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RECONSTRUCTION'S LESSONS

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In the current moment in the legal struggle for racial equality in the United States, the nation seems at risk of repeating its history. The Roberts Court has failed to fulfill its charge under the Reconstruction amendments to vigorously promote and enforce civil rights protections, and the other branches of government have proved ineffectual or unwilling to step into the breach. The racist far right is rising and the national electorate appears unable to organize in favor of racial justice priorities. In recognition of these partial analogies between conditions then and now, this Article mines the history of Reconstruction and its aftermath for lessons pertinent to the racial justice struggle today. It asks what lessons racial justice activists and legal scholars might glean from that history to help them grow their tally of gains and shrink their tally of losses despite today's less than ideal legal and political conditions. What the history of Reconstruction teaches is that legal prescription and doctrinal manipulation alone will not bring about greater racial equality; having learned that lesson from Reconstruction's history, today's racial justice activists and scholars should direct their efforts towards exploring what new approaches might be effective despite today's less than optimal legal and political conditions.

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I. INTRODUCTION

In the current moment in the legal struggle for racial justice in the United States, the Nation appears at risk of repeating its history. The country stands at a time of some hope but more cause for pessimism. The current United States Supreme Court has exhibited hostility towards key legal priorities of the racial justice movement,[1] and all indications point to this trend continuing or getting even worse. Leading commentators on race issues have suggested that the United States is headed back to the post-Reconstruction era, sometimes referred to as "Redemption" in reference to southern states' reassertion of white supremacy in their state governments, along with obliterating civil rights gains, after 1876.[2] In that period the Court undid much of the legal work of advocates of racial equality during Reconstruction.[3] Public intellectual and *New York Times* opinion columnist Jamelle Bouie has written, for example: "if the civil rights movement was Second Reconstruction, then—if we need a name for today's push against its key measures—you could do worse than the Second Redemption."[4] *The Nation*'s justice correspondent Elie Mystal argued: "We have literally been here before, when the Supreme Court remained inert as the Fourteenth and Fifteenth Amendments were violated with impunity."[5] According to Mystal, "the conservatives on this [C]ourt have now aligned themselves with the very worst courts that have propped up white supremacy throughout American history."[6] And *The Atlantic* staff writer Adam Serwer, after pointing out a number of analogies between the opinions of post-Reconstruction courts and the Roberts Court, forecast: "Not since the end of Reconstruction has the U.S. government been so firmly committed to a single, coherent program uniting a politics of ethno-nationalism with unfettered corporate power. As with Redemption, as the end of Reconstruction is known, the consequences could last for generations."[7]

Scholars, too, point out that the Roberts Court is failing to fulfill its charge under the Reconstruction Amendments[8] to vigorously enforce civil

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[1] For examples of such cases, see *infra* note 13 and further discussion in Part V.A.

[2] *See Reconstruction vs. Redemption*, NAT'L ENDOWMENT FOR THE HUMANS. (Feb. 11, 2014), https://www.neh.gov/news/reconstruction-vs-redemption [https://perma.cc/PT2G-AA2P] (providing basic information about "Redemption").

[3] *See infra* Part IV.

[4] Jamelle Bouie, *The Next Assault on Civil Rights*, SLATE (Oct. 9, 2014, 10:53 AM), https://slate.com/news-and-politics/2014/10/the-supreme-courts-next-attack-on-civil-rights-the-justices-will-likely-end-the-fair-housing-acts-disparate-impact-rule.html [https://perma.cc/7R5G-NLC4]. Redemption refers to the end of Reconstruction, when "Southern white militants regained control of state governments across the South with murder and terror, successfully disenfranchising the newly emancipated slaves." Adam Serwer, *The Supreme Court Is Headed Back to the 19th Century*, THE ATLANTIC (Sept. 4, 2018), https://www.theatlantic.com/ideas/archive/2018/09/redemption-court/566963/ [https://perma.cc/835F-CWP9].

[5] Elie Mystal, *No Attack on Voting Rights Is Too Racist for This Supreme Court*, THE NATION (Feb. 8, 2022), https://www.thenation.com/article/society/supreme-court-alabama-voting/ [https://perma.cc/C9QM-LMWK].

[6] *Id.*

[7] Serwer, *supra* note 5.

[8] These are the Thirteenth, Fourteenth, and Fifteenth Amendments. U.S. CONST. amends. XIII, XIV, XV.

rights protections.[9] Their work illuminates the problems with the current Court's jurisprudence and offers diverse doctrinal prescriptions for how the Court *could* do better. But their project has not been to ask *why* the Reconstruction Amendments did not work as well as racial justice advocates hoped they would. Nor have they mined the historical record to determine what lessons from that past might help in a situation in which the Court once again appears dead set on rolling back hard-won civil rights protections, thus repeating Reconstruction's history. This Article takes that step, extracting lessons from the partial analogies that exist between now and then to help guide racial justice advocates at this historical moment.

In his classic book on sorting valid methodologies for historical inquiry from the less so, Professor David Hackett Fischer explains that analogies are useful tools for historical inquiry provided they are not stretched beyond their legitimate applicability in changed historical circumstances.[10] Building on the observations of the public intellectuals quoted above coupled with Hackett's enthusiasm about exploring partial analogies for better historical understanding, this Article asks the following questions: What might today's racial justice advocates learn from their abolitionist predecessors' experiences during Reconstruction and its aftermath? Can studying that history provide lessons that may help avoid some of the mistakes of the past? And finally, if so, what specifics might today's advocates gain from the lessons of Reconstruction?

Of course, today's circumstances differ greatly from those of the nineteenth century. As Fischer warns, it is important never to fall into the fallacy of the "perfect analogy."[11] Nevertheless, some repeating themes emerge among the many obvious differences between now and then. One involves the apparent similarities between the perspectives of the Court today and the Court in the post-Reconstruction era, as the commentators quoted above have pointed out. Like the Post-Reconstruction Court, for example, the Roberts Court has struck down legislation Congress enacted under its Fourteenth and Fifteenth Amendment powers and drastically narrowed the interpretation of federal civil rights statutes.[12] It has shown little compunction about reversing voting rights gains, including by

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[9] This literature is too large to cite comprehensively; for several recent, interesting examples, see, e.g., Brandon Hasbrouk, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 108 (2022) (arguing for an "antiracist" interpretation of the Reconstruction Amendments); Alexander Tsesis, *Enforcement of the Reconstruction Amendments*, 78 WASH. & LEE L. REV. 849, 891–907 (2021) (examining the civil rights records of both the Rehnquist and Roberts Courts); Christopher Schmidt, *Thirteenth Amendment Echoes in Fourteenth Amendment Doctrine*, 73 HASTINGS L. J. 723, 725–30 (2021) (discussing the Fourteenth Amendment as a continuation of the commitments made in the Thirteenth Amendment, and suggesting how this insight can improve Fourteenth Amendment interpretation).

[10] DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 243–44 (1970) (explaining that analogies "are very useful explanatory tools" that play an important role in "intellectual creativity" in all sorts of disciplines; for historians, analogies serve "as heuristic instruments for empirical inquiry" and "as explanatory devices").

[11] *Id.* at 247.

[12] *See infra* Part IV.

invalidating a key provision of the Voting Rights Act of 1965,[13] thus creating a path for states to adopt voter suppression legislation all over again, just as Redeemer state governments did at the end of Reconstruction.[14]

Not only has the Roberts Court proved no friend to the racial justice cause, the other two coordinate branches of federal government have often failed to provide a countervailing force against a regressive Supreme Court. Today a dysfunctional Congress is proving far from a strong ally for racial justice advocates. Current federal executive branch leaders—despite the crucial support they received from racial justice advocates at a watershed electoral moment in 2020[15]—have likewise failed to deliver decisive action on the racial justice front, despite the efforts of reformers from within and outside government.[16]

With the benefit of hindsight, might the current racial justice movement be able to make more progress, despite these current conditions, by learning from Reconstruction's past? For example, why today do racial justice advocates both outside and within academia continue to focus on proposing reforms within civil rights doctrines, given that the current Court has no interest in entertaining such reforms? Might all of this brilliant legal energy be better directed at reforms related to law, but outside the Court's direct supervision?

Additional similarities exist in political and social conditions today as compared to the Reconstruction Era—though it is also extremely important to acknowledge that vast differences exist between these two periods as well. Civil rights advocacy during Reconstruction and the racial

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[13] *See* Shelby Cnty. v. Holder, 570 U.S. 529, 551–57 (2013), discussed further at *infra* Part V.A. For other recent Roberts Court cases that have rolled back or declined to enforce voting rights protections, see Brnovich v. Democratic National Committee, 141 S. Ct. 2321, 2343–46 (2021) (holding that Arizona's bans on out-of-precinct voting and third-party gathering of mail-in and absentee ballots did not violate Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301); Abbott v. Perez, 138 S. Ct. 2305, 2326–30 (2018) (upholding electoral maps despite the district court's finding that the maps were drawn with discriminatory intent); Bartlett v. Strickland, 556 U.S. 1, 20–23 (2009) (holding that the Voting Rights Act does not require state officials to redraw election district lines to help allow racial minority groups to elect a candidate of their choice); Crawford v. Marion Cnty., 553 U.S. 181, 202–03 (2008) (upholding Indiana voter identification law that produced racially disparate outcomes); and League of Latin Am. Citizens v. Perry, 548 U.S. 399, 443–47 (2006) (upholding racial gerrymandering that burdened the rights of minority voters in Texas).

[14] *See infra* Part IV.

[15] Without the support of Black civil rights leader and Congressman James E. Clyburn of South Carolina, for example, current President Joseph Biden likely would not have won the Democratic Party nomination. *See* Donna M. Owens, *Jim Clyburn Changed Everything for Joe Biden's Campaign. He's Been a Political Force for a Long Time*, WASH. POST (Apr. 1, 2020, 6:00 AM), https://www.washingtonpost.com/lifestyle/style/jim-clyburn-changed-everything-for-joe-bidens-campaign-hes-been-a-political-force-for-a-long-time/2020/03/30/7d054e98-6d33-11ea-aa80-c2470c6b2034_story.html [https://perma.cc/ZN9Y-MQZH].

[16] *See*, *e.g.*, Matt Zapotosky et al., *Merrick Garland's Goal Is to Restore the Integrity of the Justice Department. His Legacy Will Still Be Defined by Trump*, WASH. POST (Mar. 14, 2022, 6:00 AM), https://www.washingtonpost.com/national-security/2022/03/14/merrick-garland-justice-trump/ [https://perma.cc/N684-Y4QM] (noting that while Attorney General Merrick Garland successfully prosecuted two high profile hate crimes cases, activists fault him for being too slow and cautious in pursuing racial justice issues, including police misconduct investigations).

justice movement today share roots in the same long, complex social movement known as abolitionism.[17] Indeed, in important respects, today's racial justice movement is the direct descendent of abolitionism.[18] In both time periods, racial justice advocates exhibit gradations in thought, espousing approaches ranging from radical to moderate to conservative.[19] Today, as then, tensions sometimes manifest themselves between the perspectives of leaders of color, who have most directly experienced racism, and well-meaning white advocates, who have not.[20] Racial equality movements with these complex features can lay claim to both gains and losses.[21] This Article will argue for striving to improve the tally of gains by examining what went wrong during Reconstruction. To be sure, Reconstruction did achieve important gains, some of which lay dormant for a century but then provided the basis for more gains during the 1960s. An important question today is how to lay further groundwork for more gains once political and legal conditions again become ripe for such progress.

It also bears noting that before, during, and after Reconstruction, the United States was viscerally and violently split on political opinions and fundamental values related to racial equality. The same is true today. Indeed, the chasm today between the perspectives of members of the racist far right, on the one hand, and adherents of the racial justice cause, on the other, have direct roots in the conflicts of Reconstruction and its bitter aftermath.[22] The beliefs and ideologies of those who opposed equal rights for Black persons before and after the Civil War have been transmitted across generations to provide the basis—and often almost the very same arguments—for the rhetoric of the racist far-right today.[23] As this Article will argue, a useful path forward in these conditions might call on legal scholars and others to draw from other disciplines such as social neuroscience, which studies the brain-based reasons for racism, to find new approaches to mitigating racism through the design of law-related institutions and practices.

As in the past, extreme racism is not a regional phenomenon, but a national problem.[24] Such extreme racism manifests itself, among other ways, through violence, often state-sponsored or state-supported, against

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[17] On abolitionism's long roots, see KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION 8 (2021) (tracing abolitionism's roots back to the revolutionary period).

[18] *Id*. at 355–56 (discussing multiple through-lines between today's racial justice priorities and abolitionists' work).

[19] *Id*. at 357 (noting that members of past racial justice movements had "blind spots" and differentiating between those "in the radical vanguard and others [who] proceeded with great caution.")

[20] *Cf. id*. at 114 (noting that Black abolitionists "consistently pushed their white would-be allies to think more expansively about racism and inequality").

[21] *Id*. at 357 (noting that racial justice agitators sometimes won and sometimes lost, but that "[w]hen they failed, they kept trying").

[22] For one personal account of coming to terms with the transmission of racist ideology in a family across generations, see MAUD NEWTON, ANCESTOR TROUBLE: A RECKONING AND A RECONCILIATION xiv, 43, 214–25, 228, 311 (2022).

[23] *Id*. at 214–25.

[24] On the rise of the racist far right in the traditional North of the United States, see *In 2021, We Traced 733 Hate Groups Across the U.S.*, S. POVERTY L. CTR. (July 22, 2022, 2:26 PM), https://www.splcenter.org/hate-map [https://perma.cc/3S8C-U5RN] (offering a map showing the locations of organizations espousing racial hatred ideologies).

persons of color and their allies. Of course, violence against persons of color has never stopped in the United States; it was and continues to be a major mechanism of racial suppression. Any social movement that seeks to address racial injustice must make prosecuting racial violence a priority issue, as this Article will discuss in Part V below.[25]

As this Article will show, Reconstruction-era advocates learned through hard experience that legal prescription by itself—even through fundamental law inscribed in the Constitution through the Thirteenth, Fourteenth, and Fifteenth Amendments[26]—may be insufficient to produce desired change in the face of resistance. Those who championed those Amendments (hereinafter "Reconstruction's advocates") discovered they had been naïve in assuming that adding words to the Constitution would produce racial justice reform in the face of a lack of support from coordinate branches of government including the executive, the courts, the states, and their citizens. Republican Congresses during Reconstruction would gradually reach this understanding. But they did so only after they witnessed the full force of resistance against Reconstruction. That resistance included a hostile federal executive, legal and extra-legal actions of the states, and violent white mobs and organizations. Only after living through those experiences would a congressional majority appreciate the importance of enshrining the right to vote in the Constitution through the Fifteenth Amendment.

Of all the harms the Roberts Court has done to the cause of racial justice, its undermining of the right to vote is arguably the most dangerous development. [27] Voting is a right constitutive of all other rights, as the Black abolitionists first and most clearly envisioned. The members of the National Convention of Colored Men gathered in Syracuse, New York, in 1864, made this perspective clear in proclaiming that the right to vote was the fundamental political right without which other protections would be meaningless.[28] They presciently forecast an insight that Congress would only come to share later—namely, that:

> We may conquer Southern armies by the sword; but it is another thing to conquer Southern hate. Now what is the natural counterpoise against this Southern malign hostility? This it is: give the elective franchise to every colored man of the South who is of sane mind, and has arrived at the age of twenty-one years, and you have at once four millions of friends who will guard with their vigilance, and, if need be, defend with their arms, the ark of Federal Liberty from the reason and pollution of her enemies.[29]

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[25] *See infra* Part II.C.

[26] U.S. CONST. amends. XIII, XIV, XV.

[27] *See, e.g.*, cases cited *supra* note 13.

[28] *See* PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN HELD IN THE CITY OF SYRACUSE, N.Y., OCT. 4, 5, 6 AND 7, 1864; WITH THE BILL OF WRONGS AND RIGHTS, AND THE ADDRESS TO THE AMERICAN PEOPLE 55–61 (1864).

[29] *Id.* at 61. Although these conventions called themselves "men's" conventions, women also took an active part. *See* Samantha de Vera, *'We the ladies . . . have been deprived of a voice': Uncovering Black Women's Lives through the Colored Conventions Archive*, 19 INTERDISCIPLINARY STUD. IN THE LONG NINETEENTH CENTURY 27, 36 (2018) (reporting that,

A majority of the Reconstruction-era congressmen took much longer to appreciate this insight. In the early years of Reconstruction, most members of Congress opposed granting Black men voting rights by constitutional amendment.[30] Instead, they sought to protect civil rights by granting Congress greater enforcement powers over the states in supervising the protection of fundamental rights already found in the Constitution. But they soon discovered that that strategy would be insufficient. They realized they needed to empower Black citizens to champion their own rights through the political process, and they set out to do this through the Fifteenth Amendment.

The Fifteenth Amendment, ratified in 1870, achieved far too little too late. Rather than establishing a broad positive right to vote, it simply declared that discrimination in voting on the ground of race alone was illegal. Even that limited dictate remained completely unenforced across the South for almost 100 years. The Fifteenth Amendment did, however, signal a new approach to protecting rights by empowering citizens. Its aspirations have not been fully realized, but its potential remains potent, as discussed in Part V.B.4 below.

The fundamental nature of the right to vote was not the only new understanding Congress reached. As this Article discusses below, some Reconstruction advocates began to understand that social welfare supports were essential to supplement a commitment to civic and political equality. They also learned that federal (and ideally state) prosecution of violence to protect citizens' rights to life, safety, and bodily integrity was another fundamental piece of any commitment to civil rights equality. This Article discusses these lessons in Part V.B.3 and 4.

The history of Reconstruction and its aftermath offered still other lessons as well. A core lesson from Reconstruction's tragic history is that legal words on paper alone, even in the form of constitutional amendments, cannot suffice to bring about change.[31] Yet the alternatives, or supplements, to legal prescription and court-supervised enforcement to bring about racial justice reform remain insufficiently explored in legal theory today. Scholars and activists must continue to bring new theoretical insights into play to understand what approaches might be most effective in bringing about greater racial justice despite existing political and legal conditions.

This is the central argument of this Article: Given current conditions, racial justice advocates focused on law-related strategies need to think beyond traditional approaches. History suggests that making laws and urging the Court to robustly enforce them works best when there are strong, effective political majorities in support of them backed by

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at the 1864 Syracuse Convention, Edmonia Highgate was invited to speak and did so, though her address was not recorded in the minutes and only briefly mentioned). On additional and earlier calls of Douglass and other Black abolitionist leaders and groups for granting Black citizens broad voting rights, see Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860-1870*, 17 CARDOZO L. REV. 2153, 2171–72 (1995).

[30] *See* WILLIAM GILLETTE, THE RIGHT TO VOTE 31 (1965) (summarizing evidence in the congressional record establishing that, between 1865 and 1868, most Republicans were "completely opposed to Negro voting").

[31] *See infra* Part V.B.1.

enthusiastic, coordinated support from all branches of government. Those conditions do not pertain today. In light of that reality, this time may be best spent *developing new theories* for understanding racism and how to counter it, and then experimenting with those theories in arenas outside the Court's focus, including through voluntary action, best practices formation, new governance, and other democratic experimentalist methodologies.

To develop these themes, this Article will proceed in four Parts. Part II examines the first part of Reconstruction and the hard lessons Reconstruction's advocates learned. Part III traces the latter part of Reconstruction, focusing especially on the seemingly rapid movement of a congressional majority from eschewing proposals protecting Black men's right to vote in the Constitution toward prioritizing the right to vote at the center of the protections needed for the proper functioning of the American political system. It examines the statutes targeted at resisting statutes that Congress passed and their partial success. Part IV sketches the demise of Reconstruction's legal goals with the post-Reconstruction Court's dismantling of much of what Reconstruction Congresses had sought to achieve. Finally, Part V offers a short epilogue and summarizes the lessons racial justice advocates today might extract from the Reconstruction experience.

II. RECONSTRUCTION BETWEEN 1863 AND 1868: LESSONS LEARNED

The first Reconstruction[32] Congress (the 38th), composed of strong Republican/Unionist majorities in both houses, began its first session in 1863.[33] The fact that the secessionist states were not represented there further ensured the pro-Reconstruction Republicans' dominance. As civil rights champion Charles Sumner, Republican senator from Massachusetts,

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[32] One of the clearest starting points for "Reconstruction" (meaning the process of "reconstructing" the South), is President Lincoln's December 8, 1863, Proclamation of Amnesty and Reconstruction. *See* JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 17 (1961); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 35 (1988) [hereinafter FONER, RECONSTRUCTION]. That proclamation began with the promise of a pardon and return of all property—except in formerly enslaved persons—to all persons who had participated in "the existing rebellion," provided that these persons take an oath to henceforth support the Constitution and all acts of Congress and proclamations of the President having reference to slaves. *The Proclamation of Amnesty and Reconstruction*, FREEDMEN & S. SOC'Y PROJECT (July 27, 2022, 1:01 PM), http://freedmen.umd.edu/procamn.htm [https://perma.cc/B4BK-KSQV]. Congress, however, wanted to take a more aggressive stance, s*ee* FRANKLIN, RECONSTRUCTION, at 17–19.

This Article's focus is on congressional Reconstruction. The historiography of Reconstruction is vast, and this Article cannot begin to do justice to it. Because this Article's focus is on congressional Reconstruction, it leaves out the vast historiography on Lincoln. For the same reason, it largely leaves out the story of the activists whose work outside Congress contributed so much to the amendment process, though I try not to ignore it completely.

[33] *See Congress Profiles: 38th Congress (1863-1865)*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Congressional-Overview/Profiles/38th/ [https://perma.cc/L32R-ZFNV] (last visited July 29, 2022); *see also Dates of Sessions of the Congress*, U.S. SENATE, https://www.senate.gov/legislative/DatesofSessionsofCongress.htm [https://perma.cc/Z9GX-H9GW] (last visited July 29, 2022); *Senators of the United States, 1789 - Present*, U.S. SENATE, https://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf [https://perma.cc/5T65-Y73T] (last visited July 29, 2022).

put it: "Our whole system is like molten wax, ready to receive an impression."[34] By the end of that year, Congress had begun to consider proposed constitutional amendments to abolish slavery throughout the country.[35]

A. Enacting the Thirteenth Amendment

In January 1864, the Senate took up consideration of an abolition amendment, under the leadership of Senator Lyman Trumbull, who sponsored proposals as chair of the Senate Judiciary Committee.[36] On April 8, 1864, the Senate passed this committee's proposed language for the Thirteenth Amendment, on a vote mostly along party lines but with two Democrats, Reverdy Johnson of Maryland and James Nesmith of Oregon, on board as well.[37]

The House had a harder time obtaining the two-thirds supermajority needed to pass the proposed Thirteenth Amendment, and failed to do so in a June vote that fell largely along party lines.[38] By that point, the 1864 national election campaign was in full swing. In November, Abraham Lincoln won reelection by wide popular and Electoral College margins, in the twenty-five states in the Union at that time, based in part on his administration's recent successes in the Civil War, especially victories in Atlanta in September 1864.[39] Lincoln's opponent, Democrat George McClellan, a former Union general, lost on a platform that proved "too extreme in his Southern sympathies."[40] With a clear message from the national electorate (consisting only of Union voters), Lincoln and more reluctant federal legislators took notice; an end to the war could not be won by compromising with the southern states.[41] Here was a lesson: electoral victories greatly matter to what is possible by way of aspirations for reform.

In the elections of 1864, the Republicans picked up five additional House seats. The losing Democrats faced less public pressure during the waning days of the lame duck session that followed the elections.[42] These conditions made passage of the Thirteenth Amendment more possible. In its vote reported on February 1, 1865, the House passed the Senate's proposed language that would become the Thirteenth Amendment.[43] That

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[34] DAVID HERBERT DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 192 (1970) [hereinafter (quoting Letter from Charles Sumner to Francis Lieber (May 15, 1864)).

[35] Kurt Lash, *Introduction to Part 2A*, *in* 1 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 373, 374 (Kurt Lash ed., 2021) [hereinafter 1 ESSENTIAL DOCS.] (describing these various proposals).

[36] See MARK M. KRUG, LYMAN TRUMBULL: CONSERVATIVE RADICAL 217 (1965).

[37] *See* ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 38–39 (2004); *Debate and Passage of Abolition Amendment*, US SENATE (Apr. 8, 1864), *reprinted in* 1 ESSENTIAL DOCS., *supra* note 35, at 434, 442.

[38] *Debates and Failed Vote on Abolition Amendment*, U.S. HOUSE OF REPRESENTATIVES (June 14–15, 1864), *reprinted in* 1 ESSENTIAL DOCS., *supra* note 35, at 447, 463.

