learn how to make their arguments and proposals persuasive. This requires understanding the particular needs, motivations, and concerns of one's audience. Students learn how to use this information to make their own ideas appealing to that audience. For example, elite schools often allow their students some leeway in breaking rules if they are able to talk themselves out of trouble with "wit and style."²⁰² To put it simply, top-rung schools teach their students not only critical thinking but the art of influence.

Realpolitik—a realistic understanding of why things happen in the world and how to get things done—is taught as a leadership skill. It might also be called "shrewdness." Most K-12 public schools, whether predominantly White or Black, are woefully deficient in this respect. The absence of exposure to this skill stunts the students' growth as active, informed citizens. As curricula at these schools have become increasingly narrow in recent years, they have prioritized math and literacy, while subjects like history, social studies, and citizenship education have been crowded out.²⁰³ Many schools that still take the time to teach these subjects have largely fallen in line with United States Department of Education history and civic education initiatives designed to teach students that, "America is a force for good in the world, bringing hope and freedom to other people."²⁰⁴ These schools emphasize personal virtues like charity, loyalty, and obedience, or focus on the mere mechanics of legislatures and government.²⁰⁵ Curricula structured in this way offer mythologized explanations of real-world events, such as "Great Man" theories of history that combine fatalism with an overemphasis on ethical properties as causal mechanisms (e.g., goodness, meritocracy, justice, freedom, superiority, and

²⁰¹ See Finn, *supra* note 197, at 58 (describing "essay-text literacy," meaning "the ability to read, evaluate, analyze, and synthesize written texts").

²⁰² *Id.*

²⁰³ Joel Westheimer, *No Child Left Thinking: Democracy At Risk in American Schools*, 3 EDUC. & POL. 12, 12 (2008); See also HUNTER RAILEY & JAN BRENNAN, 50-STATE COMPARISON: CIVIC EDUCATION, EDUC. COMM'N OF THE STATES 1 (2016) ("The majority of states do not include civics, social studies or citizenship in their education accountability systems.").

²⁰⁴ Westheimer, *supra* note 203, at 12 (internal citations omitted).

²⁰⁵ *Id.* at 14.

specialness).²⁰⁶ School programs that claim to teach “good citizenship” tend to equate this with listening to authority figures, following rules, working hard, being clean and on time, being nice to neighbors, and donating time and money to charity.²⁰⁷ Very few schools teach children to critically evaluate existing norms and institutions or think about ways to address the root causes of inequity.²⁰⁸

In contrast, top-rung students learn to construct realistic causal accounts of human society. They are taught to consider individual factors such as motives, expectations, and economic/political pressure, and to examine the historical and cultural context in which events occur. Thus, rather than focusing solely on discrete individual actions, top-rung students are able to understand events as complex, systemic, emergent properties of interacting forces, contingencies, and actions. Teachers discuss heavily mythologized topics about active political participation (e.g., Martin Luther King, Jr. and the civil rights movement) in terms of practical strategy: what specifically did this group hope to accomplish through a particular action, what worked, and why? Students, thus, learn to critically evaluate present and past events and institutions from the perspectives of multiple worldviews and interest groups. Instead of passively accepting ideology, norms, and rhetoric, top-rung students immediately ask whose interest an argument serves. These students are filled with a sense of efficacy rather than resignation. They have strong counterfactual imaginations and understand that everyone and everything exists within a world that is always changing, and always changeable. Nothing is inevitable. Intelligent, organized action can turn the tide.

Another item in the skills portfolio is cultural capital; specifically, a familiarity and facility with traditional “high culture” that facilitates social mobility. Subjects of traditional cultural capital include art, music, dance, literature, theater, history, philosophy, travel, proper diction, and so on.²⁰⁹ Students at top-rung schools acquire cultural capital through advanced course offerings supplemented by an expansive range of extracurricular options.²¹⁰ Cultural capital is an important asset that allows students to stroll through doors that remain locked for others. Students are taught that it is still very much the case that being able to make a confident, well-timed reference to Velazquez or Shakespeare, for example, sends a powerful signal to high-status individuals. It says, “I belong in the club.” Students are admonished that this is a reality that should not be ignored.²¹¹

²⁰⁶ *See id.* at 12–13 (discussing efforts to define historical “fact” and forbid teaching history through any other lens).

²⁰⁷ *Id.* at 14.

²⁰⁸ *Id.*

²⁰⁹ Finn, *supra* note 197, at 58.

²¹⁰ *Id.*

²¹¹ *See, e.g.,* LINDA M. BURTON & WHITNEY WELSH, *INEQUALITY AND OPPORTUNITY: THE ROLE OF EXCLUSION, SOCIAL CAPITAL, AND GENERIC SOCIAL PROCESSES IN UPWARD MOBILITY* 4 (2015) (“[T]he social networks through which social capital flows develop in accordance with the homophily principle, which states that similar people are more likely to interact with each other than dissimilar people.”) BBAs will adapt this elite instructional model to the Black experience. *See infra* Part III.B.5.b.

Students who attend top-rung schools are automatically connected to a large staff and alumni network full of successful, powerful people. This network gives graduates a behind-the-scenes knowledge of how power is exercised, tips about unadvertised jobs, insider information about employers, access to significant personal recommendations, and, in some instances, the advantage of being able to bypass the application process and simply walk into a job.²¹² The social connections top-rung students enjoy allows them not just to get by, but also to get ahead.

b. Inculcating Racial Sensibility

Although Black Boarding Academies should strive to replicate the pedagogy taught at superior boarding academies, several important modifications will have to be made in deference to the reparative purpose.²¹³ The country's most elite schools have a long history of preserving white wealth and privilege rooted in racial and economic inequity. Their leadership-oriented instructional model has largely served to reproduce this problematic status quo.²¹⁴ It would be a sad perversion of the intent and spirit of reparations to uncritically foist this educational model onto qualified descendant children or expect it to empower the African American community *in toto*. Black Boarding Academies must, therefore, design their leadership-oriented pedagogy with an emphasis on the Black ethos.

This pedagogy teaches many specific lessons that are attentive to racial and other domains of inequity. These lessons include understanding the causes of inequity, the importance of designing realistic strategies to address inequity at its roots, and the necessity of working together in solidarity to make a concrete difference in the lives of real people, and vigilance against baked-in myths of meritocracy, entitlement, and superiority that pervade some elite institutions. Students will also be taught that while everyone has potential, not everyone has opportunities, and that, therefore, they should appreciate the opportunities afforded them. In short, students will learn that "leadership" means following in the footsteps of African American heroes like Frederick Douglas, Ida B. Wells, Malcom X, Martin Luther King, Barbara Jordan, and Thurgood Marshall. Upon graduation, academy students should feel uniquely qualified to be this type of leader.

In addition to embracing the Black ethos, the pedagogy taught at BBAs must incorporate active learning, which is learning that is teacher-guided but student-driven. Following the New England Prep School model, teachers must select complex and complicated subjects to engage, pose difficult questions about these subjects, and allow students to engage in dialogues with their teachers and classmates as they evaluate different methodologies and answers. Knowledge is not to be handed to students

²¹² See Robert E. Lang & Steven P. Hornburg, *What is Social Capital and Why is it Important to Public Policy?*, 9 HOUS. POL'Y DEBATE 1, 10–12 (1998).

²¹³ See *supra* Part II.B.

²¹⁴ See Peter W. Cookson & Caroline H. Persell, *English and American Residential Secondary Schools: A Comparative Study of the Reproduction of Social Elites*, 29 COMPAR. EDUC. REV. 283, 284 (1985) (discussing "the discovery that schools tend to reinforce the status quo").

from unvetted sources. Rather, students must learn that the only way to know something reliably is through constant critical questioning and investigation. And the more often this investigation can be project-based, the better.²¹⁵ Students who are challenged to design, test, and produce emerge with a much deeper, more functional understanding of the material.

This ability to think and relate to a diverse society will give academy students a well-rounded education. They will not graduate as educated fools, educated in the Three Rs but ignorant of the human condition. Academy graduates will have a skillset that will enable them to act as leaders both in the African American community and in society writ large.²¹⁶

6. Extracurriculars, Counseling, and Mentors

Extracurriculars are important because children learn and mature as much outside the classroom as they do inside it. Black Boarding Academies should follow the example of elite New England boarding academies, which make extracurricular activities a priority. At Phillips Exeter Academy, for example, students can participate in over 125 student-run clubs.

These organizations and activities are wide-ranging. They include: Architecture Club; Astronomy Club; Amnesty International; Archaeology and History Club; Chess Club; Community Kitchen Volunteers; Culinary Appreciation Club; DJ Factory; Elementary Teachers Aides; Entrepreneurship Club; Environmental Action Group; Film Makers Society; Gender and Sexuality Alliance; Gospel Choir; Model UN; Modern Engineering Forum; OXFAM; magazines, journals, newspapers, and radio stations; Quiz Bowl; Real World Challenge Aeronautics; Robotics Club; SIS Female Empowerment Program; Sketch Comedy Writing Club; UNICEF; Word Slam Poetry Club; vocal/music groups; and a range of culture/language clubs. In addition to offering the full range of interscholastic sports for students, Andover students can also take ballroom dancing, fencing, hip hop dancing, swimming, outdoor skills, tennis, ping pong, ice skating, volleyball, and yoga among others.²¹⁷

As in the case of pedagogy, extracurricular offerings at Black Boarding Academies should take every opportunity to engage the Black ethos. Student-directed clubs and organizations should be rooted in

²¹⁵ See LUCAS EDUC. RSCH., GEORGE LUCAS EDUC. FOUND., THE EVIDENCE IS CLEAR: RIGOROUS PROJECT-BASED LEARNING IS AN EFFECTIVE LEVER FOR STUDENT SUCCESS 1 (2021) (“Four newly released peer-reviewed research studies show that using rigorous project-based learning in U.S. public schools has strong and positive effects on student outcomes across grades and subjects.”).

²¹⁶ This person—the change-agent persona—includes the use of critical thinking to challenge the relentless pushback against racial progress. See *supra* text accompanying notes 84–87.