[39] NOAH FELDMAN, THE BROKEN CONSTITUTION 309 (2021).

[40] *Id.*

[41] *Id.* at 317 (describing Lincoln's realization after his second election that a "new Constitution would not be a compromise with injustice, but the embodiment of a higher, moral law").

[42] Lash, *Introduction to Part 2A*, *supra* note 35, at 376–77.

[43] *See Debates and Passage of Abolition Amendment*, U.S. HOUSE OF REPRESENTATIVES (Jan. 28–31, 1865), *reprinted in* 1 ESSENTIAL DOCS., *supra* note 35, at

decisive action prompted spontaneous celebrations in the streets and President Lincoln's immediate signature to send the proposed amendment to the states with hopes for quick ratification.[44] Reconstruction's advocates thus learned another lesson that applied when operating from a position of political strength: Decisive action springing from a strong voter base could produce success.[45] (Later, they would learn that the converse of this proposition was also true, i.e., waning national voter support spelled serious trouble, as discussed in Part III.A *infra*).

B. Land and Social Welfare

The Thirty-eighth Congress did not stop with the Thirteenth Amendment's passage. In March 1865, as one of its last actions, it passed Congress's first Freedmen's Bureau Act, which Lincoln quickly signed.[46] That law established the Bureau for the Relief of Freedmen and Refugees, to be organized under the War Department, for a period to continue through "the present war of rebellion, and for one year thereafter." [47] This sub-agency would manage matters related to abandoned lands, freed persons, and refugees.[48] The act authorized the Secretary of War to direct provisions, including clothing, fuel, and temporary shelter to freed persons and refugees; to appoint assistant commissioners for each state in insurrection, who should make reports to Congress; and to set apart tracts of up to forty acres of abandoned land within the insurrectionary states for the use of "loyal refuges and freedmen," which these persons "shall be protected in the use and enjoyment" of for three years.[49]

Although this plan would prove quixotic, the legislators who supported the Freedmen's Bureau bill clearly understood that the resource of land was the Holy Grail—as, indeed, it had been for the Nation's founders who drafted the original Constitution, setting out to build a political order with strong protections for property.[50] The provision of land

485, 495; *Notice of House Vote and Presidential Signature*, U.S. SENATE (Feb. 1, 1865), *reprinted in* 1 ESSENTIAL DOCS., *supra* note 35, at 496, 496.

[44] *Exciting Scene in the House of Representatives*, FRANK LESLIE'S ILLUSTRATED NEWSPAPER 345 (Jan. 31, 1865), *reprinted in* 1 ESSENTIAL DOCS., supra note 35, at 496, 496.

[45] The Thirteenth Amendment's outlawing of all slavery and involuntary servitude was a far more radical step than the gradualist proposals that preceded it, including plans to reimburse slave owners for their economic loss, which Lincoln had supported. *See* Claudia Dale Goldin, *The Economics of Emancipation*, 33 J. ECON. HIST. 66, 74 (1973) (calculating that immediate and uncompensated emancipation—the result of the Thirteenth Amendment—led to an economic loss to slave owners of $2.7 billion, as compared to a gross national product of only $4.2 billion at the time).

[46] First Freedmen's Bureau Act, ch. 90, 13 Stat. 507 (1865) (repealed 1868).

[47] *Id.*

[48] "Refugees" referred to whites displaced by the war, whom Congress included so as to avoid the impression that it intended to confer preferential treatment to Black persons. *See* FONER, RECONSTRUCTION, *supra* note 32, at 69.

[49] First Freedmen's Bureau Act, 13 Stat. at 507–09. The law further provided for an annual rent not to exceed six percent of the value of the land, after which the occupants would be entitled to purchase the land and receive "such title as the United States can convey." *Id.* at 508.

[50] *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 206–10 (1990) (describing the constitutional impact of the Federalist concern with protecting private property).

to freed people was a key aspect of the radical[51] Republicans' vision for Reconstruction. They believed this step would establish a material basis for granting citizenship and equal rights to freed persons. But the proposal quickly ran into snags, including conservatives' opposition, which defeated it.[52] The lands that might have been transferred to freed persons shrunk as Lincoln's successor, President Andrew Johnson, issued executive orders pardoning most Confederates and returning confiscated land to them.[53] Other potential avenues for granting freed persons land still existed, such as granting them deeds to government-owned land. That option went nowhere, however, because Congress failed to appropriate funds for both the Freedmen's Bureau and for grants of high-quality federal lands to freed persons.[54] Congress's inaction showed the difficulty of appropriating money to back commitments that were much easier to hold in principle than to achieve in actuality. Lack of funding was responsible for an important lost opportunity: material resources were critical but were not forthcoming.

In the end, the inability to secure material resources to the freed people in the form of land was one of Reconstruction's most significant failures.[55] Many of the approximately four million persons emancipated by

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[51] As used throughout this Article, the term Radical Republican does not refer to congressmen who were necessarily politically radical in a general sense; the term as historians of this period use it refers to "a member of the Republican Party committed to emancipation of the slaves and later to the equal treatment and enfranchisement of the freed blacks." *Radical Republican*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Radical-Republican [https://perma.cc/GFK8-8QDC] (last visited Feb. 15, 2023). In determining whether to classify the Republican members of Congress as radicals, moderates, or conservatives under this meaning, I rely on the comprehensive study of voting behaviors in DAVID HERBERT DONALD, THE POLITICS OF RECONSTRUCTION 1863-1867, at 12, 29, 63, 100–05 (1965).

[52] *See* DONALD, *supra* note 34, at 298–99 (describing Sumner's numerous proposals to grant land to the freed persons and the opposition of more conservative Republicans to such proposals).

[53] *See, e.g.*, Andrew Johnson, Granting Full Pardon and Amnesty to All Persons Engaged in the Late Rebellion (Dec. 25, 1868) (pardoning "unconditionally, and without reservation," all people involved in the rebellion, and restoring all "rights, privileges, and immunities"); *Timeline of Land Redistribution at the End of the Civil War*, AM. SOC. HIST. PROJECT, https://shec.ashp.cuny.edu/items/show/2032 [https://perma.cc/PCG5-8J23] (last visited Feb. 28, 2023) (noting that President Johnson's amnesty plan allowed southerners to reclaim "abandoned lands occupied by freedmen"); *see also* ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 141–42 (1975) (referring to President Johnson's "pardoning policy").

[54] As one of Stevens' biographers, Fawn Brodie, points out, Stevens would have been more effective in his goal of providing real property resources to freed persons if he had focused on obtaining congressional appropriations for land grants rather than pursuing what she proposes was his deep-seated Calvinist lust for punishing the wicked by continuing to push for confiscation of white southerners' property. FAWN BRODIE, THADDEUS STEVENS: SCOURGE OF THE SOUTH 305 (1966). Psychobiography has, of course, been much criticized. *See, e.g.*, DAVID JAMES FISHER, CULTURAL THEORY AND PSYCHOANALYTIC TRADITION 199–200 (1991) (discussing the limits of, but not completely denouncing, historians' use of psychoanalytic theory). Here, Brodie's observations about the lack of congressional funding to support creating the material pre-conditions from which freedpeople could experience civil equality contributes an important insight into how Reconstruction might have been more successful.

[55] *See, e.g.*, WILLIAM S. MCFEELY, YANKEE STEPFATHER: GENERAL O.O. HOWARD AND THE FREEDMEN 297 (1968) (noting that the "original goal of the Bureau" to respond to the freed persons' "passion for the land" was "unsatisfactorily achieved"). Most of the public land offered to freed persons was of poor quality and unsuitable for farming, and only a fraction of freed persons received any kind of land grants. *See* W. E. B. DU BOIS,

the Thirteenth Amendment ended up in highly exploitative laboring relationships with white landowners—a status many scholars have argued was not many steps removed from slavery.[56] In this respect alone, Reconstruction was destined to fail. The Nation's founders had based the original Constitution's design on an assumption that the United States would be a society full of land-owning citizens.[57] Emancipation created a new class of citizens who were free on paper but lacked material resources. Due to the Black Codes, they further lacked the ability to engage in free labor in order to secure their material needs. But such basic security was essential if freed persons were to take part in society on terms of civic equality. This Catch-22 drove Reconstruction's partial failure. It started with the Freedmen's Bureau's inability to carry out its most important assigned mission of getting substantial resources into the hands of emancipated persons so they would have a stable economic basis from which to build new lives as citizens.

The Bureau did only somewhat better at securing free labor rights to newly emancipated persons. One of the chief tasks of the Bureau's overworked agents was to supervise the fairness of the labor contracts under which freed persons were to sell their labor to landowners. But, as numerous historians have documented, the Bureau's record on this task was mixed at best.[58] At times, agents invalidated contracts that specified unduly low wages for workers, but in many other situations they reduced freed persons' bargaining ability by instituting, for example, requirements that they must enter year-long contracts.[59] Such requirements meant that freed persons could not exercise their bargaining power by threatening to withhold labor at key periods such as the harvesting season.[60] In the North, industrial laborers used the threat of a strike to exert economic pressure and thus gain bargaining power in relations with employers. By denying freed persons the ability to bargain from a position of any power, the Bureau negated the very free labor ideology that was so important to many northern abolitionists. Early congressional efforts to use law to bring about

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RECONSTRUCTION 601–04 (1931). *But see* FRANKLIN, *supra* note 32, at 37 (noting that the Bureau did have some positive effect—for example, it provided twenty million rations to white refuges and Black freed persons, established many hospitals, provided health care, and assisted in the settlement of some thirty thousand displaced by the war).

[56] *See* PAUL S. PIERCE, THE FREEDMEN'S BUREAU 68, 131 (1904); *see generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME (2008) (describing similarities between slave institutions and post-emancipation racial violence).

[57] *See* NEDELSKY, *supra* note 50, at 204–05 (noting the importance that various founders placed on protection of rights to property).

[58] For broad assessments of the Freedmen's Bureau in various states, see generally RANDY FINLEY, FROM SLAVERY TO UNCERTAIN FREEDOM: THE FREEDMEN'S BUREAU IN ARKANSAS, 1865-1869 (1996) (describing the Bureau's activities in Arkansas); PAUL A. CIMBALA, UNDER THE GUARDIANSHIP OF THE NATION: THE FREEDMEN'S BUREAU AND THE RECONSTRUCTION OF GEORGIA, 1865-1870 (1997) (describing the Bureau's activities in Georgia); MARTIN ABBOTT, THE FREEDMEN'S BUREAU IN SOUTH CAROLINA: 1865-1872 (1967) (describing the Bureau's activities in South Carolina); Joe M. Richardson, *The Freedmen's Bureau and Negro Labor in Florida*, 39 FLORIDA HIST. Q. 167 (1960) (describing the Bureau's activities in Florida).

[59] *See* BLACKMON, *supra* note 56, at 144.

[60] *Id.*; *see also* ABBOTT, *supra* note 58, at 71–72 (describing the labor contracting system); Richardson, *supra* note 58, at 169–74 (discussing the many inadequacies in the Freedmen's Bureau agents' handling of labor contracts).

change failed in this situation due to a lack of coordination between law's purpose and its implementation on the ground.

Reconstruction legislation also charged the War Department and its sub-agency, the Freedmen's Bureau, with a host of other tasks, including prosecuting civil rights violations. Unlawful acts targeting Black citizens and their allies included assault, murder, and other acts of brutal violence that inflicted terror with impunity on those attempting to exert their civil rights. The Bureau compiled reports about such illegal acts, which, while spotty, serve as the basis for much of what historians know about the vast extent of violence and terror during Reconstruction in secessionist and border states.[61]

Perhaps most promisingly, the Freedmen's Bureau provided emergency basics such as food, fuel, and medical care, and established hospitals and schools for freed persons.[62] Through these schools, many members of the first generation of freed persons learned basic literacy.[63] These schools produced many of the members of the next generation's Black leadership class, including such important figures as Ida B. Wells, T. Thomas Fortune, and many more.[64]

Indeed, the Freedmen's Bureau represented the first United States experiment in federal government-provided social welfare resources to foster human flourishing.[65] Its goal was to create the conditions for successful citizenship for a previously disenfranchised group that otherwise would have no shot at participating successfully in a market-based economic system. The newness of this idea did not escape President Johnson's attention when he argued, in his speech accompanying his February 1866 veto of the second Freedmen's Bureau Act (which Congress then voted to override[66]): "A system for the support of indigent persons in the United States was never contemplated by the authors of the Constitution; nor can any good reason be advanced why, as a permanent establishment, it should be founded for one class or color of our people more

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[61] For a compilation of statistics drawn from local agents' reports, see *Reconstruction in America: Racial Violence after the Civil War*, EQUAL JUST. INITIATIVE, https://eji.org/reports/reconstruction-in-america-overview/ [https://perma.cc/3MQS-P9KV] (last visited July 15, 2022).

[62] DU BOIS, *supra* note 55, at 225–26.

[63] *See id.* at 666 (describing how Freedmen's Bureau schools led to the first institutions of higher education for Black students.

[64] For more about this leadership class, often educated in Freedmen's Bureau primary schools and then at Howard University, see, e.g., SUSAN D. CARLE, DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880-1915, at 15–16, 32–33, 38, 159 (2013) [hereinafter CARLE, DEFINING THE STRUGGLE].

[65] *See, e.g.*, ABBOTT, *supra* note 58, at 133 (portraying the Bureau "as an attempt, however limited, at social engineering and an expression, however tentative, at social planning by government," that was "contrary to both history and tradition"). For an interesting argument that the Thirteenth Amendment and Freedmen's Bureau Acts reflect a constitutional commitment to the national government playing a role in protecting minimum economic security and education, see Mark Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361, 1363–64 (2016).

[66] FRANKLIN, *supra* note 32, at 60 (discussing passage and veto override on the second Freedmen's bill); KRUG, *supra* note 36, at 237–39 (discussing passage of the second Freedmen's bill).

than another."[67] Johnson was correct that the Nation's founders had not contemplated such a social welfare system, but incorrect that such a system would necessarily protect only "one class" of citizens, given that the original Freedmen's Bureau Act provided resources for white refugees of the war as well as freed people.[68] In his opposition, Johnson inadvertently put his finger on what the Freedmen's Bureau represented: a new United States government experiment in providing certain basic resources needed for human flourishing in order to achieve civil and political equality. This is yet another of Reconstruction's lessons, as I explore in Part V.B.3 below.

The Reconstruction Congresses did not come to recognize the need to provide sustenance, education, health care, and protection of bodily security to those lacking in these resources through armchair theorizing. The Reconstruction advocates came to this awareness because they faced a dire humanitarian crisis—the challenge of incorporating four million persons who started with no resources into a governmental system that assumed all worthy citizens had acquired at least a baseline of such resources through reasonably endowed families, communities, and opportunities for property ownership. Reality drove theory rather than the other way around. Interesting possibilities, such as public land transfer, might have provided an alternative, more successful history than what actually happened after Reconstruction.

Those possibilities did not materialize, however. One more act, passed on July 16, 1866, extended the Freedmen's Bureau's life to 1868 and allowed it to continue to provide education until 1870, after which the Freedmen's Bureau ended.[69] Congress had by that time fixed on a different plan based on a recognition of the waning energy for Radical Reconstruction, as further explored in Part III.

C. Law's Inefficacy When Not Supported by the National Political Will

Two additional lessons the Reconstruction advocates learned involved the relationship between racial justice reform and support from the coordinate branches of government and the Nation's electorate. These lessons hold equally true today: due to the complexity of the Constitution's structural design, major progress on racial justice through law requires coordinated commitments among the federal branches, and such commitments typically only come after rare moments in which the Nation's electorate communicates such support for racial justice goals through overwhelmingly clear voting behavior.

The Thirty-Ninth Reconstruction Congress learned these lessons in tangling with a hostile executive in the period between 1865 and 1867.

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[67] KRUG, *supra note 36*, at 134 (citations omitted). On the persistent rhetoric of opponents of racial justice about so-called "special" treatment, see Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 926–27 (2009).

[68] *See* First Freedmen's Bureau Act, ch. 90, 13 Stat. 507 (1865) (repealed 1868) (referring to beneficiaries of the Act as "refugees and freedmen").

[69] *See* Act of July 16, 1866, Pub. L. No. 39-200, 14 Stat. 173 (repealed 1868) (extending the Bureau's existence); Act of Mar. 11, 1868, Pub. L. No. 40-25, 15 Stat. 41 (discontinuing the Bureau for most purposes). On the Bureau's waning activity, see MCFEELY, *supra* note 55, at 300–04; *see also id.* at 307 (questioning the efficacy of the Bureau's director); *id*. at 313 (noting the weakening of the Bureau in 1868 to "the point of impotence"); *id*. at 327 (describing phases of the Bureau's termination).

After General Robert E. Lee's formal surrender of his army of Northern Virginia to Union General Ulysses S. Grant on April 9, 1865, it was clear that the war was in its final stages. But Lincoln's assassination only six days later squelched any mood of elation at the Union's victory. Lincoln's death meant not only the Nation's loss of a brilliant leader and rhetorician, it also meant that Vice President Andrew Johnson became President. A Democrat, Johnson had established his political bona fides in attacking the large plantation "slave power" in the South and remaining a Unionist despite the secession of his home state of Tennessee while he was serving as a United States Senator.[70] Lincoln appointed Johnson Military Governor of Tennessee, and the Republican Party nominated him to serve on the party ticket in 1864 as a way of signaling to southerners that Unionist sentiments would be rewarded.[71] What Lincoln and others failed to realize was the extent to which Johnson would oppose civil rights initiatives beyond emancipation and use his power to resist congressional Reconstruction and favor southern states.[72]

As one of his first actions, Johnson issued an amnesty proclamation that covered many of those who had taken part in the war of rebellion, thus restoring all of their property rights except in persons who had been enslaved.[73] The effect was to put back in power the same men who had led their communities prior to the war, and thus to wipe out the fragile efforts of Unionists to build new state and local governments committed to the values of the Unionist forces.[74] This is one example of the Reconstruction advocates' experience of the power of the executive to negate their work. To be effective, they would have to be equally forceful in using the powers granted them under the Constitution to push back against the executive.

At the same time, the Thirty-ninth Congress wisely stuck to the Constitution's terms where failing to do so may have backfired. As ratification of the Thirteenth Amendment gradually gained ground over the summer and fall of 1865, for example, it was unclear whether the eleven secessionist states that still had no voting rights in Congress should be counted in determining whether three quarters of the states had voted for ratification as required under the Constitution.[75] The safer legal course was to count all thirty-six states in existence at the time, including the secessionist states of the Confederacy.[76] Counted this way, the last state needed to achieve ratification, Georgia, voted in favor on December 6, 1865,

[70] MCKITRICK, *supra* note 53, at 90.

[71] *Id.* at 90.

[72] *Id.* at 134–42 (describing Johnson's policies).

[73] DU BOIS, *supra* note 55, at 254.

[74] *Id.* at 256–57 (noting Unionists' concerns that Johnson "was moving too fast" by allowing southern states to return to the Union "without guarantees").

[75] U.S. CONST. art. V (providing for ratification of constitutional amendments by all of the "Several States").

[76] *See* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 414 (2001) (noting that Congress thought it wise to require ratification of the Reconstruction Amendments by three quarters of *all* states—rather than three quarters of Union states only—to avoid doubts about the Amendment's constitutionality).

and Secretary of State William Seward declared the Thirteenth Amendment to be law.[77]

Abolishing slavery through a federal constitutional amendment did not end slavery-like practices, however. Even before the Thirteenth Amendment went into effect, resisting states had begun to enact the notorious Black Codes. These laws imposed oppressive new forms of subordination on Black persons, prohibiting freedom—in movement, residency, employment, and association—and regulating employment in ways that belied the ideology of free labor rights as discussed above.

It pays off to examine some of the specifics of these state laws in order to see how the law operated to perpetuate extreme insubordination, and thus to better understand what Congress was trying to undo by exercising its new powers under the Reconstruction Amendments. Mississippi's Black Codes,[78] enacted in the last part of 1865, contained numerous draconian restrictions. Its "vagrancy" provisions authorized fining or imprisoning Black persons, whether newly freed or formerly free,[79] if they lacked written proof of employment, assembled together or assembled together with white persons, or interacted with white persons "on terms of equality."[80] White persons were prohibited from living in "adultery or fornication" with persons of another race.[81] If Black persons did not pay fines issued against them, it was "the duty of the sheriff . . . to hire out said freedman, free negro or mulatto, to any person who will, for the shortest period of service, pay said fine."[82] Still other provisions restricted where Black persons could rent or lease land, provided for the arrest of Black persons who quit employment prior to their term of service, and authorized bounty awards and mileage reimbursement for those "carrying back every deserting employee."[83] The Codes also prohibited all Black persons from carrying firearms of any type, or ammunition, daggers, or Bowie knives.[84] In short, these Codes sought to deprive Black persons of basic civil rights in every dimension of life. Congress's extremely difficult task was to enact law that could prevent all of this— especially as states sought to accomplish such goals in the future through discriminatory practices that could be expected to evolve over time.

South Carolina's Black Code, passed the same month as the Thirteenth Amendment's ratification, shows another approach. That law

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[77] ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 39 (2019) [hereinafter FONER, SECOND FOUNDING]; ENCYCLOPEDIA OF THE RECONSTRUCTION ERA 833 app. 3 (Richard Zuczek ed., 2006) [hereinafter RECONSTRUCTION ENCYCLOPEDIA].

[78] *See* Laws of the State of Mississippi, passed at a Regular Session of the Mississippi Legislature, held in the City of Jackson, October, November, and December 1865, at 82–93, 165–167 (1866) [hereinafter Laws of the State of Mississippi].

[79] The exact language defined the persons covered as "all freedmen, free Negroes, and mulattoes." *Mississippi Black Code, 1865*, THE AM. YAWP READER, https://www.americanyawp.com/reader/reconstruction/mississippi-black-code-1865/ [https://perma.cc/7S4Z-SW3V] (last visited Feb. 20, 2023).

[80] LAWS OF THE STATE OF MISSISSIPPI, at 91.

[81] *Id.*

[82] *Id.* at 92.

[83] *Id.* at 82, 84.

[84] *Id.* at 165.

provided that all servants must work from sunrise to sunset, enter long-term employment contracts, and that "no person of color shall pursue or practice the art, trade or business of an artisan, mechanic or shop-keeper, or any other trade, employment or business" unless he had obtained a special license, which would be effective for one year only, after paying a fee of between $10 and $100 annually, depending on the type of trade. Such freed persons must also show that they had served an apprenticeship if practicing any mechanical art or trade. South Carolina's statute had vagrancy provisions much like Mississippi's, as well as provisions subjecting Black persons to punishment for moving locations without a license or hunting or fishing on land they did not own. Other states that passed laws along these lines in the period between 1861 and 1877 included Virginia, Louisiana, and Georgia.[85] In short, these Black Codes gave the lie to any claim that emancipation had led to the realization of "free labor" since they routinely denied Black workers the ability to control their labor and punished attempts to better their economic position through work.[86] Such statutes specifically restricting Black persons' rights to control their labor and advance into skilled employment would continue, usually in a less extreme form but nationwide, well into the twentieth century.[87]

The rise of Black Codes did not escape the attention of Congress. Indeed, one of the first acts of the Thirty-ninth Congress was an effort in the Senate to declare null and void all such laws "wherein any inequality of civil rights and immunities among the inhabitants of said States is recognized," based on "any distinctions or difference of color, race, or descent, or by reason or in consequence of any previous condition or status of slavery or involuntary servitude."[88] This bill, proposed by Republican Senator Henry Wilson of Massachusetts, did not become law, but laid the groundwork for laws that Congress later enacted.[89] Like Sumner and other radicals, Wilson (who would later serve as President Ulysses S. Grant's Vice President) believed that Congress must not only abolish slavery but

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[85] *See generally* ERIC FONER, SHORT HISTORY OF RECONSTRUCTION (UPDATED) 94–95 (2015); DU BOIS, *supra* note 55, at 168–69 (quoting Louisiana's labor laws), 173–74 (quoting vagrancy laws in Virginia and Georgia); EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES DURING RECONSTRUCTION 29–44 (1871) (collecting various states' Black Codes).

[86] *See*, *e.g.*, William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. S. HIST. 31, 35–37 (documenting the many ways laws deprived freed persons of their free labor rights, including laws that made it a crime to hire away a laborer under contract to another).

[87] It bears remembering that, before, during, and long after the Civil War, states in the North had less harsh but nevertheless oppressive laws that treated persons of color as subordinate to whites in employment. *See, e.g.*, DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS 8–45 (2000) (documenting the employment laws that imposed restrictions and unequal terms on Black persons throughout the country).

[88] *Freedmen's Bureau Bill, Back Codes*, U.S. SENATE (Dec. 13, 1865), *reprinted in* 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 24, 24 (Kurt Lash ed., 2021) [hereinafter 2 ESSENTIAL DOCS.].