²¹⁷ See, e.g., *Student Activities and Leadership*, ANDOVER, use <https://www.andover.edu/living/student-activities> [<https://perma.cc/47DK-QR72>] (last visited Mar. 28, 2023); *Phillips Academy Andover*, BOARDING SCH. REV., <https://www.boardingschoolreview.com/phillips-academy-andover-profile> [<https://perma.cc/SX24-VN6U>] (last visited Mar. 28, 2023); ANDOVER ATHLETICS, <https://athletics.andover.edu/> [<https://perma.cc/Y7FC-SNJ8>] (last visited Mar. 28, 2023).

community service and involvement in the Black community. Extracurricular activities may also provide opportunities to host experts-in-residence or visiting instructors for special workshops and electives. Archaeological excavations of nearby historic sites, community gardens, African American music and dance should be included. These activities will help to make Black Boarding Academies the loci of African American community empowerment.

Academies must do more than give their students an outstanding, culturally enriched PK-12 education. They must also work with students individually to ensure admission to, and success in, top colleges and universities. With a ninety-eight percent African American student body, the SEED Schools,²¹⁸ have developed an intensive college preparation and advising program tailored to low-income minority students.²¹⁹ The SEED College Transition & Success Program assists students with college application readiness through ACT and SAT training, resume and personal statement assistance, and more. This program also matches students with a list of SEED-endorsed colleges, which have high graduation rates for underrepresented students, affordable financial aid packages, and high-quality student support.²²⁰ Counselors stay in touch with students throughout their college years, helping them resolve unexpected difficulties that can become overwhelming, such as student debt and housing issues.²²¹ Academies could use a model similar to SEED's that encourages students to aim for Ivy League universities and liberal arts colleges, and to seek merit scholarships in addition to loans for financial aid. Devoting attention and resources to intensive, individualized college counseling that lasts through graduation would certainly increase African American participation in higher education.²²²

Black Boarding Academies will connect each student with a personal mentor throughout the course of their entire education. Mentors will be professionally successful adults outside the academies who are committed to giving disadvantaged children the encouragement, assistance, exposure, connections, and experiences needed to excel in school and beyond. Mentors might be judges, doctors, artists, authors, scientists, engineers, professors and teachers, business owners, philanthropists, and other successful individuals. They will act as special advocates for their mentees and introduce them to a range of professional paths and opportunities that might otherwise be unknown or alienating to them. Mentors will also arrange internships and interviews as well as help build a network of personal and professional relationships that can open

²¹⁸ For a discussion and critique of these college-oriented urban boarding schools designed for disadvantaged middle and high school students, see *supra* note 121.

²¹⁹ See THE SEED FOUND., SEED COLLEGE TRANSITION & SUCCESS PROGRAM 2 (describing the SEED Foundation's efforts to prepare students for college, aid students with college selection, and ensure students' college graduation) [hereinafter SEED COLLEGE TRANSITION & SUCCESS PROGRAM]; *Seed's College Transition & Success (CTS) Program*, THE SEED FOUND., <https://www.seedfoundation.com/collegesuccess> [<https://perma.cc/P88U-VPM3>] (last visited Mar. 28, 2023).

²²⁰ SEED COLLEGE TRANSITION & SUCCESS PROGRAM, *supra* note 219, at 6.

²²¹ *Id.* at 5.

²²² The paucity of low-income African Americans attending college is a problem that Black Reparations should try to address.

doors to positions of esteem and leadership in ways that affluent White families are able to do.

Underscoring the importance of mentoring, the Equal Employment Opportunity Commission (EEOC) found that African Americans suffer in the labor market from having fewer networking opportunities than other groups.²²³ Connections build key pathways to jobs (especially unadvertised), promotions, and higher salaries. They also help mentees build their professional skills and learn how to stand out from other applicants.²²⁴

Mentors can be of any race. They need only be committed to racial progress and understanding of the needs and challenges facing low-income qualified descendants. African American mentors are more likely than any other group to satisfy these requirements. In addition, when African American mentors come from fields in which African Americans are severely underrepresented—e.g., law, executives, investment bankers, and STEM—they give African American mentees reason to strive for positions in these fields.²²⁵ For this reason, as many mentors as possible should be African American.

C. Living

1. Full-Time Boarding

It is critical that the academies board students full-time. Full-time boarding is essential to the academic success of African American children, especially low-income children. The academic underperformance of African American children can largely be traced to the many negative influences within their home environment.²²⁶ African American children living in dysfunctional homes and failing communities face a slew of impediments to their learning and development which classroom time alone—regardless of quality—cannot overcome. Unless children’s basic needs are met, attempts at closing the education gap will be futile.²²⁷ For low-income African American students (especially those who are at-risk) to reach their full potential, BBAs must provide a positive, nurturing out-of-school environment twenty-four hours a day. These students must have space in which they can concentrate on their education and personal growth.

Black Boarding Academies will, therefore, be located on idyllic, well-equipped campuses in peaceful areas away from large cities but within feasible driving distance for school-organized trips to cultural events and

²²³ *EEOC African American Workgroup Report*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (2013), <https://www.eeoc.gov/federal-sector/report/eeoc-african-american-workgroup-report#> [<https://perma.cc/KS6G-TKPM>].

²²⁴ *Id.* (noting that professional contacts make an applicant “more employable by having someone vouch for them”).

²²⁵ *Id.* (explaining the correlation between mentorship and faster job growth).

²²⁶ *See supra* text accompanying notes 74–79, 88–98.

²²⁷ *See* James W. Ainsworth, *Why Does it Take a Village? The Mediation of Neighborhood Effects on Educational Achievement*, 81 SOC. FORCES 117, 117–18 (2002) (evaluating how poverty negatively affects educational outcomes); Nancy A. Gonzales et al., *Family, Peer, and Neighborhood Influences on Academic Achievement Among African-American Adolescents: One-Year Prospective Effects*, 24 AM. J. CMTY. PSYCH. 365, 366–67 (1996) (describing ecological influences on African American children’s educational outcomes).

home visits. BBAs will actively ensure that campuses are free from physical danger, crime, and negative police interactions. Buildings and water supplies will be free from lead, asbestos, and other harmful materials. Basic needs will be met at communal facilities within walking distance from living facilities. Excellent nutrition will be provided at dining halls, full mental and physical healthcare will be available through certified campus health centers, academic resources and assistance will be accessible at libraries and academic support centers, and recreation provided in campus recreation centers and athletics facilities.

Students will live in small dormitory “pods” of five to ten students. Each pod will have a designated live-in “dorm parent.” Dorm parents will be certified and experienced in age-appropriate supervision. These cozy group arrangements will function as a home away from home, with dorm parents providing round-the-clock, high-quality care and support for students’ academic and personal growth.

Living in small, self-contained communities will allow students to form deeper connections with each other and with the faculty and administration. Whether at meals or simply sitting around one’s room or the courtyard, students will be able to meet with other students to have extended discussions about anything—courses, culture or private matters.²²⁸ This cozy environment will also facilitate frequent, informal interactions between students and their teachers or other school officials at meals or in the courtyard. Other opportunities for casual interactions will be afforded to students, including socials or receptions perhaps in a hall named after a famous donor.²²⁹

A boarding environment also provides opportunities for experts-in-residence. Students can knock on the door of an eminent author, artist, craftsman, attorney, scientist, engineer, scholar, or CEO, and be invited into the expert’s world of knowledge. In this way, students will have tangible exposure to a range of vocations from an early age in an informal setting. They will be able to identify talents and lifelong interests that they otherwise would not have encountered.

Experts-in-residents need not be limited to the worldly famous. They can also be local individuals from whom students can benefit in other ways. For example, San Pasqual Academy, a residential education program for high school foster youths in San Diego, invites “foster grandparents” to live on campus for reduced rent. These foster grandparents act as intergenerational mentors, share their experience, insight, and support.

²²⁸ The most lasting and meaningful educational experience I had as a student at Yale Law School came outside the classroom. After dinner in the law school cafeteria, I regularly engaged in extended discussions on civil rights matters with my classmates who included Lani Guinier (later Harvard Law School professor), Clarence Thomas (later Supreme Court Justice), Hillary Rodham (later Secretary of State), and Bill Clinton (later President of the United States). These discussions took place at what was called “the Black Table,” sometimes with Sam Alito (later Supreme Court Justice) looking on from another table. The Black Table is legendary. *See*, BROOKS, RACIAL JUSTICE IN THE AGE OF OBAMA, at ix–x (2009). Black Boarding Academies should attempt to replicate this type of experience for their students.

²²⁹ Donors will be an important source of post-reparations funding. *See infra* Part III.D.2.

Foster grandparents impart knowledge from their experience with life and also engage students in activities closer to home, such as cooking, crafts, gardening, and art.²³⁰

BBA students will, in short, receive constant attention and supervision. No student will be allowed to skip class, coast along, fall through the cracks, or be given up as a lost cause. Every student on campus will be an integral part of the academy family. Their wellbeing and success will matter—and they will know it.

2. Ties to the Black Community

In addition to providing a safe and supportive living environment for students, Black Boarding Academies will also strive to strengthen the bonds between students and the African American community. Community-building endeavors start with an institutional model that prioritizes and celebrates African American perspectives and allows students to hone their leadership skills.²³¹ Students will learn how to use critical thinking to challenge with both the written and spoken word the relentless pushback against racial progress. These forensic skills are vitally important to the African American community.²³²

Students will also put these skills to use through community service—praxis. They will, for example, participate in pro bono services the academies offer to their families. These endeavors might include adult education classes, help finding employment, basic financial planning, assistance applying for public benefits, wellness checks, and family therapy. In fact, many educational organizations serving disadvantaged children include wraparound family services as an integral part of their programs. The Harlem Children's Zone is perhaps the most well-known program, having been featured on *60 Minutes* with Anderson Cooper.²³³ Since 1970, this nonprofit organization has served poor children and families who live in Harlem. It provides free parenting workshops and child-oriented health programs as an adjunct to its primary mission, PK-12 education.²³⁴ More recently, basketball superstar LeBron James has established the I PROMISE School in Akron, OH. This public elementary

²³⁰ Michael J. Lawler et al., *Comprehensive Residential Education: A Promising Model for Emerging Adults in Foster Care*, 38 CHILD. & YOUTH SERVS. REV. 10, 11 (2014). See also HOPE ACAD. AT SAN PASQUAL, CNTY. OF SAN DIEGO HEALTH & HUM. SERVS. AGENCY (describing the San Pasqual program's emphasis on family and community).

²³¹ See *supra* Part III.B.5. For a discussion of African American perspective—both representative and outlier—see BROOKS, DIVERSITY JUDGMENTS, *supra* note 88, at 40–41.

²³² BBAs could be used as laboratories for experimenting with ways of effectively challenging the relentless resistance to racial progress in our society much in the way that Howard Law School was used as a laboratory for developing strategies to fight Jim Crow in the 1930s. Thurgood Marshall and other early civil rights lawyers honed their skills as students at Howard Law School. See J. Clay Smith, Jr., *Thurgood Marshall: An Heir of Charles Hamilton Houston*, 20 HASTINGS CONST. L. Q. 503, 507–10 (1993) (describing Thurgood Marshall's influences at Howard Law School).

²³³ *Watch: Geoffrey Canada and Harlem Children's Zone on '60 Minutes' with Anderson Cooper*, HARLEM CHILD.'S ZONE, <https://hcz.org/news/hcz-on-60-minutes-with-anderson-cooper/> [<https://perma.cc/UZY2-GTZK>] (last visited Mar. 28, 2023).

²³⁴ See generally HARLEM CHILD.'S ZONE, <https://hcz.org> [<https://perma.cc/XMN7-ZCF3>] (last visited Mar. 28, 2023).

school, which targets at-risk children, provides wraparound services that include financial counseling for students' families.²³⁵

Wraparound programs have a positive impact on students, families, and communities. One study of a pilot program found that after parents were given help in signing up for modest income supplements, affordable health insurance, and child-care subsidies, their children performed better in school, demonstrated stronger study skills, were more socially competent, exhibited fewer behavior problems, and participated in more extracurricular activities.²³⁶ The improvement was especially pronounced in nine- to twelve-year-old boys.²³⁷

These findings should surprise no one. Families and communities are a child's fundamental locus of love, loyalty, and identity. Disadvantaged children will not accept a school's culture or its opportunities if they feel they are abandoning loved ones or otherwise sense they are betraying their identity.²³⁸ Stable families and the functioning communities they help to create give students the peace of mind they need to commit their full attention and energies to their intellectual growth. In this critical sense, Black Boarding Academies can only succeed if connected to the students' families and communities.

D. Finances

1. Costs

If Black Reparations were designed to redress the full impact of slavery and Jim Crow on Black lives,²³⁹ that would be an expensive proposition however calculated.²⁴⁰ Estimates range from \$6.4 trillion²⁴¹ to \$59.2 trillion.²⁴² The numbers do not look any better when viewed at the

²³⁵ JPMorgan Chase subsidizes these services. See Stephanie Rosa, *Welcome to House Three Thirty*, THE LEBRON JAMES FAM. FOUND. (Dec. 16, 2020), <https://www.lebronjamesfamilyfoundation.org/news/welcome-to-house-three-thirty> [<https://perma.cc/8UW4-AUQA>].

²³⁶ THE ANNIE E. CASEY FOUND., *NEW HOPE FOR LOW-INCOME WORKERS: IMPROVING ECONOMIC AND CHILD OUTCOMES IN MILWAUKEE* 15(1999).

²³⁷ *Id.*

²³⁸ Living a double life can be uncomfortable, untenable, and even dangerous. See generally JEFF HOBBS, *THE SHORT AND TRAGIC LIFE OF ROBERT PEACE: A BRILLIANT YOUNG MAN WHO LEFT NEWARK FOR THE IVY LEAGUE* (2014) (telling the story of a young African American man's struggle to relate his life at Yale to his upbringing on the streets).

²³⁹ See *supra* Part II.B.

²⁴⁰ Reparations can be calculated in numerous ways. The total amount of reparations could be equivalent to a desired increase in the percentage of the national wealth owned by Black people. Darity, *H.R. 40, supra* note 55 (arguing for reparations "enacted and implemented to achieve" increases in Black wealth). Alternatively, the total amount of reparations could be determined by multiplying the average racial earnings gap by the number of enslaved descendants each year the program is in existence. See BROOKS, *ATONEMENT AND FORGIVENESS, supra* note 2, at 162–63. For a discussion of other ways to calculate the cost of reparations and how these payments can be funded, see DARTY & MULLEN, *supra* note 2, at 259–63.

²⁴¹ Julia Craven, *We Absolutely Could Give Reparations to Black People. Here's How*, HUFFPOST, https://www.huffpost.com/entry/reparations-black-americans-slavery_n_56c4dfa9e4b08ffac1276bd7 [<https://perma.cc/Z5HQ-4CHM>] (last updated Feb. 23, 2016).

²⁴² Denis Rancourt, *Calculating Reparations: \$1.5 Million for Each Slave Descendant in the U.S.*, BLACK AGENDA RPRT. (Jan. 23, 2013), <https://blackagenda.com/content/calculating-reparations-15-million-each-slave-descendant-us> [<https://perma.cc/C5WU-45DK>].

state level. For example, approximately five percent of the nation's African American population resides in California.²⁴³ Assuming even half of these individuals are qualified descendants, the state of California would owe anywhere from \$160 billion (2.5 percent of \$6.4 trillion) to over \$1.48 trillion (2.5 percent of \$59.2 trillion). If reparations are invested in educating qualified-descendant children, the state would owe each child a \$275,000 to \$2.5 million-dollar education.²⁴⁴

Given the estimated cost of operating boarding academies, it could cost upwards of \$50 million annually to operate just one Black boarding academy for 500 PK-3 students on state-owned land.²⁴⁵ Capital expenditures, such as the construction of classrooms and dormitories, would also have to be factored in. These amounts would have to cover at least one exemplary PK-3 academy. This academy could expand each year with annual reparations and additional funding from the academy's post-

²⁴³ Christine Tamir, *The Growing Diversity of Black America*, PEW RSCH. CTR. (Mar. 25, 2021), <https://www.pewresearch.org/social-trends/2021/03/25/the-growing-diversity-of-black-america/> [<https://perma.cc/UR8E-6RDX>] (showing 2.8 million Black Americans living in California, out of the 46.8 million Black Americans in the United States).

²⁴⁴ In 2020, the United States Census Bureau counted 582,033 African American children under age eighteen living in California. *Current Black or African American Population Demographics in California 2020, 2019 with Demographics and Stats by Age, Gender*, SUBURBAN STATS, <https://suburbanstats.org/race/california/how-many-black-or-african-american-people-live-in-california>. [<https://perma.cc/ANR5-JCA9>]. Conservatively assuming that only half of the African American child population consists of qualified descendants, generates a figure of 291,000 qualified descendant children in California. If the amount owed to all African Americans is committed to children rather than adults, that amount divided by the number of African American children generates a per capita rough estimate for each qualified descendant child's share of the reparations fund. This yields the figures cited in the text.

²⁴⁵ Fifty million dollars assumes a per-pupil expenditure of \$100,000 for 500 students without factoring in capital expenditures. The per capita figure is meant to suggest an individual educational services pay-out for every qualified descendant child. While financial information on boarding schools is not readily available, it is reported that the three SEED schools, which offer five-day-a-week boarding, spent \$32.3 million in 2021, with a per-pupil allotment of slightly under \$27,000 for 1,185 students. 2021 ANNUAL REPORT, *supra* note 161, at 26. SEED schools are public. Among the prestigious private New England prep schools, the federal tax exempt form (Form 990) for reporting year 2020 show total operating expenses of \$131 million at Phillips Academy at Andover (founded in 1778) spent on 1,142 students, for a per-student expenditure of about \$124,000; of \$131 million at Phillips Exeter Academy (founded in 1781) spent on 1,073, students for a per-student cost of about \$124,000; and of \$72 million at Deerfield Academy (founded in 1797) spent on 650 students, for a per-student allotment of about \$111,000. *Trustees of Phillips Academy*, PROPUBLICA (2020), https://projects.propublica.org/nonprofits/display_990/42103579/05_2021_prefixes_01-04%2F042103579_202006_990_2021052018155973 [<https://perma.cc/37KP-Z2MN>]; *Phillips Exeter Academy*, PROPUBLICA (2020) <https://projects.propublica.org/nonprofits/organizations/20222174/202121319349302872/full> [<https://perma.cc/K6ZE-CASS>]; *Trustees of Deerfield Academy*, PROPUBLICA (2020), https://projects.propublica.org/nonprofits/display_990/42103563/05_2021_prefixes_01-04%2F042103563_202006_990_2021052018155136 [<https://perma.cc/2ULJ-453Z>]. Though not a boarding school, the private Harlem Children's Zone, like the SEED schools, focuses on underprivileged children. It had 2020 total expenditures of \$105 million on 1,165 students, for a per-student cost of about \$90,000. *Harlem Childrens Zone Inc*, PROPUBLICA (2020), <https://projects.propublica.org/nonprofits/organizations/237112974> [<https://perma.cc/9VVSQ-7VLR>]. Not quite an accurate comparison, the I Promise School, a non-boarding public school in Akron, Ohio which educates underprivileged children, had total operating expenses in 2020 of \$6 million, which calculates to a per-student expenditure of about \$13,000 for 452 students. *Promise Schools*, PROPUBLICA (2020), <https://projects.propublica.org/nonprofits/organizations/464341453> [<https://perma.cc/Z678-E8DF>].

repairs funding.²⁴⁶ The exemplary academy (or academies, depending on the size of the starter package) would operate as the flagship of a growing fleet. Over time, additional academies could open in each state. Each year, the academies would increase their capacities to offer a wider range of grades and services to an increasing number of students.