[89] Kurt Lash, *Introduction to Part 1A*, *in* 2 ESSENTIAL DOCS., *supra* note 88, at 5, 5 (noting that some Republicans believed that this bill could not pass without an additional constitutional amendment giving Congress the power to nullify discriminatory state legislation).

also confer equal civil rights on the freed people.[90] The manner in which southern states had acted so quickly to re-impose subordination showed moderate and Radical Republicans alike that further federal government action would be needed to protect freed persons as well as the members of free Black communities who suddenly found themselves denied the rights and status they had formerly enjoyed.

By the time the Thirteenth Amendment took effect, Congress had already begun working on the Fourteenth Amendment to address deprivations of civil rights. Congress debated the Civil Rights Act of 1866 and the Fourteenth Amendment intermittently, resulting in much "cross talk" in which ideas and proposals bled from one project to the other.[91] By March 1866, both houses of Congress had passed civil rights legislation, which President Johnson vetoed.[92] By April 7, both houses had voted to override Johnson's veto, and on April 9, the Civil Rights Act of 1866 became law.[93]

On a tandem track, Congress worked to iron out the language for the Fourteenth Amendment. Thaddeus Stevens, a Radical Republican congressman from Pennsylvania, served as chair of several powerful congressional committees and used his power to promote many Reconstruction-era initiatives. Chair of the Joint Committee on Reconstruction, Stevens had wanted a much broader proposal that would have prohibited discrimination in both civil and political rights, thus establishing the right of Black men to vote.[94] Known as an excellent strategist who could be pragmatic when necessary, Stevens agreed to compromise and introduced the Joint Committee's proposed amendment in the House in May 1866.[95] That body passed the measure, which included the basics of the provisions that would appear in the final amendment, including national birthright citizenship, the Privileges or Immunities Clause, and the Due Process and Equal Protection Clauses.[96] On June 8, the Senate passed its version, and by June 13 the House approved the Senate's slightly revised version, with all votes meeting the required two-thirds supermajority, made easier because the representatives of the eleven confederate states remained excluded from both legislative chambers.

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[90] *Henry Wilson, Politician, and Abolitionist Born*, AFR. AM. REGISTRY, https://aaregistry.org/story/henry-wilson-a-political-abolitionist-behind-the-scenes/ [https://perma.cc/GD53-KQD2] (last visited Feb. 20, 2023).

[91] Lash, *Introduction to Part 1A*, *supra* note 89, at 6.

[92] *See Debate, Civil Rights Bill, Vote and Passage*, US HOUSE (Mar. 13, 1866), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 142, 142–44; *President Andrew Johnson's Message Accompanying Veto of the Civil Rights Bill*, US SENATE (Mar. 27, 1869), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 144, 144–46.

[93] Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27. The vote in the Senate squeaked by with the exact two-thirds margin needed. DONALD, *supra* note 34, at 260.

[94] On Stevens' earlier proposal and his agreement to pull it back, see GILLETTE, *supra* note 30, at 25–26.

[95] *See Proposed Fourteenth Amendment, Speech of Thaddeus Stevens Introducing the Amendment, Debate*, US HOUSE (May 8, 1866), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 158, 158–60.

[96] *Proposed Fourteenth Amendment, Debate and Passage*, US HOUSE (May 10, 1866), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 170, 178 (quoting the language of the eventual Fourteenth Amendment).

The proposed amendment did not meet all of the goals of the so-called "Radical"[97] Republicans because it did not explicitly address political rights. Stevens urged his colleagues to vote to approve the version anyway as it was the best they were likely to get. As Stevens famously explained,

> . . . I had fondly dreamed that when any fortunate chance could have broken up for a while the foundation of our institutions, and released us from obligations the most tyrannical that ever man imposed in the name of freedom, that the intelligent, pure and just men of this Republic, true to their professions and their consciences, would have so *remodeled all our institutions as to have freed them from every vestige of human oppression, of inequality of rights, of the recognized degradation of the poor, and the superior caste of the rich*. . . . This bright dream has vanished . . . I find that we shall be obliged to be content with patching up the worst portions of the ancient edifice . . . I accept so imperfect a proposition . . . because I live among men and not among angels. . . [98]

To Stevens, Reconstruction presented the opportunity to address the root causes of inequality, based not only on race and former enslavement but also on poverty and "every vestige of human oppression."[99] Political reality had killed that dream, but broader visions of using law to defeat "caste" in its many forms would germinate in human rights movements far in the future. As Stevens showed, it was sometimes necessary to sacrifice principle for pragmatism, but ideas germinated in one period might take root and grow in different conditions. This is a lesson it behooves contemporary activists to learn too, as discussed further in Part V.B below.

The debate about the proposed Fourteenth Amendment switched to the state legislatures considering ratification just as the 1866 national elections were heating up. Johnson and the congressional Republicans entered into open warfare. In speeches supporting Democrats, Johnson attacked the Amendment, calling into question its legality given that eleven states remained excluded from representation in Congress.[100] When the Republicans won in a landslide, their political power became even stronger. The newly elected Congress would have more than a two-thirds Republican majority in both houses, paving the way for still more Reconstruction legislation.[101] Thus, another lesson arrived for the

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[97] The terms radical and moderate as used in describing Reconstruction-era legislators do not refer to general political orientation but to views on how quickly and aggressively to move on "reconstructing" the south to bring about civil rights equality. For further explanation, see *supra* note 51.

[98] *Proposed Fourteenth Amendment, Speech of Thaddeus Stevens, Vote and Passage of Amended Senate Version*, US HOUSE (June 13, 1866), *reprinted in* 2 ESSENTIAL DOCS, *supra* note 88, at 218, 218 (emphasis added).

[99] *Id.*

[100] *See, e.g.*, *Proposed Fourteenth Amendment, President Andrew Johnson's Message of Transmission*, US SENATE (June 22, 1866), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 223–24.

[101] DU BOIS, *supra* note 55, at 325 (noting Republican majorities of 42 versus 11 in the Senate and 143 versus 49 in the House).

Reconstruction advocates that remains of great importance today: The Constitution's complex design makes big change hard without massive support from the American electorate.

Ratification of the Fourteenth Amendment proved slow. Unlike the Thirteenth Amendment, which won ratification ten months after Congress sent it to the states, ratifying the Fourteenth Amendment took more than two years.[102] Three states quickly ratified the Fourteenth Amendment: Connecticut and New Hampshire in the North, and the former confederate state of Tennessee, which in doing so gained readmission to the Union. Besides Tennessee, however, every secessionist state initially rejected it, as did the border states of Delaware and Maryland. Most northern states were in no rush either.[103] By the end of 1867, only twenty-two states of the necessary twenty-eight had ratified, thus again raising the question of whether the secessionist states should be excluded from the final count. Again, Congress decided not to risk this step, which would have thrown the Amendment into permanent legal doubt, but instead sought to increase pressure on the resisting states through the exercise of its legislative powers.

To do so, Congress passed several Reconstruction Acts, aiming to bring to bear the full force of its constitutional and situational power[104] on the secessionist states. The first Reconstruction Act put the ten remaining secessionist states under United States military authority until "loyal and republican State governments [could] be legally established."[105] This military authority was to "protect all persons in their rights of person and property," "suppress insurrection, disorder, and violence," and punish "all disturbers of the public peace and criminals."[106] The President was to dispatch a chief military officer to each of these states (which Johnson in fact did), who would, in turn, set up military or civil tribunals to try offenders who violated the protections provided for in the act. The states could remove themselves from such onerous military rule only by forming "a constitution of government in conformity with the Constitution of the United States in all respects," which must include granting the elective franchise to all adult males.[107] Thus, in this first Reconstruction Act of March 2, 1867, Congress imposed the suffrage requirement it had not imposed through the Fourteenth Amendment. In addition, Congress used the Act to exert the best leverage it had over the secessionist states: to gain readmission into the Union and again become entitled to representation in Congress, a state must first ratify the Fourteenth Amendment and create a new government under which Black men would have the right to vote.[108]

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[102] For exact dates, see RECONSTRUCTION ENCYCLOPEDIA, *supra* note 77, at 833 app. 3.

[103] *Id.*; FRANKLIN, *supra* note 32, at 67 (noting that "most of the other Northern states either dragged their feet or gave no immediate consideration to the [Fourteenth] Amendment").

[104] *See* Harrison, *supra* note 76, at 375 (analyzing the lawfulness of Congress's use of the requirements imposed through the Reconstruction Acts to pressure southern states into ratifying the Fourteenth Amendment).

[105] First Reconstruction Act, ch. 153, 14 Stat. 428 (1867).

[106] *Id.*

[107] *Id.* at 429.

[108] *Id.* at 428–29.

A second act, known as the Second Supplementary Reconstruction Act, passed over Johnson's veto on March 23, 1867. It provided more details on how the process of setting up the new state governments would work, including who would be responsible for overseeing voter registration and conducting the elections and how federal presence in the secessionist states would end.[109] It provided the specific process states could use once they had met all of the requirements of the Reconstruction Acts to petition Congress for readmission to the Union, and stated that once Congress had approved the application and readmitted the states' congressional representatives, the federal military presence in the state would end.[110] Then, over yet another presidential veto, Congress passed a Third Reconstruction Act on July 19, 1867.[111] This act provided further prescriptions as to how federal supervision of resisting states' government-building process should occur, and sought to diminish President Johnson's powers to remove federal officials involved in Reconstruction.[112] Johnson in turn retaliated by firing Secretary of War Edwin Stanton, who had been secretly involved in drafting the acts.[113] Stanton's firing became the basis for Congress's impeachment of Johnson in the House and not-quite-successful trial of Johnson in the Senate, which took up much time and attention.[114] A fourth act added still more to Congress's Reconstruction scheme by requiring that the votes of all men casting ballots, rather than only previously registered voters, be counted in the process of ratifying new state constitutions.[115]

The provisions of these Reconstruction-era statutes have taken on new significance in light of the Roberts' Court's focus on original public meaning in interpreting the Fourteenth Amendment.[116] For example, the Reconstruction-era legislation passed contemporaneously with the debate over and ratification of the Fourteenth and Fifteenth Amendments show that Congress did *not* understand those Amendments to impose a "race blind" mandate. Congress's legislation was far from race blind; it was all about focusing on race and preventing harmful consequences to persons that had been subordinated on account of race. The problem was not that Congress did not understand the reality of how race was operating in American society and the need to focus specifically on fixing that, but instead that Congress's legislative fixes from Washington, D.C. could not reach far enough.

Not surprisingly, Congress's mandates *directed exclusively to the former secessionist states*[117] met with strong resistance in those covered

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[109] Act of Mar. 23, 1867, Pub. L. No. 40-6, 15 Stat. 2.

[110] *Id.*

[111] Act of July 19, 1867, Pub. L. No. 40-30, 15 Stat. 14.

[112] *Id.*

[113] *See* MCKITRICK, *supra* note 53, at 495.

[114] For more on the Radicals' impeachment and near conviction of President Johnson, see *Johnson's Impeachment and Trial*, *in* RECONSTRUCTION ENCYCLOPEDIA, *supra* note 77, at 344, 344–45; MCKITRICK, *supra* note 53, at 486–509 (describing Johnson's impeachment).

[115] Act of Mar. 11, 1868, Pub. L. No. 40-25, 15 Stat. 41.

[116] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122, 2127–28 (2022) (analyzing the Second and Fourteenth Amendments by looking to original meaning).

[117] Note here that Congress was showing its understanding that it could choose some but not all states for remedial measures, a fact that belies Justice Roberts' ground for

states, including further violence and other extralegal as well as law-based means of voter suppression. Nevertheless, Black men did vote in significant numbers, and in doing so changed for a time the secessionist states' political landscape.[118] Historians estimate that 400,000 Black men cast ballots and approximately two thousand Black men held official political office during Reconstruction.[119] In South Carolina, Black men composed a majority of South Carolina's legislature.[120] For a brief moment, Black legislators and Black-supported legislators held significant power.

During this period, Black male voting and escalating violence occurred simultaneously. Resisting states engaged in legal and extralegal practices designed to subordinate Black persons and suppress voting, such as imprisoning Black persons for petty crimes for no reason at all, and then auctioning them as laborers without pay.[121] Thus, Reconstruction's advocates learned the lesson that motivating compliance with anti-racism mandates would be extremely difficult; shockingly forceful resistance could be predicted to continue long term.

Following the enactment of the Reconstruction Acts, three southern states—North Carolina, Louisiana, and South Carolina—voted to ratify the Fourteenth Amendment after having initially rejected it. The simple reason for this switch was Black voter enfranchisement. As historian Eric Foner points out, "[w]ithout black suffrage in the South, there would be no Fourteenth Amendment."[122] With South Carolina's ratification in July 1868, the Amendment finally became part of the United States Constitution.

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invalidating key Voting Rights Acts provisions on an "equal state sovereignty" rationale. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 535 (2013), discussed further at *infra* Part V.A and text accompanying note 262.

[118] Black women, of course, could not vote but were politically engaged in many ways, both during and after the Civil War. *See* THAVOLIA GLYMPH, THE WOMEN'S FIGHT: THE CIVIL WAR'S BATTLES FOR HOME, FREEDOM, AND NATION, 88, 90–91, 122–23 (2020) (pointing out such forms of engagement); *see generally* MARTHA JONES, VANGUARD: HOW BLACK WOMEN BROKE BARRIERS, WON THE VOTE, AND INSISTED ON EQUALITY FOR ALL (2020) (tracing Black women's activism from antebellum times through Reconstruction and beyond).

[119] *See, e.g.*, FRANKLIN, *supra* note 32, at 133–38 (helping begin this historiography of Black Reconstruction leaders); Eric Foner, *South Carolina's Black Elected Officials during Reconstruction*, *reprinted in* AT FREEDOM'S DOOR 166, 167 (James L. Underwood & W. Lewis Burke Jr. eds., 2000). A fascinating historiography investigating the lives of some of these Reconstruction-era Black elected officials is DOUGLAS R. EGERTON, THE WARS OF RECONSTRUCTION 93–96 (2014) (discussing the life and career of Tunis Campbell, a Georgia activist who served as a state senator and in other roles during Reconstruction, suffered incarceration, and eventually fled the state); *id*. at 245–47 (discussing formerly enslaved Senator Blanche Bruce of Mississippi and Congressman Robert Smalls of South Carolina).

[120] FONER, RECONSTRUCTION, *supra* note 32, at 354; *see also id*. at 355–56 (noting that every state had Black elected and local officials); EGERTON, *supra* note 119, at 267 (describing South Carolina's legislature as "dominated by men of color"); *id*. at 268 (providing more details on Black elected officials in South Carolina); *id.* at 269 (discussing the prevailing coalition of Black and progressive white legislators in Louisiana); *id*. at 277–80 (discussing various Black legislators who sought federal office in the 1870 elections); *id.* at 279 (discussing Senator Hiram Revels of Mississippi).

[121] PIERCE, *supra* note 56, at 147–49.

[122] FONER, SECOND FOUNDING, *supra* note 77, at xxvii. Thus, Foner further notes, it is strange—and, one might add, arguably illegitimate—that in construing the Amendment the Court has failed to consider Black Americans' interpretation of its meaning. *Id.*

In June 1868, Congress enacted legislation to readmit the secessionist states that had ratified the Amendment and allow their representatives to retake their seats in Congress.[123] By playing hardball, Congress had achieved its objective of Fourteenth Amendment ratification. But there was a Catch-22 in this strategy: Now that the resisting states had obtained readmission to the Union and representation in Congress, they could use their political power to oppose congressional Reconstruction. Congress's best leverage had been its power to deny rebel states readmission into the Union unless they voted for the Amendment. Once they were readmitted, however, Congress lost this leverage and developed a voting bloc against Reconstruction to boot.

That same year, Congress also tried to use its best ammunition against an uncooperative executive. On February 24, 1868, the House voted to impeach President Johnson after he fired Secretary of War Edwin Stanton for opposing Johnson's lenient policies toward the secessionist states. But despite the Senate prosecutors' best efforts, the Senate failed to convict Johnson in a vote that fell one vote shy of the two-thirds majority needed. In sum, the institutional participants—Congress, the President, and the secessionist states—had played hardball to the extreme. The Reconstruction Congress had, it seemed, achieved its objective of adding civil rights protections to the Constitution, but had failed to take out the obstructionist head of the federal executive branch. These general strategic questions of which political fights to take on remain a perennial conundrum, hard to evaluate except with 20/20 hindsight. But some lessons are more clearly extractable from this history. One is that hardball politics should not be eschewed in the face of hardball tactics coming from the other side. I discuss that lesson further in Part V.B.1 below.

Another lesson is abundantly clear in hindsight—and would appear to have been evident at the time had all eyes not been on the question of whether the Fourteenth Amendment would pass at all. That lesson was that passage of the Amendment could offer little long-term civil rights protection without vigorous enforcement. Both before and after the Amendment's ratification, astounding levels of terrorist violence continued in many resisting areas.[124] This violence took many forms, from large-scale public massacres of people attempting to exercise their legal rights, to clandestine acts of terror at the homes of freed persons and on roads and

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[123] *See* An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72 (1868); *see also* An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73 (1868).

[124] It is important not to sensationalize this violence by exploiting "'the shocking spectacle' of an abused black body." Hannah Rosen, *In the Moment of Violence: Writing the History of Post-Emancipation Terror*, *in* BEYOND FREEDOM: DISRUPTING THE HISTORY OF EMANCIPATION 145, 145 (David W. Blight & Jim Downs, eds., 2017) (quoting SAIDIYA HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 4 (1997)). It is also important to appreciate freed persons' agency in sometimes exercising rights to self-defense in the face of such violence. *Cf.* JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT 41 (2018) (describing freed persons' recognition of their rights under the Second Amendment). On the history of the Second Amendment in Reconstruction, see Robert J. Cottrol, *Introduction*, *in* GUN CONTROL AND THE CONSTITUTION xxi–xxiv (Robert J. Cottrol ed., 1993). These subjects are beyond the scope of this Article but deserve mention as important aspects of the historical literature.

byways—often through "night riding," where domestic terrorists hid themselves both to avoid accountability and inflict maximum fear.[125] Historians have only partial information about the full extent of this violence.[126]

This massive resistance undoubtedly contributed to the seemingly rapid change of mind that moderate Republicans displayed in 1868 about supporting a constitutional amendment to protect the rights of Black men to vote. A key aspect of this switch involved the rhetoric of self-help. Advocates argued for giving Black men a secure right to vote in the Constitution on the ground that this would allow Black men to protect the rights of their race rather than having to rely on Congress to do so. A Fifteenth Amendment, they argued, would help ensure that civil rights protections could not be taken away in the future by Congresses less committed to civil rights. Indeed, this prospect had already materialized as the former secessionist states gained readmission to the Union and began to reassert power in Congress. If Congress could not be counted on to vigorously push for racial justice in the long run, then perhaps the freed people could protect themselves through voting. This is another key lesson pertinent today: Law in the books, even in an amendment to the Constitution, may be insufficient by itself, especially in the face of

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[125] For general treatments, see generally PAUL ORTIZ, EMANCIPATION BETRAYED 9–32 (2005) (describing Reconstruction era violence in Florida and Black persons' resistance); GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION (2d ed. 2007) (summarizing violence in Reconstruction and its political effects).

[126] Although historians have found it difficult to determine with precision the scope of this violence, a brief sketch can help illustrate the enormous gap between what the Fourteenth Amendment's drafters regarded themselves as setting out to do and what was happening on the ground. Some incidents are well known, such as the May 1866 massacre in Memphis, Tennessee, which involved a white mob attack on that city's Black community, resulting in the deaths of approximately four dozen persons, as well as the rape of five Black women, severe beatings, robberies, and massive destruction of Black owned property. James Gilbert Ryan, *The Memphis Riots of 1866: Terror in a Black Community during Reconstruction*, 62 J. NEGRO HIST. 243, 243 (1977). The Major in charge of the Freedmen's Bureau in Memphis attributed the cause of the violence to labor conflict; historians also point to the inversion of the usual social hierarchy that came from Black soldiers wearing uniforms and carrying firearms before the conflagration. *See* Kevin R. Hardwick, *"Your Old Father Abe Lincoln Is Dead and Damned": Black Soldiers and the Memphis Race Riot of 1866*, 27 J. SOC. HIST. 109, 109–10 (1993).

Two months later, on July 30, 1866, an even bigger massacre occurred in New Orleans, Louisiana, an incident that had its roots in unionists' attempts to develop a new constitution for that state. *See generally "An Absolute Massacre" – The New Orleans Slaughter of July 30, 1866*, NAT'L PARK SERV., https://www.nps.gov/articles/000/neworleansmassacre.htm [https://perma.cc/2FC7-9867] (last updated July 30, 2020); JAMES G. HOLLANDSWORTH, JR., AN ABSOLUTE MASSACRE: THE NEW ORLEANS RACE RIOT OF JULY 30, 1866 (2001) (discussing the massacre, its causes, and its consequences).

If racial conflagration constituted one type of violence, another more hidden, individualistic form of terror also appears in Freedmen's Bureau reports. *See, e.g.*, *Letter to the Freedmen's Bureau following the Murder of a Teacher (1867)*, OXFORD AFR. AM. STUD. CTR. (May 31, 2013), https://oxfordaasc.com/display/10.1093/acref/9780195301731.001.0001/acref-9780195301731-e-34109;jsessionid=7ACC3A69C1EA20992835612C6C0B9AFF [https://perma.cc/KHC4-C6R4] (reporting the shooting of a teacher); *Report on Freedmen Murdered in Houston County, Texas (1866)*, OXFORD AFR. AM. STUD. CTR. (May 31, 2014), https://oxfordaasc.com/display/10.1093/acref/9780195301731.001.0001/acref-9780195301731-e-34157 [https://perma.cc/6Q8Y-AR2L] (reporting on two dozen attacks by whites on freed persons).

substantial resistance on the ground. The People affected need a means of self-help to give such law reality, and the key means of self-help in the political process is the right to vote and run for office. This is a lesson racial justice advocates would do well to take to heart today as the country witnesses the rise of the racist extreme right. Politics matters. All of the doctrinal brilliance of our Nation's top scholars means little if the members of the political branches charged with enforcing law lack sympathy with reformers' goals.

In arriving at this insight, the Thirty-ninth Reconstruction Congress began the process of developing a new political psychology connecting human nature to government functioning that was very different from the political psychology reflected in the original Constitution. The Reconstruction advocates realized what the Black abolitionists had been saying all along: No rights are safe without the ability to exercise political power. The Nation's founders had thought that the political elite could be counted on to best protect everyone's rights and avoid the influence of factions,[127] but the Reconstruction advocates saw that local leaders would only protect the rights of their own class. They began, in other words, to arrive at new understandings of the relationship between socio-political psychology and the working of law. Put less abstractly, the Nation's founders believed in republican government run by a limited electorate of white, landed men. United States history showed the evil consequences of that assumption. Under an electorate that did not include everyone whose interests were affected by government, those who lacked voting privileges were at risk of—and suffered—severe abuse by the groups who were granted political power through the vote. That insight revolutionized key foundational assumptions underlying the United States constitutional system. It became increasingly clear that those affected by law should vote on who should represent them in making law.

It was in the Fifteenth Amendment that this transition began to occur in the articulation of rights in the Nation's foundational law. The transition was, of course, only partial in the Fifteenth Amendment, since it left in place many voting exclusions based on, for starters, sex—thus continuing to disenfranchise fifty percent of the population[128]—as well as education, religion, and taxes, as discussed in Part III below.

III. RECONSTRUCTION AFTER 1868: THE FIFTEENTH AMENDMENT AND THE FORCE ACTS OF 1870 AND 1871

Ratification of the Fifteenth Amendment and passage of additional Reconstruction–era legislation brought new lessons relevant today, including the need for both strong federal civil rights oversight and

[127] *See* Susan D. Carle, *Why the U.S. Founders' Conceptions of Human Agency Matter Today: The Example of Senate Malapportionment*, 9 TEX. A&M L. REV. 533, 550–54 (2022) (discussing the founders' views about the political elite's leadership role).

[128] The importance of continued political exclusion on the basis of gender is thus an enormously important topic deserving its own extended treatment. Here it will have to suffice to point out that gender is a big part of Reconstruction's story, which a focus on law tends to make invisible given gender exclusion from the making of law. The basic point for purposes of this Article is that the Fifteenth Amendment promoted a discourse that would extend far into the future about the limits of law alone in protecting rights.

empowering citizens to protect their own rights through voting and otherwise participating in the political process without impediment.

Six months after the difficult two-year process of ratifying the Fourteenth Amendment, Congress took up drafting the Fifteenth Amendment. Although some radicals in Congress had been arguing for Black men's voting rights starting with the Thirteenth Amendment,[129] as already noted, Republican moderates had opposed requiring Black men's suffrage in the Constitution.[130] These legislators were not convinced that the majority of newly emancipated freedmen were "ready" to exercise the franchise.[131] They still viewed voting as a privilege to which only well-educated men should be entitled, rather than a right that should be extended to all citizens affected by the laws that elected officials make or enforce. Black activists and white radicals were far ahead of Congress on these questions. As Mary Ann Shadd Cary told Congress, "The colored women of this country though heretofore silent in great measure upon this question of the right to vote . . . have neither been indifferent to their own just claims under the amendments, in common with colored men, nor to the demand for political recognition so justly made every where throughout the land."[132]

Shadd Cary's view encompassing both women and men in the fundamental right to vote was ahead of its time in comparison to the views of the congressional majority. Her vision saw the greater potential for near universal voting that would eventually be realized four decades later with enactment of the Nineteenth Amendment.[133] Although the majority of members of Congress were unable to appreciate that vision, they started

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[129] *See* Wang, *supra* note 29, at 2178; KRUG, *supra* note 36, at 222–23 (noting that very few senators favored Black suffrage in 1863). Even Stevens, as several historians note, had been somewhat lukewarm on this idea until about 1867. *See, e.g.*, GILLETTE, *supra* note 30, at 34 (calling Stevens "markedly cool on the subject in 1865"); BRUCE LEVINE, THADDEUS STEVENS: CIVIL WAR REVOLUTIONARY, FIGHTER FOR RACIAL JUSTICE 187 (2021) (noting that Stevens "had not stood in the vanguard on the question of black voting"); *id.* at 189 (surmising what reasons accounted for Stevens' equivocation on Black voting, including fears that this issue would jeopardize other goals and that "freedmen, as an uneducated, propertyless, and impoverished class, might become political putty in the hands of their wealthy employers," and noting that Stevens had opposed universal male suffrage earlier in his life out of concern for the dangers of "landless class[es]"). Sumner, too, initially favored what he called impartial, rather than universal, suffrage, which would have prohibited racial discrimination but allowed for some literacy qualifications; he changed his mind, according to his biographer, after noticing the high intelligence of many freed persons who could not read or write. DONALD, *supra* note 34, at 201. As early as 1864, Sumner also saw that without Black votes Reconstruction was doomed. *Id.* at 201 (quoting Sumner stating that "[t]heir votes are as necessary as their musquets [sic]. . . . Without them, the old enemy will reappear and under forms of law, take possession of the governments.").

[130] *See* HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION 42 (2004) ("Unlike radicals, moderate and conservative Republicans initially joined Democrats in disapproving of black suffrage. . . . [t]he argument for African-American suffrage ran counter to the traditional belief that, to understand his interests, a voter must be educated.").

[131] For a compilation of members of Congress's statements along these lines, see GILLETTE, *supra* note 30, at 31–32.

[132] JONES, *supra* note 118, at 117 (quoting Shadd's congressional testimony). Many other key Black activists saw the same necessary connection between voting rights for Black men and all women. *See, e.g.*, *id.* at 65, 103 (discussing Sojourner Truth and Frederick Douglass's outspokenness about the need to grant both Black men and all women the vote).

[133] U.S. CONST. amend. XIX.

in motion, through their adoption of the Fifteenth Amendment, a process that would eventually lead there.

The first step in that process required Congress to consider a new amendment. The change of heart among members of Congress on the question of constitutionalizing Black men's voting rights took place in a striking short time. By early 1869, less than a year after the Fourteenth Amendment's ratification, the opinions of enough members of Congress had taken a 180-degree turn to see a draft of the Fifteenth Amendment emerge from committee. The reason for this sudden shift lay in a lesson members of Congress learned in the battle for the Fourteenth Amendment's ratification and the widespread defiance of the principles that Amendment embodied: Words in the Constitution alone would be insufficient to bring about civil rights equality.

Another important point of note here is that the Republicans in Congress initially believed they had created sufficient incentives for Black men's enfranchisement in adopting Section 2 of the Fourteenth Amendment, [134] which purported to reduce states' representation in federal elections in proportion to their disenfranchisement of adult male citizens.[135] Stevens had put this provision into the Fourteenth Amendment as an alternative to an outright grant of voting rights, believing it would lead states to stop disenfranchising voters on the basis of race.[136] But Stevens turned out to be dead wrong on this; the Fourteenth Amendment's Section 2 has never been enforced.[137] Here again, a lesson for today emerges: without enforcement, even the clearest laws are only as effective as the will that exists to enforce them. The clear words of Section 2 of the Fourteenth Amendment stand as a legal nullity.

A. Congress's Changed Perception

A lot had happened in the short intervening period between Congress's consideration of the Fourteenth and Fifteenth Amendments. Resisting states had repudiated the Fourteenth Amendment until the Reconstruction Acts compelled them to ratify it to gain reentry into the

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[134] On activists' later debates about whether to push for Section 2 enforcement, see CARLE, DEFINING THE STRUGGLE, *supra* note 64, at 141–44 (discussing the Crumpacker Resolution, which would have called for reducing states' electoral strength according to their disenfranchisement of Black male voters). In the end, the decision was against such a campaign because success would simply encode race discrimination in the Nation's electoral system rather than eliminate it. *Id.*

[135] Section 2 provides: " . . . when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U.S. CONST. AMEND. XIV, § 2.

[136] *See* LEVINE, *supra* note 129, at 178–80 (discussing Stevens' compromise proposal).

[137] *See* Eden Bernstein, *The Worrisome Ghost of the Fourteenth Amendment's Second Section*, U. CHI. L. REV. ONLINE (April 12, 2020), https://lawreviewblog.uchicago.edu/2020/04/12/worrisome-ghost-eden-bernstein/ [https://perma.cc/Z4V9-DUB2] ("Section Two's mechanism for punishing states has never been invoked.").

Union, and an epidemic of violence continued in resisting states.[138] These developments vividly demonstrated that resisting states would not cooperate with the goal of achieving civil rights equality for freed persons based merely on new words added to the Constitution.[139]

The realpolitik of the Republican Party's likely future on a national scale mattered too. Unlike the 1866 national elections, the 1868 elections saw diminishing votes for the party. To be sure, Republican presidential nominee Ulysses S. Grant prevailed convincingly in electoral votes over his Democratic opponent, but the popular vote in many states had been close.[140] In a number of the secessionist and border states that Grant carried, he needed the votes of the freedmen to win.[141] Grant also benefited from the fact that Virginia, Texas, and Mississippi still had not ratified the Fourteenth Amendment and thus were not yet "restored" into the Union at the time of the election. At the same time, significant numbers of southern white men remained ineligible to vote because of their prior Confederate leadership roles. These circumstances would not exist much longer.[142] Thus, in a classic example of critical race theorist Professor Derrick Bell's interest-convergence thesis,[143] the Republicans became acutely aware that their party's future depended on maintaining high levels of Black voter participation in the South.[144] The Reconstruction Acts and the new state constitutions written to comply with their requirements provided for voting rights for Black men, but these forms of law could easily be changed. What was needed, most congressional Republicans came to believe, was an amendment protecting Black suffrage as a federal constitutional right.[145]

This change in perception based in experience and political reality also gave rise to a sense of urgency. With its end of session fast approaching

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[138] FONER, RECONSTRUCTION, *supra* note 32, at 342–43 (discussing violence and the rise of the Ku Klux Klan).

[139] BRODIE, *supra* note 54, at 299 (noting the growing Republican belief that "the freedmen could never get police protection without suffrage"); DONALD, *supra* note 34, at 428 (noting that it was the "recalcitrance of the Southern whites" rather than Sumner's persuasiveness that led senators to eventually vote with his radical bloc).

[140] *See* Wang, *supra* note 29, at 2213–15 (describing the importance of southern Black men's votes to Grant's victory in the 1868 election); GILLETTE, *supra* note 30, at 40 (noting Grant's dependence on Black votes).

[141] FONER, SECOND FOUNDING, *supra* note 77, at 98; EGERTON, *supra* note 119, at 241 (observing that the Republicans attributed their success in the 1868 presidential election to what they estimated as 400,000 Black votes).

[142] *See generally* CHARLES HUBERT COLEMAN, THE ELECTION OF 1868: THE DEMOCRATIC EFFORT TO REGAIN CONTROL (1933) (describing the resurgence of the Democratic Party's popularity in the 1868 election, particularly among southern white men).

[143] *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (arguing that the "interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites").

[144] BRODIE, *supra* note 54, at 299 ("Most Republicans were now convinced . . . that the party needed the Negro vote"); FONER, SECOND FOUNDING, *supra* note 77, at 98 (noting the connection between the statistics regarding Grant's election and broader calls for enfranchising Black voters); FONER, RECONSTRUCTION, *supra* note 32, at 344 (describing a changed mood in Congress as the radical generation faded from the scene).

[145] *See, e.g.*, FONER, SECOND FOUNDING, *supra* note 77, at 101 (noting the rapid change of heart on Black enfranchisement by conservative Republican Senator William M. Stewart of Nevada).

on March 4, 1868, the Fortieth Congress saw that it had little time left.[146] The next Congress would retain an overwhelming majority of Republicans in the Senate, but Republicans had lost twenty seats to Democrats in the House, retaining their majority by a slimmer margin.[147] The mood among Republicans had also changed. As the Radical Republicans aged, the idealism with which Reconstruction had begun faded as well, replaced by younger Republicans' pragmatic concerns about the future of the party and their political careers.[148] Stevens' death in August 1868 personified this shift.[149] And because participants sensed that this might be their last chance to secure protections for the country's formerly enslaved citizens, even many radicals became pragmatic. The great abolitionist anti-compromiser Wendell Phillips expressed this change of heart in his national abolitionist paper, *The National Anti-Slavery Standard*, when he exclaimed on February 20, 1869: "For the first time in our lives we beseech . . . to be a little more *politicians* and a little less *reformers*." [150]

A flurry of activity in both chambers took place as various drafts changed hands and the members debated the content of another constitutional amendment.[151] Even though the Radical Republicans had previously argued that voting rights could be secured without an amendment,[152] and the moderates had opposed a constitutional amendment, almost all now agreed that the better approach would be to inscribe voting rights in the Constitution.

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[146] Kurt Lash, *Introduction to Part 2A*, *in* 2 ESSENTIAL DOCS., *supra* note 89, at 435, 436.

[147] COLEMAN, *supra* note 142, at 363–64.

[148] *See* BRODIE, *supra* note 54, at 301 (describing Stevens as "feverishly intent on creating before he died what he called 'a political paradise,' and . . . racked with fear that he would not live long enough"). Sumner, too, was reaching the end of his life and career, though his uncompromising personality and distaste for compromise led him to have less influence than Stevens in Congress. *See* DONALD, *supra* note 34, at 238–39 (noting that "Stevens was an organization man, who worked through committees and exerted influence through his control of the machinery of the House of Representatives," whereas Sumner "announced principles, as from on Mount Sinai, and deplored the compromises needed to transform ideals into legislative reality"); *see also* FONER, RECONSTRUCTION, *supra* note 32, at 229–230 (discussing the very different styles, personalities and roles of Stevens and Sumner in Congress). On "liberal" Republicans' retreat from the goals of Reconstruction, see HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 530–34 (1973).

[149] FONER, RECONSTRUCTION, *supra* note 32, at 344.

[150] Wendell Phillips, *The Senate and the Proposed Amendment*, NAT'L ANTI-SLAVERY STANDARD, Feb. 20, 1869, *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 532, 532.

[151] Kurt Lash, *Introduction to Part 2A*, *supra* note 146, at 436.

[152] Sumner spoke against adopting any amendment at all, laying out three reasons for his position: (1) it was not needed because the Constitution already secured the right of all citizens to vote so that, with the abolition of slavery, Black men already possessed this right; (2) future Congresses need not be checked because Black male suffrage "will be a permanent institution as long as the Republic endures;" and—perhaps his most salient and strategic concern—(3) proposing a constitutional amendment conceded that this right did not exist without an amendment. *See Suffrage and Office Holding Amendment, Speech of Charles Sumner*, US SENATE (Feb. 5, 1986), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 498, 500 (quoting Sumner that "nobody has yet been able to enumerate the States whose votes can be counted on to assure its ratification"); *see also* DONALD, *supra* note 34, at 352–53 (adding more details about Sumner's opposition and Republicans' frustration with him for it).

A key question Congress debated concerned the scope of a voting rights amendment. Should it cover discrimination based only on race or also on related factors such as education and property? Should the amendment articulate a positive right to vote or merely prohibit discrimination in voting? Again, the Republicans disagreed on how far to go in modifying traditional principles of federalism that granted the states control over voter qualifications. The original Constitution saw voting as a political privilege, which states had the authority to bestow as they saw fit without federal government interference. The Democrats invoked these arguments to oppose an amendment.[153] Some Republicans were hesitant to go too far in upsetting traditional federalism as well.[154] They felt more comfortable prohibiting states from discriminating on the basis of race in voting but otherwise wanted to allow states to continue to exercise broad authority over setting voter qualifications. Many of the same legislators involved in drafting the Fourteenth Amendment took the lead in drafting the Fifteenth as well. One of these was moderate Republican John A. Bingham of Ohio, who had been the Fourteenth Amendment's chief drafter. Displaying his faith in law to solve racism, Bingham argued that, if Congress adopted a broad voting rights amendment, "abuses by states will hereafter be impossible."[155] But Bingham had also come to understand that *how* Congress wrote the law would be of great importance. Showing prescience in forecasting how states would dodge a federal voting rights mandate, Bingham warned that states could easily avoid granting voting rights to Black men by imposing education and property qualifications. For this reason, Bingham argued for language that would require nearly universal adult male suffrage (except for persons who in the future engaged in rebellion or had been convicted of serious crimes).[156] The language he proposed would have stated: "The right of citizens of the United States to vote and hold office shall not be denied or abridged by any state on account of race, color, nativity, property, creed, or previous condition of servitude."[157] Bingham acknowledged that this approach would prohibit states from enforcing many other popular qualifications for voting, such as education and religious qualifications (as imposed in New Hampshire).[158] Nevertheless, Bingham argued, without his proposal, "an aristocracy of property may be established, [or] an aristocracy of intellect. . ."[159]

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[153] *See, e.g., Suffrage Amendment, Speech of Charles A. Eldridge (D-WI), Debate*, US HOUSE (Jan. 27, 1869), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 463, 465 (arguing that "[t]he long-conceded right of the States to determine for themselves who of their citizens shall exercise the right of suffrage within their respective jurisdictions is now for the first time to be taken away").

[154] *See, e.g*., RALPH J. ROSKE, HIS OWN COUNSEL: THE LIFE AND TIMES OF LYMAN TRUMBULL 139, 154 (1979) (explaining why moderate Republican Trumbull was not enthusiastic about the Fifteenth Amendment as an unconstitutional encroachment on states' rights to set voter qualifications, though he did in the end vote for it).

[155] *Suffrage Amendment, Speech of John Bingham, Debate*, US HOUSE (Jan. 29, 1869), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 485, 486 [hereinafter *Bingham Speech*].

[156] *See id*. at 486 (quoting the language of Bingham's proposal).

[157] *Suffrage Amendment, Addition of Language Protecting the Right to Hold Office*, US HOUSE (Feb. 20, 1869), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 532–33 [hereinafter *Feb. 20 House Debate*].

[158] *Bingham Speech*, *supra* note 155, at 486.

[159] *Id.*

Bingham's language was similar to what Senator Henry Wilson proposed in the Senate, which would prohibit "discrimination in the exercise of the elective franchise and right to hold office on account of race, color, nativity, property, education, or creed."[160] But others, including Republican Congressman George Boutwell of Massachusetts, demurred,[161] and it was their view that prevailed. The version of the Fifteenth Amendment that Congress ultimately approved prohibited discrimination solely on the basis of race and color in the states' decisions about granting suffrage rights. This language neither defined voting as a fundamental constitutional right nor covered the kinds of closely related qualifications, such as education and property ownership, which former confederate states would soon use to disenfranchise virtually all Black citizens for almost a century.[162]

In retrospect, the Fortieth Congress's drafting decisions on the Fifteenth Amendment stand as yet another example of a missed opportunity to more effectively safeguard civil and political rights.[163] But the Amendment also represented a start to a process of expanding the franchise that continued far into the future.[164]

Like the Thirteenth and Fourteenth Amendments, the Fifteenth Amendment placed great faith in the United States Supreme Court and lower federal courts to energetically enforce legislation Congress would promulgate through its specified enforcement powers. Even at the time of its drafting, however, there were signs that the Court could not be counted on as an ally. Staunch abolitionist Salmon P. Chase was the Chief Justice of the Court, but its record had not been notable for supporting congressional Reconstruction.[165] After dissenting in the *Slaughter-House*

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[160] *Suffrage and Office Holding Amendment, Debate*, US SENATE (Feb. 8, 1869), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 500, 511.

[161] *See, e.g.*, *Feb. 20 House Debate*, *supra* note 157, at 533 (quoting Boutwell noting that similar proposals was already rejected by the House and Senate).

[162] One consideration the Amendment's drafters thought about was the fact that women lacked voting rights. To this point, some Republicans responded that they were all for granting women voting rights too. *See, e.g.*, *Suffrage and Office Holding Amendment, supra* note 160, at 516. Others found the proposition that women should vote absurd, *id*. at 515, demonstrating that Reconstruction-era prejudice involved not only race but also gender.

[163] Of course, the Court may have disregarded more robust language in any event, just as it ignored the antidiscrimination mandate in the Fifteenth Amendment for so many years, as discussed further in Part IV *infra*.

[164] These later Amendments include the Nineteenth Amendment granting women the right to vote, the Twenty-fourth Amendment banning poll taxes as a voter qualification in federal elections, and the Twenty-sixth Amendment granting the right to vote to citizens eighteen years of age or older. U.S. CONST. amends. XIX, XIV, XXVI. The Voting Rights Act of 1965, as amended, is one example of expansive voting rights legislation. Pub. L. No. 89-110, 79 Stat. 437.

[165] In *Ex Parte Milligan*, 71 U.S. 2, 127 (1866), for example, the Court ruled that Congress and the federal executive could not establish trials by military commission in any location in which civilian courts were operating—in other words, in any location except actual theaters of war. This ruling thus invalidated the provisions of the 1863 Freedmen's Bureau Act that established such trial procedures and knocked out one of the tools the federal government had to protect freed persons against violence and other deprivations of their civil rights (though the case is also important in the broader picture in protecting United States civil liberties). After this decision, Johnson issued orders dismissing pending military trials of civilians, thus granting impunity to many who had committed atrocities and were awaiting trial or had already been convicted in military courts. *See* CHARLES

Cases,[166] Chase died in 1873, and his successor would preside over the Court's dismantling of many legal aspects of Reconstruction, as discussed further in Part IV.

One virtue of the Fifteenth Amendment was that Congress's intent was clear. In plain language, the Fifteenth Amendment declared it unlawful to deny the right to vote based on race, color, or previous condition of servitude. To the extent that this Amendment was to be the self-help prong of the Reconstruction advocates' agenda, strong enforcement could have made a real difference. In different political circumstances, the Court might have had little problem understanding Congress's unambiguously stated intent, which was very different from the vague and general language used in the Fourteenth Amendment. In the end, however, that made little difference, as discussed in Part IV below. The Court was bent on dismantling Reconstruction regardless of what the Amendments said.

On February 25 and 26, 1869, the House and Senate, respectively, voted with the requisite margins to pass the stripped-down, narrow version of the Fifteenth Amendment that became law.[167] The states' ratification of the Fifteenth Amendment presented the next challenge. Ironically, it was not the southern states that posed the most difficulty on this score, because the Reconstruction Acts had forced them to enfranchise Black male voters and establish Reconstruction governments that could be expected to support the Amendment. The states quickest to ratify were southern states that had recently won readmission to the Union. These states had substantial Black voting populations in 1868 as well as Republican majorities in their state legislatures, composed of a mix of Black and white legislators—an image offering a glimpse, during its brief existence, of what a nascent post-Reconstruction era political world might have looked like if history had turned out differently.

The anti-amendment states were in the North and West, because most of these states did not grant—and were adamantly against granting—equal voting rights on the basis of race. In other words, racism was rife in

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WARREN, THE SUPREME COURT IN UNITED STATES HISTORY VOLUME 3, at 164–65 (1926). Following *Ex Parte Milligan*, Congress passed legislation over presidential veto to strip the Court of its jurisdiction to hear habeas corpus appeals. *See* Act of March 27, 1868, Pub. L. No. 40-34, 15 Stat. 44. In *Ex Parte McCardle*, 74 U.S. 506, 511–12 (1868), the Chase Court held that it lacked jurisdiction to hear a habeas appeal in a Reconstruction Act case, thus in effect signaling an implicit truce, for a time, between the Court and Congress over the constitutionality of Reconstruction-era legislation. The Chase Court did not consider a case raising the constitutionality of Reconstruction legislation until the Slaughter-House Cases, 83 U.S. 36 (1873), as discussed in Part IV *infra*.

[166] In the *Slaughter-House Cases*, the Court majority held, inter alia, that the Privileges or Immunities Clause of the Fourteenth Amendment granted only a very limited set of national citizenship rights, such as the rights to access seaports and travel to the seat of government. *Slaughter-House Cases*, 83 U.S. at 78–80. In response, dissenting Justice Stephen J. Field remarked that, if this is all the Fourteenth Amendment had been designed to accomplish, Congress and the People had worked themselves up about practically nothing. *Id.* at 96 (Field, J., dissenting). For further discussion, see Part IV *infra*.

[167] *Suffrage Amendment, Debate and Passage*, US SENATE (Feb. 26, 1869), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 536, 536–38 (showing dates and tallies of the final votes for the Fifteenth Amendment).

the "free states" too.[168] Those states did not direct their racism exclusively at Black Americans; California, Nevada, and Oregon rejected the Fifteenth Amendment because it would enfranchise their substantial Chinese populations.[169] The border states of Delaware, Maryland, and Kentucky voted it down out of fears that enfranchising Black voters would alter their electoral dynamics.[170] After Democrats won a majority in New York's state legislature, they voted to rescind the state's prior ratification (and then rescinded that vote, too).[171]

Georgia's vote on February 2, 1870, along with Iowa's vote the next day, pushed the state ratification tally over the three-quarters hurdle. President Grant, in a special message to Congress on March 30, 1870, announced that the Fifteenth Amendment was law, describing it as "a measure of grander importance than any other one act of the kind from the foundation of our free Government to the present day."[172] Supporters were of course jubilant about the Amendment's ratification, but the situation in the secessionist and border states presented little to celebrate. By 1870, the Klan and like-minded groups had spread across the region, changing moderate Republicans' calculus as to what additional steps would be necessary to protect Black citizens' civil rights.[173] Alert to the threats such violence posed both to its Reconstruction work and future electoral prospects, the still solidly Republican Congress passed three additional laws to enforce the provisions of the Fourteenth and Fifteenth Amendments, acting under the authority these Amendments granted in their enforcement clauses.

B. The Enforcement Acts

The first of Congress's new statutes aimed at protecting freed persons' rights—including the now constitutionally enshrined right of Black men to be free from discrimination in voting—was the Enforcement Act of May 31, 1870.[174] That law made it a federal crime to interfere with a person's right to vote without "distinction of race, color, or previous

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[168] States outside the South that restricted or denied voting rights on the basis of race included Connecticut, Pennsylvania, New Jersey, New York, Illinois, Iowa, Ohio, Michigan, Minnesota, Oregon, Nevada, and California. *See* Wang, *supra* note 29, at 2162–63 (examining which states restricted or denied suffrage on the basis of race at the time of the Fifteenth Amendment's ratification process); *see also* ALLAN J. LICHTMAN, THE EMBATTLED VOTE IN AMERICA 79 (2018) ("Paradoxically, while most northern states denied black people the ballot, in former Confederate states many southern blacks voted in the presidential election of 1868"); GILLETTE, *supra* note 30, at 25–27 (discussing many northern state referenda rejecting Black male suffrage by substantial majorities in the Reconstruction era).

[169] *See id.* at 153–55 (analyzing western patterns of opposition to the Fifteenth Amendment).

[170] *See id.* at 80 (noting worries about the political effects of the Fifteenth Amendment in closely divided northern and border states); *see also id.* at 105 (providing more demographic statistics showing the political consequences provoking border states' opposition).

[171] *Ratification of the Fifteenth Amendment Rescinded*, NY TIMES, Jan. 6, 1870, at 1, *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 585, 585–86.