2. Post-Reparations Funding

It is unlikely that African Americans will get the \$6.4 trillion to \$59.2 trillion owed as reparations.²⁴⁷ The inflationary effect on the economy alone may make full reparations prohibitive.²⁴⁸ Then there is the cost of funding selected, favored reparatory projects like Black Boarding Academies just discussed.²⁴⁹ Hence, reparations alone will not be sufficient. Other funding sources will have to be harvested. For that reason, reparations should be viewed as seed money, money that must be supplemented with non-reparative funding—post-reparations funding.

There is no dearth of available post-reparations funding sources available to Black Boarding Academies. To tap into these sources, these academies, not unlike other elite schools (private or public),²⁵⁰ will have to engage in annual fundraising. They must, therefore, institutionalize within their operations robust fundraising departments. Reparations (as startup funds) must cover the cost of operating a department devoted to a full range of fundraising activities. Marketing and outreach, securing donations and grants, creating scholarships, and increasing endowments must become an integral part of every BBA.²⁵¹

Public and private schools that currently provide high-quality, tuition-free education to disadvantaged minorities offer some insight into the fund-raising landscape Black Boarding Academies will likely have to traverse beyond reparations. SEED schools are urban public boarding schools that serve low-income, first-generation, college-bound students. Mostly Black, these students are given a free education that costs about \$27,000 per year per student.²⁵² Every year, the SEED Foundation draws from a stellar list of more than \$1,000,000 in donations from charitable organizations and individuals, including The Bill and Melinda Gates Foundation, Oprah Winfrey's Angel Network, and former President Barack Obama.²⁵³ Businesses and public agencies such as the Metropolitan Transportation Authority also contribute. These contributions cover

²⁴⁶ On the matter of expansion, see *supra* Part III.B.1. On the matter of sustainability and post-reparations funding, see *infra* Part III.D.2.

²⁴⁷ See *supra* Part III.D.1.

²⁴⁸ Releasing large sums of federal expenditures could lead to inflation. See DARITY & MULLEN, *supra* note 2, at 266.

²⁴⁹ See *supra* Part III.D.1.

²⁵⁰ These institutions seek funds from a variety of sources, including governments, philanthropic organizations, businesses, and individuals, as well as tuition.

²⁵¹ See *Plans for Future Schools*, THE SEED FOUND., <https://www.seedfoundation.com/future-plans> [<https://perma.cc/86Q2-LWCX>] (noting the logistical and financial considerations that go into opening a public boarding school).

²⁵² See *supra* note 245.

²⁵³ 2021 ANNUAL REPORT, *supra* note 161, at 23.

operating costs for existing schools and start-up costs for building new schools.²⁵⁴

The NAYA Many Nations Academy in Portland, Oregon, is another example. NAYA offers high school education and wraparound services (including elder care) for local high school students and their families within the Native American Youth and Family Center.²⁵⁵ NAYA relies on a diverse range of public and private funding sources for student scholarships, including large international corporations (such as Coca-Cola, JP Morgan Chase, Boeing, and eBay), charitable organizations, individual donors, and contributions from cities, counties, and tribes.²⁵⁶ In 2014, for example, the organization was able to raise over \$7 million in grants and contributions.²⁵⁷ NAYA also partners with institutions, such as universities, public schools, art museums, and police departments, to provide additional programs and services.²⁵⁸ Understanding the importance of a stable living environment and comprehensive care, NAYA plans to secure funds to construct a dormitory on campus.²⁵⁹

Education tax credits can also be used as a source of funding. Individuals and corporations can reduce their tax liability by donating a limited amount of money to state-designated scholarship funds that support low-income children. Private schools often use tax credits as a source of public funding, though it is technically not considered to be public funding because the donations never pass through state treasuries.²⁶⁰ Though public institutions, Black Boarding Academies should consider this private-public funding source.

In addition, BBAs could draw on “equitable services” under Every Student Succeeds Act (ESSA).²⁶¹ Signed into law by President Obama in 2015, ESSA gives nonprofit private schools access to various federal

²⁵⁴ Mary Bruce, *Taking a Chance; Public Boarding School Reaps Great Success*, ABC NEWS (June 4, 2010, 2:45 PM), <https://abcnews.go.com/US/article/public-boarding-school-reaps-great-success/story?id=10828451> [<https://perma.cc/VC6J-EMM6>].

²⁵⁵ See *Many Nations Academy*, NAYA FAM. CTR., <https://nayapdx.org/services/many-nations-academy/> [<https://perma.cc/76KH-TG8W>] (last visited Mar. 28, 2023). As NAYA’s student body mostly consists of Native Americans, its pedagogy is fundamentally informed by indigenous values and culture. African American, Latino, and White students make up smaller portions of the student body. Between forty and fifty percent of its students are homeless. See Anna Pedersen, *Portland Alternative School Brings Success Stories for Native American Youths*, STREET ROOTS (Mar. 22, 2020), <https://www.streetroots.org/news/2020/03/22/portland-alternative-school-brings-success-stories-native-american-youths> [<https://perma.cc/TN4T-LE9W>].

²⁵⁶ NAYA FAM. CTR., ANNUAL REPORT 2013-2014, at 11–12 (2014) [hereinafter NAYA ANNUAL REPORT]; *Our Partners and Supporters*, NAYA FAM. CTR., <https://nayapdx.org/support-us/our-partners-and-supporters/> [<https://perma.cc/MBH3-GN87>] (last visited Mar. 28, 2023).

²⁵⁷ NAYA ANNUAL REPORT, *supra* note 256, at 8.

²⁵⁸ *Our Partners and Supporters*, *supra* note 256.

²⁵⁹ Pedersen, *supra* note 255.

²⁶⁰ See ASHLEY BERNER, INST. FOR EDUC. POL’Y, PUBLIC FUNDING FOR PRIVATE SCHOOLS: RECENT RESERACH AND LARGER POLICY IMPLICATIONS 2 (2016). The specific requirements for using tax credits as a funding source varies from state to state but must comply with constitutional rules set by the Supreme Court. *Id.*

²⁶¹ See Every Student Succeeds Act, 20 U.S.C. § 6301 (2015). Private schools frequently draw upon this funding source.

programs through their local school districts.²⁶² As publicly funded schools, BBAs would presumably have automatic access to these services to support their low-income students. But this may not be so given the independence BBAs seek. Therefore, BBAs may have to go through ESSA to fund some of its services. It may be well worth it because of the bevy of services ESSA funds. For example, Title I-A ESSA programs, which are designed to close academic achievement gaps for low-income students with demonstrated needs, can cover the cost of special education services through a public-school teacher or outside provider.²⁶³ Title II-A provides professional support and development for teachers, principals, and staff. Such support could, for example, take the form of on-site teacher training and development related to expeditionary learning, or cover the cost of licensure programs.²⁶⁴ ESSA has added a new program under Title IV-A called “Student Support and Academic Enrichment” (SSAE). Funding under this new program is limited, but it is also flexible. It has supported a wide variety of activities, such as STEM-related competitions, accelerated learning programs, partnerships between educational institutions and businesses, multidisciplinary endeavors, and programs that increase participation of underrepresented student groups in certain subjects.²⁶⁵ Another program, Title IV-B, offers grants to organizations that qualify as community learning centers. These grants can be used to fund extracurricular programs and activities such as tutoring, counseling, parent participation initiatives, and career preparation services that can include internships and apprenticeships.²⁶⁶ These services cover much of what BBAs want to do. Hence, it behooves them to consider ESSA if they do not automatically qualify for the services it offers.

BBAs could seek funding directly from state coffers beyond what a state might otherwise pay as Black Reparations. The ask-for amount could be equivalent to the per-student amount of state funding. Pre-COVID, the national average spent annually was \$15,114 per child.²⁶⁷ A state-administered account could be opened for each eligible student. Payments from these accounts could be made to BBAs for authorized educational expenses; such as, tuition and boarding. Any unused annual amounts could remain in students’ accounts. Students could draw on these savings for a set number of years after high school graduation to pay for the cost of attending a state-approved college, university or professional program. The state could reclaim any unspent funds and, to assure accountability, require BBAs to make detailed financial reports.

The sustainability of BBAs could also be assured by setting aside a limited number of spaces in each class for qualified descendants from

²⁶² See ROSS IZARD, HOW FEDERAL PROGRAMS SUPPORT PRIVATE K-12 STUDENTS AND TEACHERS 3 (2019).

²⁶³ *Id.* at 5.

²⁶⁴ *Id.* at 8.

²⁶⁵ *Id.* at 10–11.

²⁶⁶ *Id.* at 12.

²⁶⁷ John Festerwald, *California Rises to 30th in Nation in Pre-Covid Per-Student Spending*,

EDSOURCE (Oct. 28, 2021, 8:28 AM), <https://edsources.org/updates/california-rises-30th-in-nation-in-pre-covid-per-student-spending> [<https://perma.cc/ZGD9-R9SB>] (noting that, spending \$14,174 per student, California ranks thirtieth in the nation).

families who can afford to pay full or partial tuition.²⁶⁸ Opening up admissions in this fashion early on moves BBAs toward covering the full range of qualified descendants sooner rather than later.²⁶⁹ But BBAs have to be careful not to crowd out their primary constituency—low-income students.

It is unlikely African Americans will receive all the reparations that are rightfully due or urgently needed to redress the lingering effects of slavery and Jim Crow. Post-reparations funding must, therefore, become part of the diurnal discourse on Black Reparations even beyond Black Boarding Academies. The same must be said about the constitutionality of Black Reparations. That issue is also a threshold matter of concern.

E. Constitutionality

Black Reparations are asymmetrical remedial measures intended to redress two specific atrocities—slavery and Jim Crow—committed against a specific race—Black Americans.²⁷⁰ The constitutionality of these race-conscious measures is determined by the law governing traditional affirmative action programs. At present, the Supreme Court appears to be on the verge of doing away with race-conscious college admissions in favor of colorblind remedial measures,²⁷¹ thus following in the footsteps of a recent California state court decisions.²⁷² The impending change in the

²⁶⁸ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1972) (reasoning that because wealth is not a suspect classification, this sort of benign discrimination does not offend the Constitution).

²⁶⁹ Of course, further analysis will be needed to define “affordability.” It will likely vary from household to household and depend on a wide range of factors, much like standard financial assessments used to determine student eligibility for financial aid. One would, however, expect academies to use a more equitable calculus than what is typically used to determine financial aid eligibility. An appropriate calculation would account for financial disadvantages disproportionately affecting African Americans such as the racial wealth gap and lower property values.

²⁷⁰ All reparations are asymmetrical remedial measures. They go only to the victims of the atrocity in question. For further discussion, see *supra* text accompanying notes 38–40.

²⁷¹ The Supreme Court will likely ban *all* affirmative action in public schools and beyond when it reconsiders *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding narrowly-defined affirmative action programs), in deciding *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022) (challenging affirmative action programs as improper racial classification), during its 2022–23 term. The Court, which is significantly more conservative than it was at the time *Grutter* was decided, added consolidated cases to its docket that have petitioned for “colorblind” admissions policies in the nation’s schools, colleges, and universities. See Amy Howe, *Court Will Hear Challenges to Affirmative Action at Harvard and University of North Carolina*, SCOTUSBLOG (Jan. 24, 2022, 11:44 AM), <https://www.scotusblog.com/2022/01/court-will-hear-challenges-to-affirmative-action-at-harvard-and-university-of-north-carolina/> [<https://perma.cc/98GN-VYQP>]. See also, Greg Stohr & Zoe Tillman, *College Affirmative Action in Doubt After Supreme Court Fray*, BLOOMBERG L. (Oct. 31, 2022, 5:47 PM), <https://news.bloomberglaw.com/us-law-week/supreme-court-justices-battle-over-race-in-college-admissions> [<https://perma.cc/7YPX-SJSD>].

²⁷² The Superior Court of California in the County of Los Angeles struck down, on equal-protection grounds, state laws requiring publicly traded companies with headquarters in the state to have at least one female director and one person of color on their board, depending on board size. See *Crest v. Padilla*, No. 20STCV37513, 2022 Cal. Super. LEXIS 5531, at 3 (L.A. Cnty. Super. Apr. 1, 2022) (finding that the Legislature cannot “skip directly to mandating heterogeneous boards” to solve the diversity problem).

In California, Prop (or Proposition) 209, the California Civil Rights Initiative, CAL. CONST. art. I, § 31 (Deering 2002), proscribes race-conscious distributions of public monies,

Court's racial jurisprudence need not, however, sound the death knell for Black Reparations. It only means that federal and state governments will have to craft Black Reparations in racially neutral ways, that is, without explicitly granting a preference to Black Americans.²⁷³ Using race-neutral measures to remedy race-conscious harms seems rather odd, to say the least.²⁷⁴ But it appears that this will be the law. In this section, I attempt to explain how Black Reparations can be constructed in a race-neutral way without vitiating them altogether. My prescription applies with equal force to Black Boarding Academies.

1. Governing Law

The structure on which the law of affirmative action law is constructed has been previously explained as follows:

[I]t is useful to draw a distinction between 'involuntary' and 'voluntary' affirmative action programs. The former are affirmative action programs imposed on an institution—such as, an employer, school district or voting district—by a court as a remedy for a proven violation of statutory or constitutional law. An involuntary affirmative action program can also be imposed by executive order. Executive

goods or services. A ballot proposition passed in 1996 by fifty-five percent of Californians who voted, Prop 209 amended the California constitution. *See Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 697 (9th Cir. 1997) (explaining that the California electorate passed Prop 209 in November 1996). Prop 209 prohibits state governmental institutions from considering race, sex, or ethnicity in public education as well as in public employment and contracting. CAL. CONST. art. I, § 31. As exceptions to its general anti-discrimination rule, Prop 209 allows race- or sex-conscious state-sponsored action for sex-based bona fide occupational qualifications, *id.* at § 31(c), the preservation of existing consent decrees, *id.* at § 31(d), and race- and sex-conscious actions required as a condition of eligibility for federal funding, *id.* at § 31(e). *See also* Stephen R. McCutcheon Jr & Travis J. Lindsey, *The Last Refuge of Official Discrimination: The Federal Funding Exception to California's Proposition 209*, 44 SANTA CLARA L. REV. 457, 458 (2004) (arguing for a narrow construction of § 31(e) "to ensure that the purpose of Proposition 209 is not frustrated"); Caitlin Knowles Myers, *A Cure for Discrimination? Affirmative Action and the Case of California's Proposition 209*, 60 INDUS. & LAB. RELS. REV. 379, 379 (2007) (finding that "employment among women and minorities dropped sharply" after the enactment of Prop 209 and questioning whether this means that affirmative action "failed to create lasting change in employers' prejudicial attitudes").

²⁷³ To be precise, the Court's concern seems to be less with racial classifications or race-conscious decision making than with *racial preferences*. Our federal civil rights laws use racial classification and are certainly race-conscious as they expressly grant rights on the basis of "race" or "color." *See, e.g.*, Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2 (banning employment discrimination). On the impossibility of conceptualizing racial neutrality, *see infra* note 279. Justice Breyer has noted, "I have counted 51 federal statutes that use racial classifications. I have counted well over 100 state statutes that similarly employ racial classifications. Presidential administrations for the past half-century have used and supported various race-conscious measures." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 827 (2007) (Breyer, J., dissenting). It is perhaps more useful to distinguish between symmetrical and asymmetrical laws rather than between race-neutral and race-conscious laws. *See supra* text accompanying notes 38–40. Conservative justices favor symmetrically (referring to it as "race-neutral") rather than asymmetrically (referring to it as "racial classifications" or "race-conscious").

²⁷⁴ It certainly is inconsistent with the reparative mission. *See supra* Part III.A. Rather than reversed discrimination, affirmative action, in my view, reverses discrimination. It is responsive to discriminatory traditions, the lingering effects of slavery, and Jim Crow. *See discussion supra* Part II.B.

Order 11246 requires certain federal contractors to ‘take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.’ . . .

A voluntary affirmative action program is created on an institution's own initiative. Such a program may, however, arise in anticipation of a threat of future litigation. Consent decrees, in which the defendant typically denies the plaintiff's charge of discrimination in violation of statutory or constitutional law, are included in the category of voluntary affirmative action. . . .

The legal basis on which an affirmative action program is challenged sets the basic framework for determining the program's permissibility. Affirmative action programs can be challenged on statutory or constitutional grounds. . . . A voluntary or involuntary program survives an attack based on constitutional grounds if it satisfies the applicable standard of judicial review—such as the strict scrutiny test—under the equal protection clause of the Fourteenth Amendment or the equal protection component of the Fifth Amendment. There must, however, be a showing of discriminatory purpose as a prerequisite for raising the constitutional issue in the first place. That is, the plaintiff must establish that the challenged affirmative action program was created or implemented ‘because of’ race or gender.²⁷⁵

As neither slavery nor Jim Crow violated federal law prior to their termination in 1865 and 1972, respectively,²⁷⁶ reparations paid from public treasuries raise an issue of voluntary, rather than involuntary, affirmative action. Black Reparations, including Black Boarding Academies, fall within the category of voluntary affirmative action.²⁷⁷

While the law governing voluntary affirmative action measures can be excessively technical and frustratingly contradictory,²⁷⁸ the norms that

²⁷⁵ BROOKS, LAW OF DISCRIMINATION, *supra* note 78, at 1291–92 (citations omitted).

²⁷⁶ Slavery was legal until it was outlawed by the Thirteenth Amendment, see U.S. CONST. amend. XIII, and Jim Crow was legal until it was invalidated by federal statutory law. See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000a.

²⁷⁷ That reparations cannot be styled as involuntary affirmative action is further indicated by the fact that issues of sovereign immunity, the statute of limitations, the absence of a cognizable right of action, and other procedural hurdles make it unlikely that any court would ever reach the merits of a lawsuit nor, if it did, would ever order a legislature to pay reparations for slavery or Jim Crow. For a discussion of litigation involving reparations including Black Reparations, see BROOKS, ATONEMENT AND FORGIVENESS, *supra* note 2, at 98–140.

²⁷⁸ For example, the colorblind, or racial omission, norm which is at the heart of the affirmative action controversy, assumes that it is possible for one to ignore another person's color or that racial or gender identity is insignificant. But Professor Thomas Reed Powell famously said: “If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind.” T. ARNOLD, THE SYMBOLS OF GOVERNMENT 101 (1935).

give shape to the legal framework are sharply drawn. These norms—racial integration (or diversity) and racial omission (or colorblindness)—have been in place since the first major affirmative action case decided by the Supreme Court. In *Regents of University of California v. Bakke*, Justice Blackmun invoked the racial integration norm and rejected the racial omission norm when he asserted that “[i]n order to get beyond racism, we must first take account of race.”²⁷⁹ Engineering racial integration is the most palpable way of getting beyond racism, of counteracting racism that comes under the patina of colorblindness, of removing the vestiges of slavery and Jim Crow from our society. Racial integration, in other words, provides the greatest boost to racial progress, and affirmative action provides the greatest boost to racial integration. These points were brought home during the heyday of affirmative action, pre-*Bakke* 1970s,²⁸⁰ which is why over the years affirmative action has received the support of a majority of justices: liberal justices like Justices Marshall, Brennan, Ginsburg, Breyer, Sotomayor, and Kagan as well as center-right justices like Justices O’Connor and Kennedy.²⁸¹

Notwithstanding the effectiveness of affirmative action, the Supreme Court limits its use, and, hence, the vindication of the racial integration norm, in public decision making. The legal framework that has developed since *Bakke* permits the government to use a racial classification in the form of preferential treatment consistent with the Equal Protection Clause if it can pass judicial review under the strict scrutiny test. In other words, the racial classification must serve a compelling governmental interest in a narrowly tailored way.²⁸² The ends must be compelling, and

²⁷⁹ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).