[172] Ulysses S. Grant, *Message to Congress Announcing the Ratification of the Fifteenth Amendment* (Mar. 30, 1870), *reprinted in* 2 ESSENTIAL DOCS., *supra* note 88, at 595, 596.

[173] FONER, RECONSTRUCTION, *supra* note 32, at 454–56.

[174] Act of May 31, 1870, Pub. L. No. 41-114, 16 Stat. 140.

condition of servitude"[175] and to prevent or intimidate a person from exercising the suffrage right.[176] It further prohibited persons to "band or conspire together, or to go in disguise upon the public highways, or upon the premises of another" with the intent to violate citizens' constitutional rights.[177] A second act, which became law on February 28, 1871, decreed that the administration of national elections in specific jurisdictions would fall under the control of the federal government and that federal judges and United States marshals had authority to supervise local polling places.[178] A third act, enacted in April 1871, sometimes referred to as the Ku Klux Klan Act, authorized the President both to use federal armed forces against persons engaged in conspiracies to deny equal protection of the law and to suspend habeas corpus rights to enforce the acts.[179] All three Enforcement Acts defined conspiracies to deprive persons of their civil and political rights as federal crimes.

Instead of leaving enforcement to local officials, the Enforcement Acts assigned prosecutorial power to federal attorneys. To facilitate the United States Attorney General's prosecution of violations of the Enforcement Acts, Congress passed yet another act to establish the Department of Justice.[180] Congress thus brought the power of the federal government to bear against state and local officials who interfered with Black voting as well as against private parties who used violence to intimidate persons attempting to vote or otherwise exercise their rights. These acts, along with President Grant's support of federal prosecutions of the Klan and other white-supremacist terrorists, produced an impressive spate of indictments, totaling somewhere between 1,000 and 2,500 cases in the early 1870s, along with more than 600 convictions.[181] According to Reconstruction historian Eric Foner, this effort "crush[ed] the Ku Klux Klan" while it was occurring.[182] Thus, Reconstruction provides a further pertinent lesson: federal prosecution of civil rights violations can help fight racist violence.

Four years later, the Forty-third Congress passed a final piece of Reconstruction legislation expanding the specific civil rights protected under federal law. On February 4 and 27, 1875, the House and the Senate,

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[175] *Id.* § 2.

[176] *Id.* §§ 3, 4, and 5.

[177] *Id.* § 6. The Act also made it unlawful for anyone to interfere with the civil rights protected in the Civil Rights Act of 1866, Pub. L. No. 39-31, 14 Stat. 27, including the right to make contracts and enjoy equal protection of the laws. Act of May 31, 1870, at § 16.

[178] Act of Feb. 28, 1871, Pub. L. No. 41-99, 16 Stat. 433. As this Act demonstrates, Congress clearly selectively targeted its enforcement powers under the Fourteenth and Fifteenth Amendments to some states and not others. *Compare id. with* Shelby Cnty. v. Holder, 570 U.S. 529, 535 (2013) (holding portions of the Voting Rights Act of 1965 unconstitutional for treating various states differently, violating states' "equal sovereignty").

[179] Act of Apr. 20, 1871, Pub. L. No. 42-22, 17 Stat. 13.

[180] Act of June 22, 1870, Pub. L. No. 41-150, 16 Stat. 162.

[181] *See 150 Years of the Department of Justice*, THE U.S. DEP'T OF JUST., justice.gov/history/timeline/150-years-department-justice#event-1195101 [https://perma.cc/V3XH-8PBV] (last updated Aug. 17, 2022); ROBERT M. GOLDMAN, RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN *REESE* AND *CRUIKSHANK* 38 (2001) (discussing case statistics); FONER, SECOND FOUNDING, *supra* note 77, at 121 (putting the total number of cases at 2,500).

[182] FONER, SECOND FOUNDING, *supra* note 77, at 121.

respectively, approved, on party-line votes,[183] the Civil Rights Act of 1875, named in honor of Senator Sumner, who had recently died after pushing for such legislation for many years.[184] The new act reaffirmed the basic rights in the Civil Rights Act of 1866, including protection of the rights to make contracts, use the courts, hold property, and enjoy equal protection of law, but also expanded antidiscrimination protections to the use of public accommodations and transportation.[185] It also provided for federal court jurisdiction over all cases brought under the Act.[186] President Grant, at the midpoint of his only term in office, signed the measure into law on March 1, 1875.[187]

Yet even as Congress and the executive expanded federal civil rights protections and aggressively pursued enforcement, the end of Reconstruction was almost at hand. An economic depression in 1873 caused hardship in many regions of the country; that situation became far more salient in white voters' minds than protecting civil rights.[188] In the 1874 midterm elections, voters delivered landslide victories to Democratic candidates at both state and federal levels.[189]

Two years later, in the Compromise of 1877 that resolved the disputed presidential election of 1876, Republican President-elect Rutherford B. Hayes ended Reconstruction, removing the federal presence and allowing free reign to the so-called Redeemer Democrats who already controlled a number of southern state governments.[190] At this point, the folly of the Reconstruction-era leaders' faith in the national government's commitment to civil rights equality became clear. As longstanding radical abolitionist and president pro tempore of the Fortieth Senate Benjamin Wade expressed, Hayes' conduct left him with "indignation and a bitterness of soul that I never felt before. . . I had been deceived, betrayed, and even humiliated . . . I feel that to have emancipated these people and then to leave them unprotected [is] a crime as infamous as to have reduced them to slavery once they are free."[191]

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[183] *See To Pass H.R. 796*, GOVTRACK, https://www.govtrack.us/congress/votes/43-2/h380 [https://perma.cc/Y8Z2-UFGH] (showing the House's Feb. 4, 1875, vote); *To Pass H.R. 796*, GOVTRACK, https://www.govtrack.us/congress/votes/43-2/s379 [https://perma.cc/H8XK-9A5Q] (showing the Senate's Feb. 27, 1875, vote, with no Democrats voting yes and four Republicans voting no).

[184] *See* DONALD, *supra* note 34, at 531–39, 586–87 (explaining this sequence of events). True to form, more moderate Republicans such as Senator Trumbull initially opposed the measure on the ground that it was a "social equality bill." *Id.* at 545.

[185] Act of Mar. 1, 1875, Pub. L. No. 43-114, 18 Stat. 335.

[186] *Id.* at § 3.

[187] *Landmark Legislation: Civil Rights Act of 1875*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1875.htm [https://perma.cc/HFK9-HE6J] (last visited Feb. 25, 2023).

[188] FONER, RECONSTRUCTION, *supra* note 32, at 512–18 (describing the effects of this Depression nationwide).

[189] For a general discussion of the 1874 election season and representative incidents of violence that occurred, see *id*. at 549–53.

[190] *Id.* at 587–98 (describing the southern Redeemer movement); FRANKLIN, *supra* note 32, at 196–97 (noting how quickly Redemption occurred after some states' readmission into the Union).

[191] Letter from Benjamin Wade to Uriah Painter, N.Y. TIMES (Apr. 9, 1877), *reprinted in* ALBERT GALLATIN RIDDLE, THE LIFE OF BENJAMIN WADE 363 (1886).

Almost an entire century would pass until the inception of what is sometimes referred to as the "Second Reconstruction."[192] This brief period included the Eighty-eighth Congress's enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, with President Lyndon B. Johnson's enthusiastic backing followed by approval by the Warren Court. President Johnson's "Great Society" social welfare legislation played a part too.[193] Until then, the Reconstruction Amendments and related legislative initiatives stood as promises made on paper, which the Nation had failed to uphold.

IV. RECONSTRUCTION'S DEMISE

As Reconstruction drew to a close, the Supreme Court wasted little time in demolishing the near-term potential force of the Reconstruction Amendments and related civil rights legislation.[194] In 1873, the Court's majority made it plain that it had no interest in giving the Fourteenth Amendment anything but the most crabbed interpretation, opining in *the Slaughter-House Cases* that the rights protectable under the Fourteenth Amendment were so narrow as to be virtually nonexistent.[195] As former Unionist Democrat Justice Stephen J. Field argued in dissent, the majority's reading rendered the Amendment "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the People on its passage."[196] Field pointed out that, on the majority's reading, "no constitutional provision was required" whereas, if the Amendment was in fact intended to protect "the natural and inalienable rights which belong to all citizens," then the work of the Amendment's drafters "has profound significance and consequence" indeed.[197]

The *Slaughter-House Cases* eviscerated the potential of the Privileges or Immunities Clause in a manner that continues to distort the Fourteenth Amendment's interpretation to this day, as a vast body of literature has explored.[198] While it is beyond the scope of this Article to pursue that line of analysis, a basic point about what the Court did in that case does matter to the analysis here. Note how quickly the Court cut short the Fourteenth Amendment's doctrinal development—in just one case with

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[192] *See generally* MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA, 1945-2006 (3d ed. 2007).

[193] *See generally* JOSHUA ZEITZ, BUILDING THE GREAT SOCIETY: INSIDE LYNDON JOHNSON'S WHITE HOUSE (2018) (describing Johnson's Great Society's programs); RANDALL B. WOODS, PRISONERS OF HOPE: LYNDON B. JOHNSON, THE GREAT SOCIETY, AND THE LIMITS OF LIBERALISM (2016) (describing the rise and fall of the Great Society initiative); JULIAN E. ZELIZER, THE FIERCE URGENCY OF NOW: LYNDON JOHNSON, CONGRESS, AND THE BATTLE FOR THE GREAT SOCIETY (2015) (analyzing the factors that made the Great Society initiative possible).

[194] *But see* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 30 (2011) (arguing that the Court's goal during this period was not to gut the Reconstruction Amendments and statutes but to preserve a space for these laws to address "state neglect" by remedying "unpunished interference on account of race" in civil and political rights).

[195] Slaughter-House Cases, 83 U.S. 36, 78–80 (1872).

[196] *Id.* at 96 (Fields, J., dissenting).

[197] *Id.*

[198] *See, e.g.*, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L. J. 1385, 1387 (1992) (noting that the *Slaughter-House Cases* "virtually read out" the Privileges or Immunities Clause from the Fourteenth Amendment).

bad facts (the plaintiffs were contesting legislation related to their business interests, not discrimination against them on the basis of their race) and even worse results. The Court had not needed to render an opinion on the Privileges or Immunities Clause's meaning to decide it did not apply to the plaintiffs' case, but it took the opportunity to reach that broad question nonetheless, in a way that badly damaged the original public meaning of that Amendment. The Court, in other words, refused to acknowledge Congress and the People's instructions in amending the Constitution to bring the federal government into the protection of civil rights equality. The Court was acting politically, just as the Roberts Court did in eviscerating Congress's constitutionally authorized acts to protect voting rights and other legacy aspects of the Reconstruction Amendments.[199]

In *The Slaughterhouse Cases,* the Court signaled its unwillingness to embrace the change Congress and the People called for through the Fourteenth Amendment. In short order, the Court started to invalidate key provisions of the legislation enacted under the enforcement provisions of the Fourteenth and Fifteenth Amendments as well. The Court took those steps in cases such as *United States v. Reese*,[200] *United States v. Cruikshank*,[201] *United States v. Harris*,[202] and the *Civil Rights Cases* of 1883.[203] These decisions struck down key provisions of both the Enforcement Acts of 1870 and 1871 and the Civil Rights Act of 1875.

Because these cases are not well known today, a short discussion of them is worthwhile here. The underlying facts in *Reese* arose from the denial of the right to vote to Black male citizens in citywide elections that took place in January 1873 in Lexington, Kentucky.[204] The Court, with brand-new Chief Justice Morrison Waite writing the opinion, struck down as overbroad Sections 3 and 4 of the Enforcement Act of 1870, on the ground that the language of the two provisions "does not confine their operation to unlawful discriminations on account of race."[205] Therefore, under the Court's archaic logic, even though the prosecution at issue in fact *did* aver unlawful discrimination on account of race in voting, the statutory provisions were not a lawful exercise of Congress's enforcement authority

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[199] *See generally*, Shelby Cnty. v. Holder, 570 U.S. 529, 551–57 (2013), discussed further the in Part V.A *infra*.

[200] United States v. Reese, 92 U.S. 214, 220–22 (1876) (striking down portions of the Enforcement Act of Mar. 31, 1870, Pub. L. No. 41-114, 16 Stat. 140).

[201] United States v. Cruikshank, 92 U.S. 542, 552–59 (1875) (striking down an indictment under § 6 of the Enforcement Act of 1870).

[202] United States v. Harris, 106 U.S. 629, 644 (1883) (finding no "constitutional authority" for § 2 of the Enforcement Act of Apr. 20, 1871, Pub. L. No. 42-22, 17 Stat. 13).

[203] The Civil Rights Cases, 109 U.S. 3, 12–15 (1883) (overturning the first two sections of the Civil Rights Act of 1875, Pub. L. No. 43-114, 18 Stat. 335).

[204] In these elections, Black residents outnumbered whites in the city, but a white Democrat won the election handily. GOLDMAN, *supra* note 181, at 66. The local press reported that this was due to the suppression of the Black vote by operation of a poll or capitation tax the city had enacted a few years before. *Id.* A federal grand jury indicted several election officials, including Hiram Reese, who refused to accept the poll tax tendered by William Garner, a qualified Black voter, and then refused to receive and count Garner's vote. *See Reese*, 92 U.S. at 215. The circuit court sustained the defendants' demurrer to the indictment and certified the case to the Supreme Court for an opinion on the constitutionality of Sections 3 and 4 of the Enforcement Act of 1870. *Id.*

[205] *Reese*, 92 U.S. at 220.

under the Fifteenth Amendment.[206] The Court's modern practice would generally call for narrowing the statute to constitutional limits rather than striking it down entirely, especially when its application would be constitutional on the facts in the case under review.[207] Indeed, as a matter of logic alone, the *Reese* Court had this option even in 1874. But it declined to do so, stating, "[w]e are not able to reject a part which is unconstitutional. . . This would to some extent substitute the judicial for the legislative department of the government."[208] That faulty reasoning ignored the fact that, by striking down the provisions *in toto,* the Court was rejecting Congress's intent far more broadly than it would have if it narrowed the statute's interpretation to cover only acts that clearly deprived Black persons of civil rights. Again, the weakness of the Court's reasoning suggests its political motivations. It was not doing its best to preserve Congress's work but instead was reaching to knock it down.

These were the points the Court's sole dissenter made, noting that the facts alleged in the case *did* involve the denial of the right to vote on account of race, [209] the statute *did* recite that the unlawful acts prohibited were denials of voting rights on account of race, and the intention of Congress on this subject "is too plain to be discussed."[210] Congress had, after all, just passed the Fifteenth Amendment, the object of which plainly was to "secure to a lately enslaved population protection against violations of their right to vote on account of their color or previous condition."[211] But this logic did not move the Court's majority, predisposed to find ways of curtailing the Enforcement Acts in light of their broad reach and interference with traditional federalism principles.

In *Cruikshank*, the Court engaged in an even more transparent dodge of Congress's intent under the Enforcement Acts, holding that the prosecutors there had failed to allege that the defendants—who were none other than the leaders of the Colfax massacre, regarded as the worst instance of mass violence during Reconstruction[212]—had violated *any* federally protected rights.[213] *Cruikshank* involved an indictment filed

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[206] *Id.*

[207] *See, e.g.*, Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987) (noting that the Court generally will presume "that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision," unless Congress has indicated otherwise).

[208] *Reese*, 92 U.S. at 221.

[209] *Id.* at 238, 243 (Hunt, J., dissenting) (noting that Garner's "race and color" prevented the election officers' acceptance of his tax).

[210] *Id.* at 241.

[211] *Id.*

[212] FONER, RECONSTRUCTION, *supra* note 32, at 437. Professor Carol Anderson's graphic description of this incident puts it thus:

> . . . there was simply death. Buzzards, dogs, and insects feasting on what was left of the Black militia. Brains splattered all over the ground. Faces missing. Bullets that had made Swiss cheese of men's backs, especially those who had surrendered. Bodies upon bodies upon bodies that had clearly undergone unspeakable torture all on the battleground of democracy.

CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA 97 (2021).

[213] In addition, seeming to whipsaw the federal prosecutors who were attempting to pursue civil rights violations under the Enforcement Acts, the Court stated that, in *Reese*, it

under Section 6 of the Enforcement Act of 1870, which, as already noted, made it unlawful for "two or more persons" to "band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to . . . injure, oppress, threaten, or intimidate any citizen, with the intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States."[214] The defendant participants in the Colfax massacre had been involved in murdering an estimated one hundred freed persons who had been meeting in a courthouse to discuss political strategy following a contested gubernatorial election in that state.[215] A federal attorney had secured an indictment against some of the ringleaders of the massacre, and the federal circuit court certified questions concerning the indictment's legality to the Supreme Court.

The indictment contained numerous counts, which the *Cruikshank* Court divided into two categories. One category involved counts that averred that the defendants' intent was to prevent the victims in the "exercise and enjoyment of rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States, and as citizens of the said state of Louisiana . . . for the reason" that they were "persons of African descent and race, and persons of color, and not white citizens."[216] This language was as explicit as it could be about race being the reason for the denial of rights, but the Court held that it failed to pass legal muster because in these counts "[t]here is no specification of any particular right."[217]

In a second category, the Court placed all counts that *did* aver specific rights—namely, interference with the victims' rights to peaceably assemble, bear arms, and enjoy security in their persons and property under the due process right to life, liberty, and property. The Court held that none of these rights were rights of national citizenship, which were all that the Fourteenth Amendment protected.[218] Even the right to peaceably assemble for lawful purposes was not a right of national citizenship, since it "existed long before adoption of the Constitution" and was "not, therefore,

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had just explained that "exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude" *was* a right of national citizenship (ignoring the fact it had just struck down much of that protection), but "as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising the right to vote on account of their race, &c., it does not appear that it was their intent to interfere with any right granted or secured by the constitution or laws of the United States." United States v. Cruikshank, 92 U.S. 542, 556 (1875). In an exercise of judicial formalism that blinks reality, as was quite common in the Court's jurisprudence of the period, the Court concluded, "we may suspect that race was the cause of the hostility, but it is not so averred." *Id.* This conclusion can only be called astonishing given that the case involved armed conflict between whites and a hugely outnumbered group of Black citizens who had gathered to assert their political rights.

[214] *Cruikshank*, 92 U.S. at 548.

[215] On the Colfax massacre, see generally CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION (2008).

[216] *Cruikshank*, 92 U.S. at 557.

[217] *Cruikshank*, 92 U.S. at 557.

[218] *Cruikshank*, 92 U.S. at 553–55.

a right granted to the people by the Constitution."[219] The Court used similar logic to dismiss the other counts alleging specific violations of rights listed in the Constitution.

Legal historians sometimes characterize the *Reese* and *Cruikshank* rulings as signaling the end of the Reconstruction era, but, as experts in this period have pointed out, the subsequent history is more complicated.[220] Federal prosecutors continued to pursue cases under the provisions of the Enforcement Acts that the Court had not struck down, trying to draft their indictments to avoid the pitfalls the prosecutors in the *Reese* and *Cruikshank* cases had encountered. But the Court continued to invalidate civil rights prosecutions when opportunities presented themselves, as in *United States v. Harris*, where the Court again used the specious logic of *Reese* to invalidate provisions of the Ku Klux Klan Act on the grounds that those provisions could, in some *other* case, potentially be applied to conspiracies against whites.[221] The Court reached this conclusion despite the facts in the case before it, involving a lynch mob that beat and murdered Black men being held in a local jail.[222]

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[219] *Id.* at 551. The Court acknowledged that the right to peaceably assemble to *petition Congress* for redress of grievances was an attribute of national citizenship, but since the indictment had not stated that this was the specific purpose of the freedmen's meeting in the courthouse, the Court held that it would not sustain these counts on that ground. *Id.* at 552–53.

[220] *See, e.g.*, GOLDMAN, *supra* note 181, at 124 ("Race relations during the last quarter of the nineteenth Century were in fact characterized by their 'variety and inconsistency.'") (quoting C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955)).

[221] United States v. Harris, 106 U.S. 629, 641 (1883).

[222] *Id.* at 629–32. More specifically, an armed group of white men stormed a Tennessee jail and captured four Black prisoners, beating them and murdering one. *Id.* Prosecutors charged them with violating Section 2 of the Second Force or Ku Klux Klan Act, which made it unlawful for two or more persons to "conspire together, or go in disguise upon the public highway or upon the premises of Another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws." Act of Apr. 20, 1871, Pub. L. No. 42-22, 17 Stat. 13, §2. The Court held this provision unconstitutional because, first, following the specious logic of *Reese*, the law "covers cases both within and without the provisions of the amendment," since conspiracies between white men to violate other white men would also be punishable under it. *Harris*, 106 U.S. at 641. Second, the Court cited its "state action" logic from Virginia v. Rives, 100 U.S. 313 (1880). *Harris*, 106 U.S. at 639. In a decision that portended the invalidation of the Civil Rights Act of 1875 three years later, *see* The Civil Rights Cases, 109 U.S. 3, 12–15 (1883), the *Rives* Court held that the protections of the Fourteenth Amendment could only apply to state action and not actions of individuals, even those acting with state authority. *Rives*, 100 U.S. at 318. Thus, the Black defendants in *Rives* were not entitled to Black jury members because, for one, a "mixed jury" was "not essential to the equal protection of the laws," *id.* at 323, and, second, the allegation in the case had not been that state law discriminated against Black citizens in jury selection, but instead that "*the officer* to whom was entrusted the selection of person" had "confined his selection to white persons." *Id.* at 321 (emphasis supplied). The *Rives* Court acknowledged that "[i]n one sense, indeed, his act was the act of the State," but nevertheless concluded that the officer had been engaged in "criminal misuse of the state law" and thus "cannot be said" to have denied rights to the Black defendants. *Id.* Note how this logic further narrowed the scope of the Fourteenth Amendment so that denial of rights *by state officials*, exercising discretion granted them *under state law*, could not constitute state action where discrimination was not patent on the face of the law.

As experts point out, Reconstruction unwound in locally varied ways and timelines so that blanket generalizations oversimplify.[223] But there is no denying that, by the mid-1870s, the key institutions necessary for Reconstruction to succeed—the Court, the Congress, state governments, republican state constitutions, and, after the election of 1877, the federal executive branch—either opposed by every means possible (as in the former secessionist and border states) or failed to continue to press forward the Reconstruction agenda.

In 1883, in *The Civil Rights Cases*, the Court struck down the Civil Rights Act of 1875, declaring it unconstitutional because it reached private actions.[224] In so doing, it rejected the perspectives advanced by dissenting Justice John Marshall Harlan, a former slaveholder who had become a civil rights advocate.[225] First, Justice Harlan argued that the Thirteenth Amendment, which clearly covered private action, prohibited discrimination that perpetuated the "badges and incidents" of slavery.[226] He argued that segregation in places of public accommodations was such a badge or incident of slavery.[227] Second, Justice Harlan suggested that, in public transportation and accommodations, where owners of conveyances were clearly providing *public* goods, discrimination against passengers on the basis of race or color violated the civil rights to free movement and personal agency that all citizens should enjoy.[228]

The Court's record of blazing defiance of Congress's intent under the Reconstruction Amendments continued through the nineteenth century. In *Giles v. Harris*, cynical Civil War veteran and father of legal realism Justice Oliver Wendell Holmes[229] rejected test case litigation that racial justice advocates filed to challenge the patently racist voter disenfranchisement device of grandfather clauses.[230] These clauses provided that only men whose grandfathers had voted before the Civil War could vote, thus patently perpetuating racial exclusion in voting.[231] Justice Holmes invoked the political question doctrine to conclude that the injury alleged constituted *too great* a harm for the judiciary to address. Of course, the Fifteenth Amendment's purpose was to prevent precisely this type of harm, but Holmes' concern about the Court's institutional capacity to police resisting states took precedence in his view. Thus, with only a few victories

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[223] GOLDMAN, *supra* note 181, at 124, 128; RECONSTRUCTION ENCYCLOPEDIA, *supra* note 77, at 833 app. 3 (listing the dates of "redemption" of each of the secessionist states, defined as the date on which white Democrats again achieved control over state government). *See also id*. at 520–22 (defining Redemption and its characteristics throughout the South).

[224] *Civil Rights Cases*, 109 U.S. at 11–12.

[225] *See generally* PETER S. CANELLOS, THE GREAT DISSENTER: THE STORY OF JOHN MARSHALL HARLAN (2021). Canellos suggests that Harlan's close relationship to his Black half-brother, Robert Harlan, contributed to his development of racial equality commitments. *See id.* at 355.

[226] *Civil Rights Cases*, 109 U.S. at 35 (Harlan, J., dissenting).

[227] *Id.* at 34–36.

[228] *Id.* at 37–43.

[229] For more on Holmes, see *infra* notes 241–243 and accompanying text.