²⁸⁰ See BROOKS, RACIAL JUSTICE IN THE AGE OF OBAMA, *supra* note 228, at 144–51, figs. 30, 32, 34, 36, 38, 40, 42 & 44 (showing advances in earnings at all levels of education); 157–59, figs. 55, 57 & 59 (showing advances in college participation, even *exceeding* whites). After *Bakke*, the Supreme Court disallowed the use of racial quotas in government decision making. Racial preferences then became the standard form of affirmative action. See *Bakke*, 438 U.S. at 316–17 (Powell, J.). See also, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

²⁸¹ See, e.g., *Bakke*, 438 U.S. at 267 (finding that affirmative action is permissible in at least some contexts, in a plurality opinion by Justice Powell, joined in part by Justices Brennan, White, Marshall, and Blackmun); *Grutter v. Bollinger*, 539 U.S. 306, 307–10 (2003) (upholding a race-conscious admissions program, in an opinion written by Justice O’Connor and joined in full by Justices Stevens, Souter, Ginsburg, and Breyer); *Fisher v. Univ. of Tex.*, 579 U.S. 365, 365–67 (2016) (upholding a race-conscious admissions program, in an opinion written by Justice Kennedy and joined by Justices Ginsburg, Breyer, and Sotomayor).

²⁸² See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Adarand*, 515 U.S. at 227.

the means must be narrowly designed to achieve such ends. These are the strict scrutiny's ends test²⁸³ and means test.²⁸⁴

²⁸³ The constitutional ends test can basically be satisfied on two grounds—the remedial-purpose rationale and the diversity rationale. The remedial-purpose rationale received the imprimatur of a divided Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). By a 6-3 vote, the Court overturned an affirmative action plan adopted by the city of Richmond, Virginia, that required white-owned prime contractors to whom the city awarded construction contracts to subcontract at least thirty percent of the dollar amount of the contracts to one or more Minority Business Enterprises ("MBEs"). An otherwise qualified MBE from anywhere in the United States was eligible to avail itself of the thirty-percent set-aside. *Id.* at 477. For the first time, five members of the Court unequivocally agreed that the strict scrutiny test is the appropriate standard of judicial review under the Equal Protection Clause for affirmative action programs favoring racial minorities. *Id.* at 494–96. Applying the strict scrutiny test, Chief Justice Rehnquist and Justices O'Connor (the author of the majority opinion), White, Scalia, and Kennedy ruled that Richmond failed to show a compelling governmental interest to justify the plan, because the factual predicate supporting the plan did not establish a firm basis for believing that the plan's purpose was to redress past discrimination in the city's construction industry. *Id.* 498–506. There was no record of prior discrimination by the city in awarding construction contracts. Rather, the plan was based on a generalized assertion that there had been past discrimination in the construction industry nationwide (past societal discrimination), *id.* at 498–500, and relied on improper statistical studies. *Id.* at 500–02. The city's set-aside program also failed the strict scrutiny test because the thirty-percent quota was not narrowly tailored to remedy the city's past discrimination even if such discrimination could be established. *Id.* at 507–08. In *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 207 (1995), the Court, in a five-to-four decision, held that the strict scrutiny test applies to congressionally designed race-based affirmative action programs challenged under the Fifth Amendment.

An alternative rationale for upholding voluntary race-based affirmative programs is the diversity rationale. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court reviewed a plus-factor affirmative action plan in which race was one of several considerations used in admitting students to the prestigious University of Michigan Law School. By a vote of five to four, the Court, in an opinion written by Justice O'Connor, held that student body diversity constitutes a compelling state interest and, as such, satisfies strict scrutiny's ends test. *Id.* at 327–33. Relying in significant part on Justice Powell's concurrence in *Regents of University of California v. Bakke*, 438 U.S. 265, 316 (1978) (Powell, J., concurring), the Court deemed it important that the "university's use of race [was] to further only one interest: 'the attainment of a diverse student body.'" *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 311 (Powell, J., concurring)). "Justice Powell," the Court noted, "emphasized that nothing less than the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* (quoting *Bakke*, 438 U.S. at 313 (Powell, J., concurring) (internal citation omitted)). "In seeking the 'right to select those students who will contribute the most to the 'robust exchange of ideas,' a university seeks 'to achieve a goal that is of paramount importance in the fulfillment of its mission.'" *Id.* (quoting *Bakke*, 438 U.S. at 313 (Powell, J., concurring)). "Both 'tradition and experience lend support to the view that the contribution of diversity is substantial.'" *Id.* (quoting *Bakke*, 438 U.S. at 313 (Powell, J., concurring)). The Court has upheld the diversity rationale in subsequent cases, including *Fisher*, 579 U.S. at 381 (2016), thereby elevating Justice Powell's concurrence in *Bakke* to *ratio decidendi*. See also *Grutter*, 539 U.S. at 326–34.

²⁸⁴ "To be narrowly tailored, a race-conscious admissions program cannot use a quota system," *Grutter*, 539 U.S. at 334, but instead must "remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application," *Fisher v. Univ. of Tex.*, 570 U.S. 297, 309 (2013) (quoting *Grutter*, 539 U.S. at 337). "In other words, an admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.'" *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 317). For a more detailed discussion of the strict scrutiny test, see generally, Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VANDERBILT L. REV. 793 (2006).

Conservative justices reject this legal framework. They believe that the voluntary use of race by a public entity can never serve a compelling state interest. Pushing back against the liberal perspective on race,²⁸⁵ conservative justices view race-conscious decision making, such as affirmative action, as a form of “discrimination”—“reverse discrimination.” It is, in the words of Justice Thomas, the Court’s longest-serving conservative justice, “just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.”²⁸⁶ Chief Justice Roberts advises that, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²⁸⁷ Hence, the racial omission norm trumps the racial integration norm in the view of conservative justices. This point of view has had a growing presence on the Supreme Court as the Court has gotten increasingly conservative since *Bakke*. Adherents on the current Court are Chief Justice Roberts and Justices Thomas and Alito.²⁸⁸ If the Trump appointees (Justices Gorsuch, Kavanaugh, and Barrett) remain true to their conservative convictions, the Court will have enough justices to overturn race-conscious admissions.²⁸⁹

2. Saving Black Reparations

If the conservative perspective becomes law, as I think it will, reparative programs will have to be crafted in a racially neutral fashion in order to satisfy the Equal Protection Clause.²⁹⁰ Racial classifications will no longer be valid for whatever reason when used voluntarily; in other words, without the predicate of a violation of federal law.²⁹¹ Justice Thomas’s view on the matter—“a State’s use of race in higher education

²⁸⁵ See *supra* text accompanying notes 278–282.

²⁸⁶ *Adarand*, 515 U. S. at 241 (Thomas, J., concurring).

²⁸⁷ *Parents Involved*, 551 U.S. at 748 (2007).

²⁸⁸ See, e.g., *Fisher*, 579 U.S. at 389 (Thomas, J., dissenting); *id.* (Alito, J., dissenting opinion, in which Roberts, C. J., and Thomas, J., joined).

²⁸⁹ “Civil rights groups were worried about all three Trump appointees and their positions on race when they were nominated.” Marcia Coyle, *Gorsuch, Kavanaugh, Barrett Offer Few Clues on Affirmative Action’s Future*, Law.com (Jan. 24, 2022, 5:13 PM), <https://www.law.com/nationallawjournal/2022/01/24/gorsuch-kavanaugh-barrett-offer-few-clues-on-affirmative-actions-future/> [<https://perma.cc/2S7F-9W7X>].

²⁹⁰ It has long been established that the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, largely shapes Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits racial discrimination in admissions at private colleges receiving federal funds. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 284, 287 (noting that Title VI reflects a “congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution,” but “proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment”). See also *Grutter v. Bollinger*, 539 U.S. 306, 343 (2006) (adopting *Bakke*’s view of Title IV); *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (“We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI” (*citing* *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001); *United States v. Fordice*, 505 U.S. 717, 732, n.7 (1992); and *Alexander v. Choate*, 469 U.S. 287, 293 (1985))).

²⁹¹ For the distinction between involuntary and voluntary affirmative action, see *supra* text accompanying notes 275–276. While both forms of affirmative action are governed by different statutory standards, they are largely governed by the same constitutional rule—the strict scrutiny test. For further discussion, see, e.g., BROOKS, LAW OF DISCRIMINATION, *supra* note 78, at 1292–1403. But even in the statutory context, the Court could rule that judicial remedies must be race neutral. That would depend, one would suppose, on the text of the governing statute.

admissions decisions is *categorically* prohibited by the Equal Protection Clause²⁹²—will become the law of the land for all voluntary affirmative action programs employed by public entities.²⁹³ Thus, while remedying past discrimination or creating a diverse student body may still be compelling state interests,²⁹⁴ the means to achieving this interest would have to be racially neutral.²⁹⁵ Can Black Reparations pass conservative scrutiny? I think they can.

The key is to base Black Reparations not on race but on slavery or Jim Crow; in other words, the atrocities themselves.²⁹⁶ Slavery and Jim Crow are facially neutral atrocities in that they victimized non-Black Americans as well as Black Americans. Thus, offering reparations to the *descendants* of slavery or Jim Crow, as opposed to Black descendants, avoids the use of a race-conscious category. None of these descendants of slavery or Jim Crow are exclusively Black. I begin with slavery.

On an episode of “Finding Your Roots,” Henry Louis Gates Jr.’s award-winning series on Public TV, the Harvard scholar turned TV star, interviewed the White filmmaker, Michael Moore. In exploring Moore’s family tree, Gates revealed that Moore’s eighth-great-grandfather, who was Scottish, was “sold into slavery to Massachusetts as a prisoner of war”

²⁹² Fisher v. Univ. of Tex., 570 U. S. 297, 315 (2013) (Thomas, J., concurring) (emphasis added).

²⁹³ The fundamental legal difference between liberal and conservative justices is over the meaning of the Equal Protection Clause. Both camps reach opposite conclusions regarding the constitutionality of race-conscious government measures, drawing a line from the Equal Protection Clause, as interpreted by *Brown v. Board of Education*, 347 U.S. 483 (1954), to today. Both camps swear allegiance to *Brown*. See, e.g., Parents Involved in Comm. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 747 (Roberts, C.J.), 798–99 (Stevens, J., dissenting). Harkening back to Justice Blackmun’s view expressed in *Bakke*, see *supra* text accompanying note 280, liberal justices argue that “the Equal Protection Clause permits . . . [the] use [of] race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it.” *Parents Involved*, 551 U.S. at 823 (Breyer, J., dissenting). Conservative justices argue that, “The whole point of the Equal Protection Clause is to take race off the table.” David Savage, Supreme Court Justices Voice Support for Affirmative Action Ban, L.A. Times (Oct. 15, 2013, 1:06 PM), <https://www.latimes.com/nation/nationnow/la-na-nn-supreme-court-justices-affirmative-action-20131015-story.html> [<https://perma.cc/NLE3-W5TF>]. The issue, in other words, is what is the legal proposition for which *Brown* stands? Does *Brown* mean that the integration norm trumps the racial omission norm (liberals) or that the racial omission norm trumps the racial integration norm (conservatives)?

²⁹⁴ For a discussion of the constitutional ends test, see, e.g., *supra* note 283.

²⁹⁵ On the one hand, it would appear that the means test, but not the ends test, would be affected. To be narrowly tailored, an admissions program can use neither a racial preference nor a racial quota. See *supra* note 283. On the other hand, it could be argued that the strict scrutiny test itself falls because diversity can never be a compelling purpose for the use of race in college admissions. Perhaps the Court’s opinion in *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022), will clarify the matter.

²⁹⁶ Betting that the governing legal regime will not change, the California Task Force on Reparations would base eligibility for reparations on race. Reparations for the state’s participation in the peculiar institution would go to African Americans who are direct descendants of enslaved or freed Black people living in the U.S. before the end of the 19th century. See INTERIM REPORT, *supra* note 5, at 5. See also Soumya Karlamangla, *California Task Force Votes to Offer Reparations Only to Descendants of Enslaved People*, N.Y. TIMES (Mar. 30, 2022), <https://www.nytimes.com/2022/03/30/us/california-reparations.html> [<https://perma.cc/T5U6-DRV8>]; Lil Kalish, *California Task force: Reparations for Direct Descendants of Enslaved People Only*, CAL MATTERS (Mar. 30, 2022), <https://calmatters.org/california-divide/2022/03/california-reparations-task-force-eligibility/> [<https://perma.cc/GE9X-MC6Z>].

in 1649.²⁹⁷ Historians, in fact, estimate that during the seventeenth and eighteenth centuries, more than 300,000 White people lived in bondage in the American colonies.²⁹⁸ Also, it is estimated that, “Between 1492 and 1880, between 2 and 5.5 million Native Americans were enslaved in the Americas in addition to 12.5 million African slaves.”²⁹⁹ Even after slavery was outlawed by the American government, “those interested in profiting from the enterprise deployed a bouquet of legal terms and frameworks to continue the practice” of enslaving Native Americans.³⁰⁰ Thus, Black people were not the only racial group forced into chattel slavery on American soil. Slavery was a system of unabashed economic exploitation in which the profit motive trumped morality.³⁰¹

Though dark skin color would eventually become the social marker of American slavery, color and slavery were not coterminous. Acknowledging the existence of other slave trades in America in no way diminishes the magnitude slavery has had on Black lives, including its lingering effects. That point must be made absolutely clear.³⁰² The case for singling out African Americans for Black Reparations (and Native Americans for their own reparations³⁰³) is solid in my view.³⁰⁴

Jim Crow, like slavery, was not exclusive to African Americans. Although Black people were the main targets of Jim Crow, other people were also materially impacted by these laws. “White-only” or “Colored” signs in restaurants, theaters, restrooms, drinking fountains and other places of public accommodations excluded Black people and other non-

²⁹⁷ *Finding Your Roots: Hard Times* (PBS television broadcast Feb. 26, 2019).

²⁹⁸ See, e.g., DON JORDAN & MICHAEL WALSH, *WHITE CARGO: THE FORGOTTEN HISTORY OF BRITAIN’S WHITE SLAVES IN AMERICA* (2008). One prominent reviewer, Joyce Lau, writes: “Mainstream histories refer to these laborers as indentured servants, not slaves, because many agreed to work for a set period of time in exchange for land and rights. The authors argue, however, that slavery applies to any person who is bought and sold, chained and abused, whether for a decade or a lifetime. Many early settlers died long before their indenture ended or found that no court would back them when their owners failed to deliver on promises. And many never achieved freedom or the American dream they were seeking. . . . *White Cargo* is meticulously sourced and footnoted. . . . Quotations from 17th- and 18th-century letters, diaries and newspapers lend authenticity as well as color. Excerpts from wills, stating how white servants should be passed down along with livestock and furniture, say more than any textbook explanation could. . . .” Joyce Lau, *Master and Servant*, N.Y. TIMES (Apr. 27, 2008), <https://www.nytimes.com/2008/04/27/books/review/Lau-t.html> [<https://perma.cc/MQ3Z-L33G>].

²⁹⁹ See *Colonial Enslavement of Native Americans Included Those Who Surrendered, Too*, Brown Univ. (Feb. 15, 2017) (quoting Linford D. Fisher, “*Why Shall Wee Have Peace to Bee Made Slaves*”: *Indian Surrenderers During and After King Philip’s War*, 64 ETHNOHISTORY 91 (2017)), <https://www.brown.edu/news/2017-02-15/enslavement> [<https://perma.cc/J3X9-2E4U>].

³⁰⁰ David Treuer, *Review: The New Book ‘The Other Slavery’ Will Make You Rethink American History*, L.A. TIMES (May 13, 2016, 10:00 AM), <https://www.latimes.com/books/jacketcopy/la-ca-jc-native-american-slavery-20160505-snap-story.html>.

³⁰¹ See generally, Greg Timmons, *How Slavery Became the Economic Engine of the South*, HISTORY, <https://www.history.com/news/slavery-profitable-southern-economy> (last updated Sept. 2, 2020).

³⁰² The authors of *WHITE CARGO*, *supra* note 298, take care to quote African American sources in their research and clearly state that their research does not diminish the significance of the much larger Black slave experience.

³⁰³ I make this argument in *WHEN SORRY ISN’T ENOUGH*, *supra* note 2, at 223–309.

³⁰⁴ See *supra* Part II.B.

White people, e.g., Asians and Latinx. An example can be found in *Gong Lum v. Rice*.³⁰⁵

In this case, Martha Lum, “a child of Chinese ancestry, born in this country,”³⁰⁶ sued a high school district and the State Superintendent of Education in Mississippi for refusing to admit her to a high school “for children of the white or Caucasian race.”³⁰⁷ She claimed discrimination “on account of her race or ancestry.”³⁰⁸ The law governing school attendance was described by the Court as follows:

By statute it is provided that all the territory of each county of the state shall be divided into school districts separately for the white and colored races; that is to say, the whole territory is to be divided into white school districts, and then a new division of the county for colored school districts. In other words, the statutory scheme is to make the districts . . . districts for the particular race, white or colored. . . .³⁰⁹

Under state law, “a Chinese citizen of the United States” is classified “among the colored races,” in other words, “brown, yellow, or black.”³¹⁰ Citing the major precedents upholding Jim Crow laws,³¹¹ the Court denied the petitioner’s equal protection claim.³¹²

This case illustrates the fact that, although Black people were the primary victims of Jim Crow, other races were also victims. Jim Crow was a race-conscious but not a race-specific atrocity, albeit Black people bore the brunt of it. Thus, as in the case of slavery, one could base eligibility for reparations on a familial connection to Jim-Crow persecution without violating any constitutional prohibition against preferential treatment accorded to a specific racial group. Any person—Black, Latinx, Asian or even White—with a familial connection to slavery or Jim-Crow falls within the reach of the reparation. The fact that the reparation carries the name of a specific racial group—Black people—does not convert the reparation into a racial preference if it is applied equally to all descendants.³¹³ Nor

³⁰⁵ *Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding segregated public schools as applied to children of Chinese descent who, like Black children, were denied enrollment in white schools).

³⁰⁶ *Id.* at 85.

³⁰⁷ *Id.* at 81–82.

³⁰⁸ *Id.* at 81.

³⁰⁹ *Id.* at 83.

³¹⁰ *Id.* at 85.

³¹¹ *Id.* at 85–87 (citing, *inter alia*, *Plessy v. Ferguson*, 163 U. S. 537 (1896) (holding that a Louisiana statute requiring the separation of the white and “colored races” in railway coaches did not violate the Fourteenth Amendment); *Roberts v. City of Boston*, 59 Mass. 198 (1849) (holding, in an opinion written by Chief Justice Shaw, that a state law mandating the separation of “colored” and white students did not violate equal protection under the Massachusetts constitution).

³¹² *Gong Lum*, 275 U.S., at 87.

³¹³ Violence Against Women Act, 34 U.S.C. § 12361 (originally enacted as 42 U.S.C. § 13981), is gender-specific in name but not in operation. See *United States v. Morrison*, 529 U.S. 598, 619–20 (2000) (referring to the Violence Against Women Act’s application to “victims of gender-motivated violence,” not just women who face violence). Like most of our civil rights laws, it operates symmetrically. For the distinction between symmetrical and asymmetrical civil rights laws, see *supra* text accompanying notes 32–34.

does the fact that it is likely to have a disproportionately favorable impact on Black Americans.³¹⁴

A conservative constitutionalist might argue that redressing Jim Crow is more racialized than redressing slavery because, unlike slavery, there were no White victims of separate-but-equal. Therefore, a reparation based on a familial connection to Jim Crow provides a racial preference for non-Whites rather than a race neutral remedy for the victims of the atrocity. To that extent, reparations for Jim Crow operate as racial preferences. The fact that not every non-White is eligible for Jim Crow reparations, the argument continues, does not remove the racial preference. Race makes non-Whites more eligible for these reparations than Whites.