[230] Giles v. Harris, 189 U.S. 475, 482, 488 (1903).

[231] For a description of the wave of grandfather clauses adopted by southern states in the period between 1890 and 1915, see Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835, 845–47 (1982).

along the way in the first half of the twentieth century,[232] both the Fourteenth and Fifteenth Amendments would lie dormant—in the words of historian Foner, as "sleeping giants"[233]—for almost 100 years.

Although most of the Framers were doers rather than scholars, they did leave behind some reflections offering their insights into how and why their efforts had failed. Former Free Soil party founder, longtime radical senator, and eighteenth Vice President of the United States, Henry Wilson wrote a three-volume analysis entitled *The Rise and Fall of the Slave Power in America*, in which he observed that, even if all constitutional questions had been correctly resolved, there "remains the far more serious difficulty of constituency" and "man's ability to govern himself."[234] Exhibiting the longstanding ambivalence about universal suffrage even radicals displayed during Reconstruction, Wilson repeated his worries about illiteracy given full "[m]anhood suffrage"; on the other side of the coin, he observed pessimistically that "[t]he fact, too, that the South . . . still contends that this is a white man's government, in which the freedmen have no legitimate part, and from which they shall be excluded, even if violence and fraud be needful therefor, may well excite alarm in the most sanguine and hopeful."[235]

Law, in other words, had not been enough. As Wilson put it:

> The demon of slavery has indeed been exorcised and cast out of the body politic, but other evil spirits remain to torment, if not destroy. The same elements of character in the dominant race . . . still remain to be provided for, guarded against or eliminated, in our efforts to maintain a free form of government. Perhaps, indeed, legislation has done its best or utmost, and all that now remains or can be done, is to bring up the popular sentiment and character to its standard. Can it be done?[236]

If the difficulty of changing human hearts and minds through prescriptive law was one of Wilson's insights, another was the need for social welfare to make the ideal of civil rights equality work in actuality. Wilson called on "the members of the Republican Party to take a new departure and incorporate philanthropic and patriotic action with political action; [in] other words, to engage individually and socially, and outside of party organization, in missionary work to prepare those made free to use intelligently and wisely the power their enfranchisement has given them."[237] The policies of Reconstruction had been "'[i]nadequate, almost ludicrously so, to the great and manifold exigencies of the situation, except as the beginning and earnest of greater and more systematic efforts."[238]

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[232] *See. e.g.*, Guinn v. United States, 238 U.S. 347, 356–68 (1915) (striking down Oklahoma's grandfather clause, though by this time states had moved to using fake education tests to disenfranchise Black voters).

[233] FONER, SECOND FOUNDING, *supra* note 77, at xxviii.

[234] HENRY WILSON, 3 HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 737 (1875).

[235] *Id.*

[236] *Id.* at 738–39.

[237] *Id.* at 739.

[238] *Id.* at 740.

Wilson closed his analysis with a call for "human instrumentalities," as he put it, to do much more.[239] As discussed in Part V, that "much more," as seen through the lenses of the present, might include more work in voluntary, collaborative, and civil society arenas that allow for experiments with new approaches to social welfare outside the strictures of law.

The demise of Reconstruction undoubtedly left its advocates despondent, but the lessons they took from their experiences do not appear to have led them to renounce their beliefs in the potential for greater justice through law. Leaders such as James Ashley and Lyman Trumbull, for example, went on to pursue other social reform causes, including northern workers' labor rights and economic reform legislation to curb the excesses of capitalism.[240]

To be sure, changes were afoot in late nineteenth century jurisprudence. In 1881, jurist Oliver Wendell Holmes would write his important book rejecting legal formalism's conception of law as a logical system and emphasizing instead the extra-legal factors—including politics, ideology, and personal prejudice—that influence judges' decisions.[241] Young enough to have felt the duty to enlist to fight in the war and develop a deep cynicism based on what he experienced, [242] Holmes' life spanned the nineteenth to the twentieth centuries and his ideas reflected a new generation's perspective; most of the key advocates of congressional Reconstruction, whose lives did not extend beyond the nineteenth century, retained a more humanitarian and idealistic outlook. Their ideas, combined with the legal realism Holmes introduced, would be passed forward to later generations of racial justice and human rights activists.[243]

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[239] *Id.* Wilson incorporated religious references as well, referring to "God's hand in American history" and "the many Divine interpositions therein recorded," while also noting, consistent with his call for people to do more, that "no faith, personal or national, is legitimate or of much avail that is not accompanied by corresponding works." *Id.*

[240] *See* REBECCA E. ZIETLOW, THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION 157–77 (2018) (detailing Ashley's work on northern labor rights after losing his congressional seat in 1868); KRUG, *supra* note 37, at 346–47, 349–50 (discussing Trumbull's work on labor rights, legislation to curb monopolies, defense of Eugene Debs, and promotion of the populist People's Party following his Senate defeat in 1873); ROSKE, *supra* note 154, at 172–73 (describing Trumbull's work against monopolies and "the money power"). Bingham, on the other hand, did not continue to be involved in domestic political reform; instead, he served for twelve years as United States ambassador to Japan, where he "took a firm anticolonial stance" but, according to his biographer, "said virtually nothing about constitutional law" after he retired from Congress in 1873. GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT 167, 169 (2013).

[241] *See, e.g.*, OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881) (espousing his famous adage that the "life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.")

[242] *See, e.g.*, LOUIS MENAND, THE METAPHYSICAL CLUB 59 (2001) (arguing that Holmes and other men of his generation come back from the war disdainful of the "individualism, humanitarianism, and moralism that characterized Northern intellectual life before the war").

[243] Holmes' cynicism, in contrast, contributed to his rejection of law's potential use as a moral tool that could be employed to protect the vulnerable. In authoring cases such as *Giles v. Harris*, 189 U.S. 475, 482 (1903), which, as discussed, rejected a carefully crafted

V. EPILOGUE & CONCLUSIONS

What are we to make of the objectives of the Reconstruction advocates, their fifteen-year battle, and its many failures (along with some important successes, including permanently abolishing slavery and involuntary servitude and instituting the concept of birthright citizenship in the United States)? What were the key lessons they learned and what might be their application to the present times? To explore these questions, this section first presents a short epilogue sketching the aftermath of Reconstruction in racial justice advocates' work over the next century, and then assesses what continuing relevance Reconstruction's history may have today.

A. A Short Epilogue

The Framers passed their ideas on to the next generation of post-Reconstruction racial justice advocates.[244] These advocates developed a multitude of strategies, some based on the Reconstruction Amendments and others not, to tackle racial injustice during the so-called "nadir" period in national race relations following Emancipation, typically dated between 1880 and 1915.[245] They did not get very far on the legal front, but a few victories did occur. For example, a handful of states, including New York and Minnesota, passed state civil rights statutes modeled on the Civil Rights Act of 1875, and advocates brought a few successful cases under these laws.[246] They also won several Supreme Court civil rights cases, though these cases at first changed little on the ground.[247]

T. Thomas Fortune, son of Florida Reconstruction politician Emmanuel Fortune and educated in Freedmen's Bureau schools, articulated the idea that became the template for a series of organizations intended to provide a national nonpartisan structure for racial justice reform.[248] These organizations, which grew directly out of Black abolitionists' meetings in the 1830s and beyond, included the Afro American League, the Afro American Council, and the Niagara Movement, which then flowed into the founding of the NAACP in 1910.[249] This biracial group ended up having staying power, led in its first years by Oswald Garrison Villard, grandson of abolitionist William Lloyd Garrison, and having as its chief litigator Moorfield Storey, former secretary to Charles

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challenge to Alabama voter disenfranchisement law, and *Buck v. Bell*, 274 U.S. 200, 205–08 (1927), which upheld sterilization of the "feeble minded" in the interest of eugenics (of which Holmes was an enthusiastic advocate), Holmes articulated a jurisprudence unsympathetic to the goal of using law to create a more justice social order. Holmes' proto legal realism would pave the way for sociological jurisprudence and then the legal realist movement, and some of the participants of those movements, including Charles Hamilton Houston, would contribute important ideas about to how to use law for social change that blended Holmes' anti-formalism with humanitarian and abolitionist values. On Houston's intellectual influences and civil rights work, see generally GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

[244] *See generally* CARLE, DEFINING THE STRUGGLE, *supra* note 64 (discussing racial justice advocacy work of the post-Reconstruction generation of Black leaders).

[245] *See, e.g.*, *id.* at 2–3.

[246] *Id.* at 58–62.

[247] *Id.* at 133–35.

[248] *Id.* at 31–54.

[249] *Id.* at 54–121, 174–92, 252–56.

Sumner.[250] W. E. B. Du Bois provided important intellectual vision based on the combination of his sociological, historical, and early critical race theory genius.[251]

In its early years, the NAACP won a few cases, including *Guinn v. United States*, which struck down Oklahoma's grandfather clause as unconstitutional under the Fifteenth Amendment,[252] and *Buchanan v. Warley*, which invalidated a Louisville, Kentucky housing segregation ordinance.[253] These wins fueled the organization's growth, which, in turn, propelled a plethora of experiments with a wide variety of tactics. These included, unsuccessfully, legislative[254] and international human rights advocacy[255] and, more successfully, court-based approaches on issues including housing, criminal defense, and voting.[256] That work culminated, most famously, in the case that stands in the public memory for the end of *de jure* race classifications, *Brown v. Board of Education*.[257]

At the same time, ideas about the relationship between law and socio-political psychology continued to develop. In the 1920s, sociological jurisprudence helped inspire the NAACP's legal director, Charles Hamilton Houston to conceptualize lawyers as social engineers.[258] Philosophical pragmatism and its offspring, United States legal realism, further advanced thinking about how to use law for social change.[259]

Almost one hundred years after the Reconstruction Amendments' passage, American national political institutions lined up in a perfect storm in which the three branches of national government worked in tandem, for a short but significant time, on a so-called "Second Reconstruction."[260] That period, as already noted, saw passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 as well as significant social welfare legislation. The lasting damage done by Reconstruction's demise emerged in the ways the Court upheld these laws. To take but one example, the Warren Court's decision to uphold the Civil Rights Act under the Commerce Clause rather than the Enforcement Clause of the

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[250] *Id.* at 251–66.

[251] *Id.* at 27, 260.

[252] United States v. Guinn, 238 U.S. 347, 356–68 (1915).

[253] Buchanan v. Warley, 245 U.S. 60, 82 (1917).

[254] *See, e.g.*, ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950 at 38–50 (1980) (tracing some of the NAACP's advocacy for federal anti-lynching legislation).

[255] *See* CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS 1944-1955 (2003) (describing the NAACP's work at the United Nations).

[256] *See, e.g.*, LOREN MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT AND THE NEGRO 258–62 (1966) (introducing an account of this broad-ranging litigation work).

[257] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[258] *See generally* MCNEIL, *supra* note 243 (describing Houston's influences, ideology, and practices).

[259] *See, e.g.*, Susan D. Carle, *John Dewey and the Early NAACP: Developing a Progressive Discourse on Racial Injustice*, *1909-1921*, *in* DEWEY'S ENDURING IMPACT: ESSAYS ON AMERICA'S PHILOSOPHER 249, 249–50, 255–62 (John R. Shook & Paul Kurtz eds., 2011) [hereinafter Carle, *John Dewey*] (describing Dewey's influence on movements for racial justice).

[260] *See* MARABLE, *supra* note 192, at 38–40 (describing how the Supreme Court, Congress, and President Johnson all contributed to the desegregation effort).

Fourteenth Amendment, was due to the negative precedent set by the *Civil Rights Cases,* discussed in Part IV above, which held that the Fourteenth Amendment did not authorize Congress to regulate private conduct.[261]

Like the Reconstruction Era, this period lasted less than two decades. It came to an end with the Burger, Rehnquist, and Roberts Courts, together with the elections of Presidents Ronald Reagan, George H.W. and George W. Bush, and Donald J. Trump. A critical blow to the federal legislative gains of the 1960s occurred when the Roberts Court, in *Shelby County v. Holder*,[262] invalidated a key provision of the Voting Rights Act, despite the virtually unanimous bipartisan support of both Houses of Congress in their votes to renew the act. More specifically, the Court invalidated Section 4 of the Act, which provided that any state that in 1964 had voter participation levels below fifty percent of the voting eligible population must submit proposed changes to their voting procedures to the Department of Justice pursuant to the provisions of Section 5 of the Act. This ruling in effect rendered Section 5's preclearance program inoperative.

The Court's ruling in *Shelby County* employed specious logic just as post-Reconstruction Courts did in the decisions discussed in Part IV above. Chief Justice Roberts' opinion for the majority invented a concept he termed "equal state sovereignty"; that principle, he claimed, barred Congress from using its Fourteenth and Fifteenth Amendment enforcement powers to impose requirements on some states but not others.[263] But this assertion ignored the fact that all of the Reconstruction-related legislation Congress passed in the period contemporaneous with its passage of the Reconstruction Amendments, as detailed in Parts II and III above, singled out some states—namely, those that had seceded and were continuing to resist civil rights equality—for different, targeted treatment.[264] An originalist Court should very much care about such contemporaneous evidence of original public meaning,[265] but in this case the desired result, not any principled methodology of constitutional interpretation, drove the majority's analysis. As Judge Richard A. Posner pointed out, "the [C]ourt's invocation of 'equal sovereignty' is an indispensable prop of the decision," but "there is no doctrine of equal sovereignty."[266]

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[261] *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 250–52 (1964) (upholding the Civil Rights Act of 1964 under the Commerce Clause, rather than the Enforcement Clause of the Fourteenth Amendment, which would have required overruling *The Civil Rights Cases*, 109 U.S. 3 (1883)).

[262] Shelby Cnty. v. Holder, 570 U.S. 529, 556–57 (2013).

[263] *Id.* at 535, 544–45.

[264] *See supra* note 178.

[265] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122, 2127–28 (2022) (looking to historical evidence of original public meaning); Dobbs v. Jackson Women's Health Org., No. 15-1392, slip op. at 79–101 app. A (U.S. June 24, 2022) (surveying state laws in existence in 1868 to determine the scope of the right to abortion under the Fourteenth Amendment).

[266] Richard A. Posner, *The Supreme Court and the Voting Rights Act: Striking Down the Law Is All about Conservatives' Imagination*, SLATE (June 26, 2013), https://slate.com/news-and-politics/2013/06/the-supreme-court-and-the-voting-rights-act-striking-down-the-law-is-all-about-conservatives-imagination.html [https://perma.cc/G9SD-66BM]; *see also* Eric Posner, *John Roberts' Opinion on the Voting Rights Act is Really Lame*,

In *Shelby*, Chief Justice Roberts reassured that "[o]ur decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2" of the Voting Rights Act.[267] That assurance proved hollow when the Roberts Court then narrowed Section 2's application as well.[268] Since then, the Court has continued to uphold state legislation designed to restrict voting,[269] and as of this writing promises to do more such damage in the future.

At the same time, the Nation has endured a blatantly racist President whose rhetoric invoked the worst of the Redeemers' ideology.[270] Congress has shown no signs of being able to take up, much less move forward, a racial justice agenda, and future control of the federal executive branch and Congress is very much up in the air. Nothing close to the perfect alignment of the stars necessary for a "Third Reconstruction" exists or can realistically be expected to arise in the foreseeable future.

B. Conclusions

In these times, as during Reconstruction, the Nation lacks the rare alignment of all three federal branches pushing strongly in favor of progress on racial justice issues that characterized the 1960s. Given these political conditions, racial justice advocates may wish to draw on some of the hard lessons the Reconstruction advocates learned as discussed above, including the following.

1. Be Skeptical About the Effect of Words on Paper Alone

As discussed above, Reconstruction's advocates learned through their experiences attempting to enforce civil rights equality through the Fourteenth Amendment that mere words on paper, even when put into the Constitution, cannot be counted on to produce intended effects without the enthusiastic support of the branches of federal and state government charged with interpreting and enforcing the law. This is not to say that words on paper do not matter; they obviously do, and nothing about this Article's argument is intended to downplay the value of the Fourteenth Amendment. Two key lessons emerge from the Reconstruction Amendments' partial failures, however. First, at the level of horizontal separation of powers, it is clear that successful achievement of the goals

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SLATE (June 25, 2013) https://slate.com/news-and-politics/2013/06/supreme-court-on-the-voting-rights-act-chief-justice-john-roberts-struck-down-part-of-the-law-for-the-lamest-of-reasons.html [http://perma.cc/UH7N-98E4] ("Roberts is able to cite only the weakest support for this [equal sovereignty] principle . . . . None of the usual impressive array of founding authorities show up in his analysis").

[267] *Shelby Cnty.*, 570 U.S. at 557.

[268] *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2336–43 (2021) (rewriting traditional standards for proving Section 2 cases to make it harder for plaintiffs to succeed).

[269] *See, e.g.*, cases cited *supra* note 13.

[270] *See, e.g.*, Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016, 11:35 AM), http://time.com/4473972/donald-trump-mexico-meeting-insult/ [https://perma.cc/M4UG-JLDQ] (quoting Trump saying, *inter alia*, "[t]hey're bringing drugs. They're bringing crime. They're rapists"); Roque Planas, *Donald Trump Blames Crime on Blacks, Hispanics*, HUFFPOST (June 5, 2013, 8:04 PM), https://www.huffpost.com/entry/donald-trumpblames-crime_n_3392535 [https://perma.cc/9DHW-MJLV] (quoting Trump's comment that Black and Latino people commit the "overwhelming amount of violent crime in our major cities").

articulated in the Fourteenth Amendment would have required words on paper *backed by* strong support from the Court, the Executive, and Congresses far into the future. The twin examples of Reconstruction in the 1860s and the Second Reconstruction of the 1960s teach that advantageous alignments of all three federal branches are rare and, when not present, preclude major change through legislative dictate under the complex structure of United States government. Incremental progress may occur and much important ground can be laid in nadir periods to create the conditions to move forward when conditions change.[271] The reverse is also true; major backsliding is also expectable when blatant racists control the executive branch, whether they be Andrew Johnson,[272] Woodrow Wilson,[273] or Donald Trump.[274]

Second, at the level of vertical separation of powers, Reconstruction failed due to powerful resistance from states, local governments and private citizens. Law does not necessarily change human minds and hearts, as contemporary behavioral theorists are starting to study empirically using sophisticated new data analysis tools.[275]

In light of these realities, scholars and other public intellectuals whose job it is to generate ideas to advance racial justice goals must refrain from engaging in naive faith in law on the books.[276] To be sure, they must fight hard to protect doctrines that appear in great jeopardy today in light of the proclivities of the Roberts Court.[277] Smart defensive litigation and doctrine-focused scholarship must continue, if only to minimize the harm the current Court may wreak. But today's racial justice advocates in the academy and beyond sometimes seem insufficiently attentive to the reality that doctrine by itself is necessary but not sufficient. Doctrinal tweaking probably will not result in much, if any, positive change given the ideological and political commitments of the current majority on the Court. Given these current conditions, the now-traditional public impact litigation techniques the NAACP first developed,[278] and especially affirmative test

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[271] *See* CARLE, DEFINING THE STRUGGLE, *supra* note 64, at 297–98 (describing how Black activists' multi-dimensional, ground-laying efforts during the nadir period between 1880 and 1915 at multi-dimensional ground-laying that permitted the later, classically conceived "civil rights" movement to burst forth when political conditions improved).

[272] *See supra* text accompanying notes 53, 70–74.

[273] On Woodrow Wilson's racism and its legacy, see, e.g., Dick Lehr, *The Racist Legacy of Woodrow Wilson*, THE ATLANTIC (Nov. 27, 2015), https://www.theatlantic.com/politics/archive/2015/11/wilson-legacy-racism/417549/ [https://perma.cc/KYG2-G6PN].

[274] *See supra* note 270.

[275] *See generally* BENJAMIN VAN ROOIJ & ADAM FINE, THE BEHAVIORAL CODE: THE HIDDEN WAYS THE LAW MAKES US BETTER . . . OR WORSE (2021) (describing studies about when law does—or, more often, does not—work in directing human behavior).

[276] The distinction between law on the books and law in action is a longstanding precept of sociological jurisprudence, pioneered by Roscoe Pound and others. *See generally* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910) (exploring this distinction).

[277] *See, e.g.*, Matthew B. Lawrence*, Subordination and Separation of Powers*, 131 YALE L. J. 78, 78 (2021) (calling for the application of anti-subordination principles to separation-of-powers questions).

[278] On the earliest work of the NAACP in developing public impact litigation strategies, see Susan Carle*, Race Class and Legal Ethics in the Early NAACP*, 20 LAW & HIST. REV. 97, 106–28 (2002). On the predecessor organizations that first experimented with these strategies, see generally CARLE, DEFINING THE STRUGGLE, *supra* note 64.

case litigation, should be carefully thought through. The risks of harm from bad results often may outweigh the low probability of positive ones.[279] Put most bluntly, racial justice advocates in and outside the legal academy should wean themselves from the dual habits of looking to the Court for significant progress on racial justice issues *and* teaching students to venerate the Court as a key locus of racial justice progress.

Relatedly, one may wonder whether the Framers' experiences with hardball politics provide a lesson for the present moment as, for example, when commentators debate whether to use Congress's constitutional powers to reform the structure of the Court within the constitutionally prescribed bounds of Congress's authority to do so.[280] In periods of deeply clashing perspectives between the branches and with the Nation's future on racial justice (and other deeply important constitutional questions) very much at stake, refraining from hardball politics may turn out to be the province of fools.

2. Prosecute Violence

Yet another lesson identified in Part III.B above concerns the importance of the government's vigorous *enforcement* of the civil rights laws on the books. As discussed above, one of the lasting gains of Reconstruction, replete as it was with horrific resistance through violence, was the creation and enforcement of the civil and criminal provisions of the Enforcement Acts, which, the evidence suggests, had an impact on reducing hate-based violence. Successor statutes exist today.[281] The current times obviously call for devoting priority attention and resources to prosecuting hate-based violence. Law may not change hearts and minds simply because it exists, but enforcement matters.

3. Promote Social Welfare Rights

As Justice Harlan pointed out in his *Plessy v. Ferguson* dissent, civil rights and access to goods provided through the so-called "social" realm are not easily divisible categories. Today a great deal of theoretical work has been done in theorizing the fundamental right to the core resources needed for human flourishing, including rights to basic sustenance, education, adequate health care, and safe housing. The tentative efforts of Reconstruction's advocates in establishing the Freedmen's Bureau represented a first step in this complex history of social welfare legislation

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[279] For a recent example of this conundrum, see the Twitter thread started by Matthew Stiegler (@Matthew Stiegler), TWITTER (May 16, 2022, 10:38 AM), https://twitter.com/MatthewStiegler/status/1526210583145635841?s=20&t=S_2XsOGRaIu44-9Fdu6KYA [https://perma.cc/3UYN-LTAF], debating a University of Virginia Law clinic's pursuit of an important case about awards of public interest attorney's fees before the Court, despite a likely result harmful to public interest lawyers.

[280] *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398, 402–14 (2021) (outlining some of the leading proposals for structural reform of the Supreme Court).

[281] These provisions, some inherited directly from the Reconstruction Era and some passed in later eras, include 18 U.S.C. §§ 241, 242, 245, 247, 248, 249, 294. *See generally What We Investigate: Federal Civil Rights Statutes*, FBI, https://www.fbi.gov/investigate/civil-rights/federal-civil-rights-statutes [https://perma.cc/WLA8-ZF23] (last visited July 24, 2022).

in the United States.[282] Then, the "Great Society" initiatives of the 1960's and 1970's enacted in tandem with federal civil rights legislation pursued these connections more explicitly.[283]

Contemporary legal scholars have continued to explore the constitutional dimensions of federal and state governments' duties to care for the material welfare of the Nation's inhabitants. In *A New Birth of Freedom*, Charles Black riffs on arguments of the abolitionist constitutionalists to argue that the Declaration of Independence's reference to the right to the pursuit of happiness, along with the Ninth and Fourteenth Amendments, provide a basis for finding a fundamental right "to be in a situation where that pursuit has some reasonable . . . chance of moving toward its goal."[284] Black insists that the government has an affirmative constitutional duty "to devise and prudently to apply the means necessary to ensure . . . a decent livelihood for all."[285] And, as he presciently states in words on point for this new time, this duty on the part of Congress is not one the Court must approve or enforce[286] (though one might hope the Court at least would stop undermining it[287]).