This constitutional challenge might be defeated in a number of ways. First, it could be argued that Whites are not excluded from Jim Crow reparations because they are White. They are excluded because their ancestors were not victims of Jim Crow. Were they victims then Whites today would be eligible. In addition, the conservative constitutional argument could be countered by linking reparations based on Jim Crow to reparations based on slavery. Arguably, the linkage provides vicarious constitutional support for Jim Crow reparations. How the two atrocities can be connected is explained in the next section.

3. Crafting Eligibility for BBAs

Given the constitutional concerns just discussed,³¹⁵ it may be necessary to link Jim Crow with slavery in determining eligibility for BBAs as well as other forms of Black Reparations. It may also be prudent to do so; for it avoids giving reparations to *any* descendant of slavery or Jim Crow. Such expansion of eligibility would also open the floodgates for reparations claims to the detriment of the targeted victims—Black Americans. Jim Crow laws alone applied to untold numbers of non-Black

³¹⁴ The Violence Against Women's Act, *supra* note 313, is also instructive on this point. The Act applies to men as well as to women even though in operation it protects more women than men. Women simply have a greater need for the Act than do men. See *Morrison*, 529 U.S., at 628–35 (Souter, J., dissenting, joined by Justices with whom Stevens, Ginsburg, and Breyer, JJ., dissenting)(describing Congress' findings on the prevalence of violence against women that motivated the Violence Against Women Act). Only when a law or policy has a discriminatory purpose rather than just a disproportionate effect does it rise to the level of constitutional concern. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239–41 (1976). The Supreme Court has upheld the constitutionality of a school financing system that had a significant disparate impact on Latinx students on the ground that, *inter alia*, the system was established to serve a facially neutral purpose. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973). And the Court has upheld photo ID requirements for voting even though the evidence clearly showed that these neutrally crafted rules had a disparate impact on minority voting. *Crawford v. Marion Cnty. Election Bd*, 553 U.S. 181, 213–23 (2008) (Souter, J., dissenting) (describing the impact of the upheld ID requirements on minority voters). The Court seems to be importing the common law test of criminal liability—*actus non facit reum nisi mens sit rea* (the act is not culpable unless the mind is guilty)—into civil liability. There is no *mens rea* in Black Reparations. In upholding the constitutionality of Black Reparations, the Court has an opportunity to demonstrate its respect for its own precedents. And if the Court does so, it will be one of the few times in which precedents that have regularly disadvantaged African Americans can be used to their advantage.

³¹⁵ See *supra* text accompanying notes 313–314.

persons of color.³¹⁶ Thus, it would be impossible to craft an effective or meaningful reparative regime for African Americans based on a generic familial connection to any group persecuted by slavery or Jim Crow. This is the conundrum the Supreme Court has forced upon the nation should it discontinue the use of race-specific reparations.

One way to shrink the pool of eligible victims to African Americans as much as possible without violating constitutional law is to base eligibility on a familial connection to a member of a group persecuted by *both* slavery and Jim Crow. This, in fact, is the standard of eligibility I proposed earlier for admission to Black Boarding Academies—“qualified descendants.”³¹⁷ A dual eligibility standard—slavery and Jim-Crow—necessarily eliminates most White Americans (as they may have descended from victims of slavery but not from victims of Jim Crow) and most non-Black minorities (as they may have descended from victims of Jim Crow but fewer from victims of slavery). A Black person with a connection to Jim Crow but not to slavery (e.g., a current resident whose Canadian ancestors immigrated to the U.S. in the 1940s) or with a connection to slavery but not to Jim Crow (e.g., a current resident whose American ancestors immigrated to Canada during slavery) could not be a qualified descendant because they could not meet the dual eligibility standard.³¹⁸ It might be easier for a Black American to accept a degree of “disinheritance” under a reparative program that, like Black Boarding Academies, features rehabilitative, or community-oriented, reparations rather than compensatory, or *in personam*, reparations.³¹⁹ The “disinherited” can benefit from the former, in which they are “free riders” of sorts, but not from the latter.

If the Supreme Court does what most Court observers believe it will do—strike down race-conscious affirmative action—then it will have put Black Americans and, indeed, the entire nation in a difficult spot. Americans, well-intended, might not be able to effectively redress centuries of racial oppression that targeted Black people.³²⁰ Race-specific efforts are needed. They are logical and moral. They should also be legal.

IV. CONCLUSION

Two newborn babies lie side-by-side—one Black American and the other White American. Without knowing anything more about them, we can be reasonably certain that it will be harder for the Black American baby to succeed in the United States. This child will find more racial hurdles on its life’s track, and taller hurdles. This child will receive fewer

³¹⁶ See, e.g., *supra* text accompanying notes 305–314. See generally *Jim Crow Laws*, HISTORY.COM (updated Jan. 11, 2023), <https://www.history.com/topics/early-20th-century-us/jim-crow-laws>; Urofsky, *Jim Crow Law*, BRITANNICA, <https://www.britannica.com/event/Jim-Crow-law>, [https://perma.cc/GB87-CZF2].

³¹⁷ See *supra* text accompanying notes 104–105.

³¹⁸ Disadvantaged, low-income families and children in foster care cannot reasonably be expected to undertake a difficult, time-consuming, and potentially expensive genealogical investigation spanning more than a century. The academies themselves will have to provide this service. See *supra* Part III. As slavery is the gravamen of the reparative claim, the connection to slavery would seem to be more important than the one to Jim Crow.

³¹⁹ For a discussion of the forms of reparations, see *supra* Part II.A.

³²⁰ See *supra* Part II.B.

cheers from the crowd and less support if it lags or stumbles. This child will be penalized or taken out of the race for any mistakes it makes rather than given another chance. Our society steers African Americans to the bottom from birth—especially if they are poor. Black Reparations ought to prioritize the most vulnerable living victims of slavery and Jim Crow.

Starting Black Reparations in such a limited fashion flies in the face of all those who, like myself, had hoped that Black Reparations could effectuate transformative racial justice in our country. But having taken a great deal of time to analyze and think through the matter, I now reluctantly conclude that Black Reparations cannot deliver that mythical Third Reconstruction.³²¹ The American race problem is too big for Black Reparations alone to handle. It would take decades of massive amounts of government spending and the sustained moral commitment of the American people to realize transformative racial justice in this country. The inflationary impact of trillions of dollars of government spending makes transformative reparations a prohibitive proposition. Hence, African Americans are unlikely to receive all the reparations that are rightfully due or urgently needed to redress the lingering effects of slavery and Jim Crow. The only option, if we are to have Black Reparations, is to prioritize as victims of other atrocities have had to do.³²²

This Article attempts to make the case for prioritizing low-income Black children. It proposes an education reparation—Black Boarding Academies—that will enable these precious souls, especially those at risk of falling into the dreaded foster care system, to thrive rather than merely survive by giving them a safe and nurturing environment in which to develop leadership skills. Given the cost of building and operating BBAs and finite reparatory payments, it seems prudent to plan for post-reparations fundraising. There are, in fact, myriad public and private

³²¹ The long-awaited Third Reconstruction is sorely needed to complete the march to racial justice that began with the First Reconstruction (1865–1877) and picked up in the Second Reconstructions (1954–1972). Both reconstructions were responsive to racial oppression, the First Reconstruction ending slavery with the enactment of the Reconstruction Amendments to the Constitution and the Second Reconstruction ending Jim Crow with the enactment of the Civil Rights Acts of the 1960’s and early 1970’s. Likewise responding to racial injustice, the Third Reconstruction is charged with ending the lingering effects of slavery and Jim Crow—what I have called “transitional racial justice”—some of which effects are discussed in Part II.B *supra*. On the transformative changes in our society wrought by the First Reconstruction and Second Reconstruction, see, e.g., W. E. B. DU BOIS, *BLACK RECONSTRUCTION* (1935) (studying the post-Civil War Reconstruction era); JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS, 1954-1965* (1987) (telling the story of the Civil Rights Era through the people who lived it). On the Third Reconstruction, see, e.g., David Prior, *The Concept of a Third Reconstruction*, H-Civ War (Apr. 16 2021), <https://networks.h-net.org/node/4113/blog/h-civwar-authors-blog/7580046/concept-third-reconstruction> [<https://perma.cc/9QXA-NA4M>]; Peniel E. Joseph, *The Perils and Promise of America’s Third Reconstruction*, TIME (Sept. 15, 2022, 6:00 AM), <https://time.com/6211887/america-third-reconstruction/> [<https://perma.cc/6Q8U-GMX7>].

³²² Don Tamaki, a civil rights lawyer who worked on reparations for Japanese Americans interned during World War II and the only non-Black member of the California Reparations Task Force, noted that organizers of the Japanese American Redress Movement had to grappled with similar questions about determining eligibility. “We had to exclude groups too within our community . . . practical and very difficult decisions were made.” Lil Kalish, *California task force: Reparations for direct descendants of enslaved people only*, (Mar. 30, 2022), <https://calmatters.org/california-divide/2022/03/california-reparations-task-force-eligibility/> [<https://perma.cc/CM7M-LHH7>].

funding sources available. Finally, the standard of eligibility for admissions to BBAs—a familial connection to a member of a group persecuted by both slavery and Jim Crow—is dictated by the Supreme Court’s impending decision to discontinue affirmative action in education. All Black Reparations must be attentive to this existential threat coming from the Supreme Court. However, even if the Supreme Court were to unexpectedly uphold affirmative action under federal law, the legal risk to Black Reparations will not go away. Nine states, including California and Florida, have already decided to ban race-conscious admissions in public school.³²³ The eligibility test posited in this Article should work at the state level as well.

Having for many years studied and written about worldwide responses to past atrocities—what scholars call “post-conflict justice”—I well appreciate the difficulty of resolving our country’s own past atrocities. Numerous issues are raised. The importance of these issues is matched only by their complexity.

³²³ See, e.g., Kelsey Butler & Patricia Hurtado, *Affirmative Action End Will Crush the Diversity Talent Pipeline*, BLOOMBERG L., (Oct. 30, 2022), <https://news.bloomberglaw.com/us-law-week/affirmative-action-end-will-crush-the-diversity-talent-pipeline> [<https://perma.cc/QYS4-C5FF>].