In the United States, social welfare rights have developed in complex legislative, as opposed to constitutional, frameworks. From this perspective, it is not substantive rights but the federal constitutional *structure* that protects the social welfare dimensions of racial justice and equality more generally. Federalism continues to play an important part, as in states' provision of rights to education and other social welfare supports. But Reconstruction-era changes to the constitutional structure with respect to the federal government's responsibility for civil rights, as discussed above, are important as well. That changed structure establishes that Congress has an important role to play where states either will not—or, often, cannot, due to problems of coordination—act to provide the underlying social welfare resources that are necessary to promote civil and political equality among a thriving citizenry.[288]

Today, however, the current Court improperly downplays the alterations to the federalist structure the Reconstruction Amendments wrought.[289] When the current Court has failed to uphold social welfare

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[282] *See* Graber, *supra* note 65 at 1363–66.

[283] On these Great Society initiatives, see generally ZELIZER, *supra* note 193, at 85–130 (2015) (describing the civil rights efforts taken as part of the Great Society initiative of President Lyndon Johnson's administration)

[284] CHARLES L. BLACK, A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 131 (1999).

[285] *Id.* at 133.

[286] *Id.* at 138.

[287] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 542, 586 (2012) (striking down Congress's attempt through the Affordable Care Act to cover more poor Americans under shared state and federal Medicaid funding).

[288] *See* LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS 10, 18 (2015) (presenting the thesis that Reconstruction transformed "people's relationship to the federal government" as they began to look "to the federal government, not just state or local governments, to protect, support, and further their interests.") *See also* U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

[289] *See, e.g.*, *Sebelius*, 567 U.S. at 533–35 (referring to federalist principles as interpreted by Chief Justice Marshall, years before the Reconstruction Amendments

protections, it has often invoked federalism. The Roberts Court did so, for example, in invalidating the important Medicaid extension provisions of the Affordable Care Act.[290] The lesson learned involves the importance of attending to the structural aspects of the Constitution rather than rights *per se*. Racial justice scholars should oppose the ways in which the Court has failed to acknowledge that the enforcement provisions of the Reconstruction Amendments *altered* the federalist structure in significant (though still limited) respects.

4. Emphasize the Fundamental Nature of the Right to Vote

As discussed in Part III above, one crucial insight the Reconstruction advocates achieved in the second half of Reconstruction involved the importance of protecting citizens' right to vote and otherwise participate meaningfully in political processes. While Congress in the end protected voting rights only with respect to discrimination on the basis of race, many of the congressional radicals, including Ashley, Stevens, and Sumner, along with key activists, such as Douglass and Shadd Cary, recognized that the arguments supporting Black men's suffrage logically required granting suffrage to women as well.[291] In this change of mindset towards universal suffrage rights, the Fifteenth Amendment heralded an important change. To be sure, the members of Congress fell short of creating a robust positive right to political participation when they decided to prohibit discrimination on the basis of race only, rather than covering property and education restrictions as they had considered doing. Nevertheless, the idea that voting is a fundamental right—first understood clearly by the Black abolitionists, then by the white radicals, and finally by most congressional Republicans as reflected in a limited sense in the Fifteenth Amendment—was new, important, and potentially transformative. It stands today as an important step in defining a fundamental political right with enormous yet unfulfilled potential.

5. Further Explore the Relationship Between Law and Human Psychology

At bottom, I have argued, the Reconstruction advocates in part failed to achieve their goal of creating foundational law that would further racial equality due to their unwarranted faith in the power of words on

changed the federalist structure). Chief Justice Roberts also failed to acknowledge that the Reconstruction Amendments altered the principle of equal state sovereignty on which he based his rationale for striking down important provisions of the Voting Rights Act in *Shelby County v. Holder*, 570 U.S. 529, as discussed *supra* at text accompanying notes 262–269. At the time of the enactment of the Amendments and supporting legislation, Congress and the People of course appreciated that federal supervision of states' grant of voting rights to their citizens would have to be greater in some jurisdictions than others, depending on the history of voter suppression in particular jurisdictions. *See supra* note 178.

[290] *Sebelius*, 567 U.S. at 533–35.

[291] *See, e.g.*, JONES, *supra* note 118, at 65 (noting Douglass' support of women's suffrage); *id.* at 117 (quoting Shadd's congressional testimony calling for suffrage for Black men and women); LEVINE, *supra* note 129, at 101 (describing Stevens' "democratic radicalism" as including "publicly endorsing the right of women to vote and hold public office"); ZIETLOW, *supra* note 240, at 13 (noting James Mitchell Ashley's support for women's suffrage); DAVID W. BLIGHT, FREDERICK DOUGLASS: PROPHET OF FREEDOM 488 (2018) (describing Douglass as an "old ally" of the women's suffrage movement); DONALD, *supra* note 34, at 251–52, 577–78 (noting Sumner's support for women's suffrage).

paper, without more, to achieve legal reform. But we cannot fault them for this today because *they lacked adequate theoretical tools* to help them think through how law could be brought to bear effectively, in the face of resistance, to solve the complex and intractable problem of racism.

A century of further intellectual inquiry into the nature of law and connected issues of human psychology provides contemporary racial justice theorists with far greater resources to think about these questions. Nevertheless, too little of the enormous brainpower being devoted to racial justice questions in the legal academy goes towards thinking about approaches to law and legal change other than traditional doctrinal analysis. We still know far too little about how and when law can work effectively to eradicate racism (as well as oppression and subordination more generally, as Stevens wanted to do), and what kinds of law, in what contexts, work best to those ends.

Reconstruction's history teaches that these questions falling outside the realm of traditional doctrinal analysis urgently need attention. Most basically, as an empirical matter, what kinds of regulatory strategies work best in reducing racism and in what circumstances? What can—and, more importantly, what can't—law do as a matter of prescription? What promise do the new ideas of today hold, including ideas arising from 20th Century sociological jurisprudence, the Legal Realist movement, and various interdisciplinary law-and-social-science approaches that grew out of these legal movements?

These approaches today include the many strands of "new governance" theory,[292] related in turn to "democratic experimentalism," often characterized as derived from John Dewey's classical pragmatist philosophy, which heavily influenced the American Legal realists.[293] Another example, derived from behavioral economics, is Cass Sunstein and others' "nudge" theory, which studies the ways in which human decision-making is rife with non-rational behavior and suggests that law sometimes works best when it is not prescriptive but instead "suggestatory," to coin a

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[292] A classic collection on new governance theory is LAW AND NEW GOVERNANCE IN THE EU AND US (Gráinne de Búrca & Joanne Scott eds., 2006) [hereinafter LAW AND NEW GOVERNANCE]. These editors define new governance as "a construct which has been developed to explain a range of processes and practices that have a normative dimension but do not operate primarily or at all through the formal mechanism of traditional command-and-control-type legal institutions. The language of governance rather than government signals a shift away from the monopoly of traditional politico-legal institutions, and implies either the involvement of actors other than classically government actors, or indeed the absence of any traditional framework of government . . . A further characteristic often present in new governance processes is the voluntary or non-binding nature of the norms"). *Id.* at 2, 3.

[293] Dewey argued that action and ideas must relate to each other, and that any evaluation of ideas must take place in relation to action. *See generally* Susan D. Carle, *Theorizing Agency*, 52 AM. U. L. REV. 307, 354–63 (2005). On the connection between democratic experimentalism and John Dewey's pragmatist philosophy, see, e.g., Charles Sabel, *Dewey, Democracy, and Democratic Experimentalism*, *in* DEMOCRATIC EXPERIMENTALISM 35, 37–38 (Brian E. Butler ed., 2012). On Dewey's influence on legal realism, see generally JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995) (analyzing various realists' interpretations and responses to Dewey's philosophy). On what John Dewey's philosophy meant for early twentieth century social reform efforts, see generally Carle, *John Dewey*, *supra* note 259, at 249–50, 255–62.

term.[294] A host of related ideas combine hard and soft law, and public and private law, especially in the realm of international law where prescription often is not an option.[295] These ideas have proved useful in domestic legal contexts as well, such as in workplace law, environmental law, and more.[296] They may similarly provide promising new directions in the racial justice arena, but need to be prioritized to counterbalance the legal academy's continued exaltation of Court-focused, doctrinal analysis of racial justice issues.

Yet another important approach taps the now highly sophisticated fields of public relations and marketing analysis, which recognize the importance of "framing" ideas in public consciousness to effectively support law reform campaigns. Examples include gay rights activists' use of public relations techniques in their campaign for marriage equality. In a surprisingly short time, reformers were able to turn public opinion in their favor. Activists reframed the issues to focus equality, individual autonomy, and freedom from government intrusion, and substantially erase from mainstream public discourse prejudice against same sex marriage rooted in phobias about social "deviance."[297] With this dramatic shift over less than a decade, gay rights activists built the groundwork for a quite striking achievement—namely, persuading the Roberts Court to protect same-sex marriage as a constitutional right anchored in the Fourteenth Amendment.[298] So too have activists for low-wage workers in Los Angeles used sophisticated public relations techniques, as documented in Professor Scott Cummings' study of these activists' "comprehensive campaign" strategies.[299]

Racial justice advocates should also turn more attention to interdisciplinary fields seeking to understand the causes of racism in the function of the human brain. Science today may be poised to help in generating the theory Reconstruction advocates lacked. For example,

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[294] RICHARD THALER & CASS SUNSTEIN, NUDGE: THE FINAL EDITION 18–32 (2021).

[295] *See generally* LAW & NEW GOVERNANCE, *supra* note 292.

[296] For a case study of "hybrid" new governance and rights-based approaches to race antidiscrimination law in the European Union, see Gráinne De Búrca, *EU Race Discrimination Law: A Hybrid Model?*, *in* LAW AND NEW GOVERNANCE, *supra* note 292, at 97, 118–20; for a case study of the injection of new governance ideas into occupational safety and health law in the United States, see Orly Lobel, *Governing Occupational Safety in the United States*, *in* LAW AND NEW GOVERNANCE, *supra* note 292, at 269, 275–87.

[297] *See* David L. Trowbridge, *Engaging Hearts and Minds: How and Why Legal Organizations Use Public Education*, 44 LAW & SOC. INQUIRY 1196, 1201–14 (2019) (discussing how marriage equality activists used public education strategies in their campaigns); *see also* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1315–18 (2010) (noting how marriage equality advocates used public relations and education techniques to change the national narrative about gay marriage).

[298] Obergefell v. Hodges, 576 U.S. 644, 664–73 (2015).

[299] SCOTT CUMMINGS, AN EQUAL PLACE 460 (2021). And just as social justice advocates have used these techniques to shape public consciousness and bring about change, so too have business interests, such as Uber, used similar campaigns to shape the terms of debate about employment fairness in the gig economy. *See, e.g.*, Sarah Ellison, *When Foreign Markets Resisted, Uber Launched a Media Charm Offensive*, WASH. POST (July 11, 2022, 12:00 PM), https://www.washingtonpost.com/media/2022/07/11/uber-germany-india-media-campaigns/ [https://perma.cc/3JF7-2E7L] (describing Uber's "aggressive global influence campaign that was the company's strategy for powering its way into skeptical local markets around the world").

advances in neuroscience are helping legal scholars understand the brain basis for racism. These discoveries may help the same scholars use their particular expertise in fashioning legal institutions (conceived of much more broadly than simply courts and laws) to develop practices to counter racial exclusion.

Especially promising along these lines are advances in the subfield of social neuroscience.[300] Social neuroscience refers to an interdisciplinary field that looks to a wide range of empirical, science-based research to better understand the brain-based dimensions of human social behavior.[301] Among many other topics, social neuroscience investigates what causes bias in human judgment, including racial prejudice; how bias might be countered with effective interventions; and how law might be used to accomplish these goals. It investigates, for example, what techniques work to mitigate bias in decision-making when applied—as research shows most effective—right before the point of decision.[302] Might more effective judicial remedies be fashioned for racial discrimination on the basis of this research? Might the development of best practices help build into institutional design methods of curtailing implicit bias without resort to courts? Could policy articulated in state and federal laws push institutions to adopt such practices through incentives and the creation of safe harbor provisions?[303] In the same way that the disparate impact analysis now codified in Title VII arose from the social science thinking of the leaders of the National Urban League in the 1940s,[304] might the social neuroscience of the 2020s lead to creative new approaches for the 21st Century?

Interdisciplinary collaboration along all these lines provides promising routes for developing new insights. But those collaborations require that more legal scholars interested in racial justice devote their attention to these topics rather than remaining fixated on neo-formalist doctrinal analysis of the vagaries of the current Court's rulings in an era in which little help can be expected to come from that direction.[305] The Court gravely disappointed the cause of civil rights in the wake of Reconstruction. It is taking a similar direction now. Law-based racial justice advocates would do well to learn from that history and avoid making the same mistake of slipping back into legal formalism in looking to

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[300] *See* Susan D. Carle*, Acting Differently: How Science on the Social Brain Can Inform Antidiscrimination Law*, 73 U. MIAMI L. REV. 655, 661–70 (2019) [hereinafter Carle, *Acting Differently*] (exploring the relevance of social neuroscience to antidiscrimination law).

[301] *See* John T. Cacioppo & Jean Decety, *An Introduction to Social Neuroscience*, *in* THE OXFORD HANDBOOK OF SOCIAL NEUROSCIENCE 3, 6 (Jean Decety & John T. Cacioppo eds., 2015) (defining the field of social neuroscience).

[302] Carle, *Acting Differently*, *supra* note 300, at 727–29 (discussing research on effective interventions against bias and group think).

[303] *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 480–83 (2001) (discussing how federal sexual harassment law creates safe harbor incentives that motivate employers to adopt best practices in stopping workplace sexual harassment).

[304] *See* Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 Florida L. Rev. 251, 270-80 (2011).

[305] On the revival of formalism in law, see Tomas C. Grey, *The New Formalism* STAN. L. SCH., PUB. L. & LEGAL SERIES 16–27 (1999).

doctrinal development as a means of persuading a hostile Court to take a different tack.

VI. CONCLUSION

The aim of this Article has been to argue that contemporary advocates focused on law-related strategies for racial justice need to think beyond traditional approaches. Reconstruction's history suggests that advocates need to think beyond courts to experiments with voluntary approaches, best practices guidance, rolling rule regimes, institutional design incentives and much more. They should think about public education campaigns to change public narratives, opinion polling, media campaigns and more. This is not, of course, to say that the racial justice movement is not thinking in this way; advocates very much are doing so. But legal academia could be doing so much more in support of these initiatives if racial justice scholars spent more time thinking about topics other than the Court.

The problem of racial injustice, though identified and addressed by Reconstruction's advocates almost a century and a half ago, has drastically evaded solution. Its persistence is due in part to the lack of sufficient theoretical support Reconstruction's advocates faced as they undertook their enormously ambitious task of using law to counter racism. Today it is time to pursue better understandings of the relationship between legal theory, human psychology, and both traditional and less traditional uses of law-related strategies to attain that goal.[306]

[306] An example of a leading scholar who *is* looking to social science for help in theorizing racial injustice is Darren Hutchinson. *See* Darren Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection* 110 CAL. L. REV. 371, 372–79 (2022).

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ARTICLE

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

Roy L. Brooks*

"The past is never dead. It's not even past."

– William Falkner, 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.*

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

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[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-georgetowns-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]

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[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 Schwatzberg & 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 reparations[10]—designed to effectuate transitional racial justice.[11] For example, non-monetary rehabilitative reparations (institutional or community-wide programs or services[12]) 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 restrictions[17]) 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-

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[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 restricted[25]) 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] DARITY & 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

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[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

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[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]

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[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, savings[52]) 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

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[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 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

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[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

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[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

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[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&loct=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

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[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

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[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 *Sweat 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 *Sweat*, 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 Supremacy[87]—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,

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[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

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[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.

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[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] S*ee 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

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[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

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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]

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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]

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[120] *See infra* Part III.D.2.

[121] A 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

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[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.
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> 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

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[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 homelessness, 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,

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[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

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[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; s*ee 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&loct=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

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[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 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

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[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

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[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 ratios[190]) 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

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[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

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[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

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[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 shinning 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

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[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]

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[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

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[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

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[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

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[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

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[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.

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[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

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[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 trillion[241] to $59.2 trillion.[242] The numbers do not look any better when viewed at the

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[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 DARITY & 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://blackagendareport.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-

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[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/9VSQ-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].

reparations 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

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[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

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[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

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[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://edsource.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

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[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

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[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 test[283] 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

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[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-9WTX].

[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, s*ee 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 Clause"[292]—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"

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[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 reparations[303]) 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-

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[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

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[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 prudential 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

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[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

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[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 prudential to plan for post-reparations fundraising. There are, in fact, myriad public and private

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[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].

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NOTE

AREN'T I A WOMAN DESERVING OF JUSTICE? RESTRUCTURING VAWA'S FUNDING STRUCTURE TO CREATE RACIAL AND GENDER EQUITY

Maryam Asenuga*

"Because young Black women . . . are depicted not as frightened, pregnant adolescents who are . . . abused by men . . . but as criminal defendants . . . it is virtually impossible for the mainstream public, their communities, or their potential advocates to understand their vulnerability or to respond accordingly."[1]

This Note analyzes the funding priorities of the Violence Against Women Act (VAWA), and how the law's egregious funding of prosecutors, enforcement agencies, officers, and courts directly impacts Black female survivors of intimate partner violence (IPV). Although VAWA was passed in 1994 to serve as a federal remedy for women subjected to IPV, over 85% of current VAWA's funding supports law enforcement, prosecutors, and the overall criminal legal system. This directly harms Black women due to this community's historically negative relationship with the legal system. Additionally, Black women subjected to abuse are also uniquely impacted by VAWA's emphasis on punitive measures and enforcement due to their overrepresentation amongst IPV survivors. This Note will advance the argument by investigating three grant programs under VAWA.

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1 BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION 7 (1st ed. 2012) (emphasis added) (finding that Black women subjected to gendered violence face particular peril because race, gender, and culture are missing from the discussions surrounding punitive policies as a solution to gendered violence).

INTRODUCTION

In 2009, Tiffany Wright, a Black girl was shot in the head and killed while she waited at a high school bus stop.[2] At the time, Wright was eight months pregnant.[3] The police told reporters that they believed the shooting arose from a domestic dispute between Wright and her adoptive brother, Royce Mitchell.[4] Previously, Wright had accused Mitchell of raping her, which her foster mother reported to the Department of Social Services and the police before Wright's death.[5] Despite the severity of these allegations and the Wright's age, investigators did not interview Wright until a month after the initial report.[6] The police did not meet with Mitchell until the day of Wright's death, when Mitchell was arrested and charged with statutory rape and taking indecent liberties with a minor.[7] At Mitchell's bond hearing, the defense attorney vilified Wright and diminished her credibility by focusing on the victim's sexual history.[8] Ultimately, in 2021, the District Attorney dropped Mitchell's rape charge.[9]

This is a result known all too well by Black women.[10] Indeed, for Black female victims and survivors[11] who have experienced intimate partner violence (IPV),[12] the criminal legal system either ignores the violence against this community[13] or criminalizes Black women for defending themselves against the violence that they have experienced.[14]

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[2] JournalNow Staff, *Dropped Sex Charges In Dead Teen's Case Upset Police*, WINSTON-SALEM J., https://journalnow.com/dropped-sex-charges-in-dead-teens-case-upset-police/article_41db29b3-fb02-51d5-90fd-da1cf0dddd3a.html [https://perma.cc/C2RT-WN84] (last updated Apr. 16, 2021).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *See generally* Michael Pinard, *Race Decriminalization and Criminal Legal System Reform*, 95 N.Y.U. L. Rev. 119, 131 (2020) (recognizing how the criminal legal system at "each stage of the system, from policing practices to the impact of criminal records, will continue to harm Black……women…").

[11] This Note will use the language of "victims and survivors" in reference to women, alive or deceased, subjected to abuse. Also, while it is evident that intimate partner violence crosses all racial, social, economic, and political lines, this Note focuses specifically on Black women due to the unique relationship Black women have historically shared with IPV and the criminal legal system, which receives the majority of VAWA's funding. This Note uses Black women loosely to refer to all women-identifying people of African descent. However, it is important reiterate that intimate partner violence affects all communities. The rate of violence against Native women is 37.5%. Similarly, 23.4% of Latinx women and 41–60% of Asian Pacific Island women have been subjected to intimate partner violence.

[12] This Note generally uses "intimate partner violence" or IPV to describe the phenomenon of domestic violence, sexual assault, dating violence, and stalking perpetrated by a current or former intimate partner or spouse.

[13] *See generally* Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. Davis L. Rev. 941, 968-980 (2006) (noting the criminal legal stories of Black women who were ignored by prosecutors and other legal actors and were rendered "invisible").

[14] *See* Kali Nicole Gross, *African American Women, Mass Incarceration, and the Politics of Protection*, 102 J. AM. HIST. 25, 25 (2015) (discussing how racial and gender discrimination contributes to the disproportionate incarceration of Black women who defend themselves against their abusers).

Wright's case illustrates a significant consequence Black female survivors face in their interactions with the legal system—the lack of effective protection.

Individuals and activists are now proposing that resources aimed at reducing violence against women[15] be shifted away from prosecutors and police officers because of the racial and gender inequities that the legal system exacerbates.[16] One central area of focus for these activists is the Violence Against Women Act (VAWA), which is the first federal law to classify IPV as a crime and establishes structural remedies for survivors.[17] As VAWA is currently up for its fourth reauthorization in Congress and was approved by the House in March 2021,[18] civil rights activists have criticized the law's disproportionate funding of the criminal legal system.[19] As the first federal law to sanction penalties for IPV,[20] VAWA reveals a close relationship with the criminal legal system.[21] In reference to VAWA's substantial funding of law enforcement, prosecution, and incarceration to address IPV, Leigh Goodmark, an expert in domestic violence policies, stated, "For the last thirty years, the United States has relied primarily on one tool to combat intimate partner violence—the criminal legal system."[22]

This Note argues that a revised appropriations bill under VAWA which shifts funding away from the legal system and to culturally-specific

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[15] This Note focuses on IPV specifically against women because women have been found to be most at risk of victimization. Women make up 85% of IPV victims. However, it is evident that intimate partner violence affects people of all genders, gender identities, and gender expressions.

[16] *See* Francesca Willow, *What is Abolition Feminism, What Is Carceral Feminism & What Could a World Without Prisons Look Like?*, ETHICAL UNICORN (Mar. 26, 2021), https://ethicalunicorn.com/2021/03/26/what-is-abolition-feminism-what-is-carceral-feminism-what-could-a-world-without-prisons-look-like/ [https://perma.cc/Y34C-BRE4] (discussing Abolition Feminism as an alternative to policing and prison systems to combat gender-based violence); *see also* Leigh Goodmark, *The Violence Against Women Act Is Unlikely To Reduce Intimate Partner Violence – Here's Why*, THE CONVERSATION (Oct. 17, 2018) [hereinafter Goodmark, *Violence Against Women Act*], https://theconversation.com/the-violence-against-women-act-is-unlikely-to-reduce-intimate-partner-violence-heres-why-103734 [https://perma.cc/L4LS-CCUK] (the author expresses that they "believe that [the Violence Against Women Act] still relies too heavily on the criminal system" and "doesn't do enough to address the causes of intimate partner violence").

[17] *Id.*

[18] Susan Davis, *House Renews Violence Against Women Act, But Senate Hurdles Remain*, NPR (Mar. 17, 2021), https://www.npr.org/2021/03/17/977842441/house-renews-violence-against-women-act-but-senate-hurdles-remain [https://perma.cc/E68R-5FVG].

[19] *See* Leigh Goodmark, *Reimagining VAWA: Why Criminalization Is a Failed Policy and What a Non-Carceral VAWA Could Look Like*, 27 VIOLENCE AGAINST WOMEN 84, 92 (2021) [hereinafter Goodmark, *Reimagining VAWA*] ("For over 25 years, VAWA has dedicated significant resources to criminalizing intimate partner violence—in essence, to encourage police and prosecutors to do things that were already required by law. That funding has not resulted in lower rates of intimate partner violence, has not deterred intimate partner violence, and has had serious consequences, both intended and unintended, for the people whose lives it has affected.").

[20] 34 U.S.C. § 12291(a)(12).

[21] *See generally* LISA N. SACCO, THE VIOLENCE AGAINST WOMEN ACT (VAWA): HISTORICAL OVERVIEW, FUNDING, AND REAUTHORIZATION, CONG. RSCH. SERV. 12 (2019) ("The fundamental goals of VAWA are to prevent violent crime; respond to the needs of crime victims; learn more about crime; and change public attitudes through a collaborative effort by the criminal justice system.").

[22] LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE 1 (Claire M. Renzetti ed., 2018) [hereinafter GOODMARK, DOMESTIC VIOLENCE].

victim programs, economic and housing programs, is necessary to target the pressing needs of Black female survivors.

The ongoing Congressional debates regarding VAWA make now an opportune time to investigate VAWA's funding priorities and the effects its interventions have on Black female survivors. VAWA's emphasis on enforcement is demonstrated by VAWA's two largest grant programs, the Services, Training, Officers, and Prosecutors Grant Program (STOP) and the Improving Criminal Justice Responses Program (ICJR).[23] This Note will examine these two programs, in addition to providing an analysis of the Culturally Specific Services Program (CSSP).[24] This analysis will demonstrate that VAWA harms Black women because the law's two largest grant programs strengthen the legal system that has criminalized Black female survivors, and this enforcement focus is compounded by the inattention to the needs of Black female survivors. Who is VAWA's funding structure working for, and whom is it working against?

Black women are impacted by VAWA's focus on criminal enforcement because they make up a disproportionately high number of IPV victims.[25] IPV disputes increased across the country during the COVID-19 pandemic, "18% in San Antonio, 22% in Portland, Ore.; and 10% in New York City", but the IPV rates dramatically increased to 50% or higher for women of color.[26] However, Black women face 2.5 times the rate of violence of other women of color.[27] IPV is one of the leading causes of death for Black women ages fifteen to thirty-five.[28] Although Black women make up only 7% of the general population, they account for 22% of IPV-related homicides.[29] Additionally, 45% of Black women have experienced IPV.[30]

These shocking statistics are partly due to the fact that Black women's intersectionality leaves them vulnerable to IPV.[31] Recognizing the

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[23] SACCO, *supra* note 21, at 12 (an overview of the appropriations and set-asides for the STOP and ICJR programs that this Note relies heavily on).

[24] *Id.*

[25] *See* Maya Finoh & Jasmine Sankofa, *The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence*, ACLU (Jan. 28, 2019), https://www.aclu.org/news/racial-justice/legal-system-has-failed-black-girls-women-and-non [https://perma.cc/SH7S-DDRE] (explaining that "Black girls, women, and non-binary people are hyper-vulnerable to abuse" including rape, homicide, and sexual and domestic violence).

[26] Jeffrey Kluger, *Domestic Violence Is a Pandemic Within the COVID-19 Pandemic*, TIME (Feb 3. 2021), https://time.com/5928539/domestic-violence-covid-19/ [https://perma.cc/S6EZ-5289].

[27] N. Jamiyla Chisholm, *COVID-19 Creates Added Danger for Women in Homes With Domestic Violence*, COLORLINES (Mar. 27, 2020), https://colorlines.com/article/covid-19-creates-added-danger-women-homes-domestic-violence/ [https://perma.cc/SXX6-CMME].

[28] Feminista Jones, *Why Black Women Struggle More with Domestic Violence*, TIME (Sept. 10, 2014), https://time.com/3313343/ray-rice-black-women-domestic-violence/ [https://perma.cc/PT82-2A9U].

[29] *Id.*

[30] Stephanie Hargrove, *Intimate Partner Violence in the Black Community*, THE NAT'L WOMEN CTR. ON VIOLENCE AGAINST WOMEN IN THE BLACK CMTY. (Oct. 2018), https://ujimacommunity.org/wp-content/uploads/2018/12/Intimate-Partner-Violence-IPV-v9.4.pdf [https://perma.cc/S4SU-EGSC].

[31] *See* Katherine Hilson, *The Intersectionality of Domestic Abuse: Law Enforcement Barriers Black Women Face*, CRIMRXIV (Nov. 16, 2020), https://www.crimrxiv.com/pub/05op0xl6/release/1?readingCollection=e3ec78b4 [https://perma.cc/8VBU-G3VZ]

impact of intersectionality is helpful in understanding how the relationship between IPV and criminal legal enforcement creates harm to Black women. Coined by Kimberlé Crenshaw, intersectionality is an analytical framework for understanding how the interconnected nature of one's identities creates overlapping and interdependent forms of discrimination.[32] Black women's race, class, and gender combine to create compounding oppressions, which increase Black women's disproportionate exposure to IPV.[33] Black female survivors are then detrimentally affected by VAWA's governmental responses to IPV because they continue to perpetuate criminalization and disenfranchisement.[34] For example, evidence has demonstrated that Black female victims are prosecuted and incarcerated at higher rates when they decide to defend themselves during IPV disputes.[35] This occurs because Black women's racial and gender identities have led to stereotypes that deem Black women as violent aggressors who must be punished.

It is imperative to analyze VAWA's current funding structure in a broader intersectional framework to create an approach that effectively prevents and reduces IPV. By investigating the interaction between VAWA's grant programs and Black women, this Note serves to create a path forward for an amended funding structure that effectively serves *all* women subjected to intimate partner violence. This intersectional approach will improve the law's ability to prevent and reduce violence. This approach is crucial because if women subjected to abuse are injured rather than aided by a law specifically intended to address IPV, the law is not working in accord with its purpose. VAWA, the vehicle of alleged assistance, has been tainted and may have been tainted from its very origin.

This Note will proceed in three parts. Part I will review the historical prevalence of violence against women, the evolution of the public and legal responses to IPV, and the relationship between Black women and

("[O]ppressive structures of race, class, and gender limit the alternatives [Black] women have to resolve domestic encounters and negotiate the institutional challenges they face . . .").

[32] Kimberlé Crenshaw, *Mapping The Margins: Intersectionality, Identity Politics, And Violence Against Women Of Color*, 43 STAN. L. REV. 1241, 1244 (1991).

[33] *Id.* at 1242 ("[T]he violence that many women experience is often shaped by other dimensions of their identities, such as race and class.").

[34] *See generally* Abigail Higgins & Olúfémi O. Táíwò, *How the Violence Against Women Act Failed Women*, THE NATION (Mar. 3, 2021), https://www.thenation.com/article/society/violence-against-women-act/ [https://perma.cc/68FG-562G] ("[Black women] who do not fit the imagined profile of the right victim (because they are the wrong race, gender, sexual orientation, or even age) report facing exclusion, hostility, and mockery when they attempt to get help from . . . the very same formal institutions supported legally and financially to address the problem by laws like VAWA.").

[35] *See generally* Jane Coaston, *A Black Woman Shot And Killed Her Abusive Husband In A "Stand Your Ground" State. Now She Faces Murder Charges*, VOX (Aug. 25, 2018), https://www.vox.com/2018/8/25/17778712/stand-your-ground-alabama-black-woman-guns [https://perma.cc/K333-9KEA] (describing how "Stand Your Ground" laws do not serve Black women who use self-defense against their abusers, citing the story of Jacqueline Dixon); *see also Why do Black women go to Jail for Self-defense?,* NEW YORK MINUTE (Oct. 9, 2020), https://www.newyorkminutemag.com/why-do-black-women-go-to-jail-for-self-defense/ [https://perma.cc/7SHZ-5DSU] (noting how "almost 60% of women state prisoners have a history of sexual abuse. Part of that population…are incarcerated for criminal charges after pleading self-defense to free themselves from their abusers").

the legal system. This Part will also describe VAWA's legislative history and provide a procedural explanation of the Act's funding structure. Part II will analyze three of VAWA's grant programs to examine the programs' effects on Black women. Finally, Part III will analyze how Congress can introduce a revised appropriations bill that will fund economic and housing programs, which will meet the two most pressing needs for Black female survivors.[36]

I. HISTORY AND SUBSEQUENT TREATMENT OF VIOLENCE AGAINST WOMEN

This Part provides an overview of the history leading up to the passage of VAWA, and connects that history to the policy and legal interpretations of the law. Section I.A outlines the historical prevalence of violence against women and the women's rights movements that arouse of it. Section I.B. discusses the relationship between Black women and the criminal legal system. Then, Section I.C. will examine VAWA's funding structure and its grant programs.

A. The Conditions That Led to VAWA's Enactment

1. Historical Climate and the Battered Women's Movement

IPV dates back to ancient times.[37] Ancient Roman communities of 600 BC treated women as the property of their husbands, who could lawfully beat, or even murder, their wives for misbehavior.[38] In the United States, violence against women has persisted, especially in light of the increase in overall crime.[39] The disproportionate infliction of violence against women continued through the late 1990s to today, with variations over time.[40] From 2010 through 2017, the homicide of women by their intimate partners increased.[41] According to the Department of Justice

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[36] *See generally Gender and Racial Justice in Housing*, NAT'L WOMEN'S L. CTR. (Feb. 2021), https://nwlc.org/wp-content/uploads/2021/02/Gender-and-Racial-Justice-in-Housing.pdf [https://perma.cc/XVN8-4XWN] (noting how Black female survivors are disproportionately represented in the homeless population); *see also* J. Sebastian Leguizamon et al., *Revisiting the Link Between Economic Distress, Race, and Domestic Violence*, 35 J. INTERPERSONAL VIOLENCE 4141, 4141 (2020) (This article uses "a multivariate regression model to estimate how differences in the change in reported incidences of domestic violence by race correlate with changes in mass layoffs by race").

[37] *See* Anna Clark, *Domestic Violence, Past and Present*, 23 J. WOMEN'S HIST. 193, 193-195 (2011) (describing the history and normalization of IPV dating back to the ancient Roman period).

[38] *Worldwide History of Domestic Violence*, IRESEARCHNET, http://criminal-justice.iresearchnet.com/types-of-crime/domestic-violence/worldwide-history-of-domestic-violence/ [https://perma.cc/X9JA-VXHC] (last visited Oct. 20, 2021).

[39] *See* RACHEL E. MORGAN & JENNIFER L. TRUMAN, CRIMINAL VICTIMIZATION 2019, DEP'T OF JUST., BUREAU JUST. STAT. 11 (2020), https://bjs.ojp.gov/content/pub/pdf/cv19.pdf [https://perma.cc/87EQ-EFAX] (reporting that "the percentage of violent victimizations reported to police was higher for females (46%) than for males (36%)").

[40] *Id.* at 6.

[41] *See generally* Emma E. Fridel and James Alan Fox, *Gender Differences in Patterns and Trends in U.S. Homicide, 1976–2017*, 6 VIOLENCE AND GENDER 1 (2019) (finding that homicides by intimate partners are increasing, driven primarily by gun violence).

(DOJ), women made up 85% of IPV victims in 2001.[42] IPV accounted for 20% of violent crimes against women in that same year. In 2020, one in four women experienced severe physical IPV during their lifetime, compared to one in nine men.[43]

a. The Effects of IPV on Women Were Often Ignored

Despite this grim reality, IPV was trivialized in American society until the 1970s.[44] In 1964, some doctors viewed IPV as "therapeutic."[45] This characterization as therapeutic stems from a 1964 study that concluded that couples use fighting to "balance out each other's mental quirks."[46] Judges and psychiatrists sometimes deemed it a pathology of the underclass or individual women.[47] Consequently, societal influences normalized IPV.

b. The Battered Women's Movement Encouraged Recognition of IPV and Brought Remedies for Victims

However, the efforts of the Battered Women's Movement in the 1970s led to societal recognition of the severity of violence against women. The Battered Women's Movement, or the Movement, was a social movement that developed in the 1970s to support women subjected to IPV. Mirroring the spirit of England's women's liberation movements, this grassroots movement called attention to the male hegemony that allowed IPV to persist.[48] G. Kristian Miccio, an expert on domestic violence, rape, and other gender-related crimes, articulated, "By situating male intimate violence within a cultural paradigm, the Battered Women's Movement focused on altering the social conditions that produced, created, and supported such abuse."[49]

The initial focus of the Movement's advocates was to secure domestic violence shelters.[50] The dangerous intersection between IPV and housing insecurity tends to force abused people to remain with their abusers due to financial dependence or the lack of affordable housing for people who choose to leave abusive partners.[51] As a result of the advocates'

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[42] CALLIE RENNISON, INTIMATE PARTNER VIOLENCE, 1993-2001, DEP'T OF JUST., BUREAU JUST. STAT. (2003), https://bjs.ojp.gov/content/pub/pdf/ipv01.pdf [https://perma.cc/M8AC-AP9H].

[43] *National Statistics*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/STATISTICS [https://perma.cc/7A2U-N7KB] (last visited Dec. 21, 2021).

[44] Eliana Dockterman, *50 Years Ago, Doctors Called Domestic Violence 'Therapy'*, TIME (Set. 25, 2014), https://time.com/3426225/domestic-violence-therapy/ [https://perma.cc/T8YU-NCBQ].

[45] *Id.*

[46] *Id.*

[47] *See* Barnes, *supra* note 13, at 974 n. 135 (quoting Randal Albelda, *Fallacies of Welfare-to-Work Policies*, 577 ANNALS 66, 74 (2001) (welfare receipt 'constitute[s] dysfunctional behavior' or 'a pathology — one of the many 'bad' behaviors that helps reproduce poverty'")).

[48] Miccio, G. Kristian, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservation of the Battered Women's Movement*, 42 HOUST. L. REV. 237, 249 (2007).

[49] *Id.*

[50] Sydney Hyer, *History of the Battered Women's Movement*, DELAWARE COAL. AGAINST DOMESTIC VIOLENCE, https://dcadv.org/blog/history-of-the-battered-womens-movement.html [https://perma.cc/5ZHW-DR8L] (last visited Sept. 15, 2021).

[51] *See* Giulia Paglione, *Domestic Violence and Housing Rights: A Reinterpretation of the Right to Housing*, 28 HUM. RTS. Q. 120, 123 (2006).

organizing, approximately 250 shelters were operating by the end of the 1970s.[52] Eventually, the advocates' efforts led to over 50% of states passing laws that made it easier for survivors to receive civil protections.[53]

However, the Movement shifted away from its initial focus and became increasingly professionalized and allied with other entities like law enforcement.[54] Over time, the organizers of the Battered Women's Movement collaborated with enforcement agencies, prosecutors, the courts, the private bar, and social services organizations.[55] For example, the Movement's organizers began advocating for more funding of police, prosecutors, and courts.[56] Antiviolence reformers also prioritized laws that centered on carceral legal responses to IPV and state-sanctioned punishment.[57] Partnering with law enforcement occurred because feminist movements often focused on the experiences and circumstances of specific women—white middle-class women.[58] Some criminologists point to male entitlement and fragile masculinity as the root of IPV repeat offenders.[59] These feminists posited that the cure was to strengthen criminal laws and remove police discretion because "lax policing of abusers and rapists as *the* gender justice issue . . . ."[60]

The shift in focus away from housing security to more punitive solutions led to policies like mandatory arrest laws, which evidence shows often led to the arrest of abused women and escalated violence.[61] These laws allow an officer to make an arrest when there is probable cause that abuse has been perpetrated or when a person holding a protective order fears imminent harm.[62] Consequently, this collaboration influenced subsequent efforts and legislation that relied on enforcement to solve IPV.[63]

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[52] Kathleen J. Tierney, *The Battered Women Movement and the Creation of the Wife Beating Problem*, 29 SOC. PROBS. 207, 208 (1982).

[53] *Id.*

[54] *Id.* at 286—292.

[55] *Id.*

[56] *See* GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 15.

[57] *Id.* at 14.

[58] *Id.* at 7 (recognizing that white middle-class women had "faith in the deterrent power of criminal law").

[59] *Id.* at 146 (Criminologist Michael Salter states that for repeat offenders "'violence appears to be, at least in part, an effort to shore up a fragile and unstable sense of masculine honour and entitlement, the threat of punishment appears as an additional affront to their authority and may trigger a compensatory escalation in violence.'")

[60] AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION 7 (2020).

[61] ERICA R. MEINERS & JUDITH LEVINE, THE FEMINIST AND THE SEX OFFENDER: CONFRONTING SEXUAL HARM, ENDING STATE VIOLENCE 15 (2020).

[62] David Hirschel, et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 J. CRIM. L. & CRIMINOLOGY 255, 256 (2008).

[63] *See* Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. ETHNIC & CULTURAL DIVERSITY IN SOC. WORK 219, 220 (2018) (noting that decades of anti-violence movements, like the Battered Women's Movement, entailed the "collaboration with the institutions of police, prosecution, courts, and the systems of jails, prisons, probation, and parole.").

c. Anti-IPV Reformers Shifted their Focus to the Criminal Legal System to Reduce IPV

By the 1970s, IPV disputes resulted in increased arrest and prosecution rates, for abusers but also for victims.[64] This occurred because antiviolence advocates pressured prosecutors to increase their low prosecution rates of IPV cases. Some prosecutors initially argued that they would not bring IPV cases to court because there could be no proof without the cooperation of IPV victims.[65] Victims often feared retaliation by their partners or the financial loss created by their partner's incarceration.[66] Thus, advocates demanded "no-drop prosecution" policies, which allowed prosecutors to circumnavigate victims' refusal to cooperate through various, and sometimes disturbing, tactics.[67] To encourage cooperation, prosecutors provided inducements, subpoenaed reluctant witnesses, and in extreme cases, arrested and imprisoned victims as material witnesses before trial.[68] By 1996, two-thirds of prosecutors' offices adopted some form of no-drop policies.[69]

As this story suggests, the responses to IPV became more focused on enforcement, and women of color warned of the problems that this would create for their communities.[70] Judith Levine and Erica R. Meiners, authors of pieces centered on gender-related crimes, noted that women of color feminists "adamantly opposed outsourcing vengeance to the state," because their experiences indicated that prisons do not eliminate violence, "but instead perpetrate and perpetuate it, while destroying individual lives, families, and communities."[71] This focus has now been labeled "carceral feminism."[72] Coined by sociologist Elizabeth Bernstein, carceral feminism refers to "a reliance on policing, prosecution, and imprisonment to resolve gendered or sexual violence."[73] Black female activists forewarned that this criminal law focus intentionally constructed new laws in a way that negatively impacted Black women subjected to IPV due to increased

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[64] *See generally* Lisa Holland-Davis & Jason Davis, *Victim Arrest in Intimate Partner Violence Incidents: A Multilevel Test of Black's Theory of Law*, 6 J. PUB. AND PRO. SOCIO. 1 (2014) (finding that the Battered Women's Movement inadvertently led to the increase in arrests and prosecution of victims and perpetrators following the Movement's push for pro-arrest policies).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 15.

[69] *Id.*

[70] *See* GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 7 ("From the beginning of the antiviolence movement women of color foresaw the problems that criminalization would create for their communities, but those concerns went largely unheeded in the rush to institutionalize criminalization in law and policy.").

[71] MEINERS & LEVINE, *supra* note 61, at 13.

[72] Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 J. WOMEN IN CULTURE AND SOC'Y 45, 47–58 (2010) (explaining how feminists' embrace of criminalization laid the groundwork of what became known as carceral politics and carceral feminism).

[73] Alex Press, *#Metoo Must Avoid "Carceral Feminism"*, VOX (Feb. 1, 2018) https://www.vox.com/the-big-idea/2018/2/1/16952744/me-too-larry-nassar-judge-aquilina-feminism/ [https://perma.cc/LNQ7-XJUD].

policing.[74] During a 2000 conference centered on women of color and IPV, Angela Davis articulated that criminal law is a "poorly suited" solution because IPV is rooted in both individual social circumstances and larger systemic contexts.[75] Additionally, former Senior Counsel for Economic Security at the National Women's Law Center, Brenda Smith, argued that VAWA's criminal focus would disproportionately affect Black women because the intersection of racial and gender discriminations coupled with the legal system's historically oppressive relationship with the Black community leaves Black women the most vulnerable to any expansions of policing.[76] The intersectionality of Black women's identities has created a "paradoxical political dynamic" that isolates Black female victims and treats them as criminals.[77]

As concerns increased regarding the reliance on the legal system, there is this simultaneous issue facing Black women's treatment by the legal system. The burgeoning law-and-order focus that "made feminism more prosecutorial and punitive" harmed Black female victims due to their historically oppressive relationship with the criminal legal system.[78] Specific manifestations of the legal system's oppression of Black female survivors of IPV will be expounded upon below.

B. Black Women and the Criminal Legal System

In order to understand how VAWA's enforcement focus is detrimental to Black female survivors, this section will explore how the legal system has historically treated Black women. Section I.B.1 provides an overview of how slavery influenced the relationship between Black women and the criminal legal system. Next, Section I.B.2 explores how racial and gender discrimination combined with punitive policies contributes to the criminalization of Black women. Further, Section I.B.3 addresses legal actors' damaging perceptions of Black women. Finally, Section I.B.4 explains why Black women—including Black survivors of IPV—distrust the legal system.

1. Slavery as the Historical Origins of the Relationship between Black Women and the Legal System and its Effects

The legal system's criminalization of Black women and their "overrepresentation in prison has a long history rooted in the tangled dynamics of race, gender, enslavement, and the law."[79] Slavery's development in the American colonies involved the creation of laws that endangered Black women.[80] Specifically, laws prevented the prosecution of white slave-holding offenders who raped enslaved women; however, Black male offenders who raped white women were violently punished.[81] This

[74] *Id.*

[75] GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 18.

[76] *See* Goodmark, *Reimagining VAWA*, *supra* note 19, at 85.

[77] RICHIE, *supra* note 1, at 112.

[78] GRUBER, *supra* note 60, at 1 .

[79] Kali N. Gross and Cheryl D. Hicks, *Introduction—Gendering the Carceral State: African American Women, History, and the Criminal Justice System*, 100 J. OF AFR. AM. HIST. 357, 359 (2015).

[80] *Id.*

[81] *Id.*

contradictory treatment between white male offenders and Black male offenders within the criminal legal system reflected the prejudicial attitudes against Black women who were seemingly not deserving of legal protections compared to other survivors. Additionally, the legal system often punished Black women who defended themselves against their abusers.[82] For example, Celia (nineteen years old)[83] and Virginia Christian (sixteen years old)[84] were two Black slaves executed in 1855 and 1912, respectively, after defending themselves against their abusive masters.

Moreover, Black women who were not sentenced to death were met with longer prison sentences than their white counterparts who committed similar crimes.[85] In prison, Black women were often confined under harsh conditions, which exposed them to rape and other forms of brutality.[86] The unfair social hierarchy that slavery buttressed contributed to these occurrences in prison systems and within the broader criminal legal system. Over time, this hierarchy not only created the foundation that modern-day punitive policies were established on, but it also contributed to the adverse treatment of Black women.

2. Punitive Policies as Causes of Black Women's Vilification by the Legal System

Federal and state governments implemented pro-arrest legislation in response to IPV that have created punitive consequences, which further the criminalization of Black women, expose them to disparate outcomes, and illustrate the legal system's destructive relationship with the community.[87] In the late 1990s, white feminist lawyers pushed for harsher arrest laws.[88] For example, feminist lawyers sued New York City's police departments for their "arrest-avoidance" policies.[89] A similar development

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[82] *See* Gross, *supra* note 14, at 25—26 ("Structured by colonial and antebellum judiciaries, laws representing the priorities of enslavers effectively negated and criminalized black womanhood by subjecting black women to brutality and exploitation and by barring them from lawful avenues for redress.").

[83] Mariame Kaba, *Black Women Punished For Self-Defense Must Be Freed From Their Cages*, THE GUARDIAN (Jan. 3, 2019) https://www.theguardian.com/commentisfree/2019/jan/03/cyntoia-brown-marissa-alexander-black-women-self-defense-prison [https://perma.cc/LP5N-FJA9].

[84] Lashawn Harris, *The "Commonwealth of Virginia vs. Virginia Christian": Southern Black Women, Crime & Punishment in Progressive Era Virginia*, 47 J. SOC. HIST. 922, 923 (2014).

[85] *See generally* Gross, *supra* note 14, at 29—30 ("Between 1794 and 1835 in Philadelphia, roughly 72 percent of black women who went before juries were convicted. They also had fewer of their cases dismissed than any other group and were more starkly overrepresented in prison than black men.").

[86] *See generally* Jaclynn Ashly, *'Treated Worse Than Animals': Black Women In Pretrial Detention*, ALJAZEERA (Jul. 7, 2021) https://www.aljazeera.com/features/2021/7/7/treated-worse-than-animals-black-women-in-us-pretrial-detention [https://perma.cc/87RC-ASV2].

[87] *See generally* Willow, *supra* note 16 ("[Mandatory arrest] has led to victims being arrested instead of/as well as perpetrators, while perpetrators are still less likely to go to jail or prison than other criminals, sexual assault remains underreported, and violence hasn't stopped.").

[88] *See* GOODMARK, DOMESTIC VIOLENCE, supra note 22, at 13.

[89] *Id.*

took place in Oakland, California in 1976, as seen in *Scott v. Hart*.[90] *Scott* challenged the Oakland Police Department's response to calls for assistance from abused women.[91] The goal of this class action was two-pronged: 1) obtain adequate police protection for abused women by reversing the department's arrest-avoidance policy and 2) educate the public and legal system about IPV.[92] In response to *Scott*, the Oakland Police Department rescinded its arrest-avoidance policy and agreed to criminalize domestic violence.[93]

Further, two prominent cases solidified the legal system's arrest policies. Two months following *Scott,* activists filed suit against the New York City (NYC) Police Department for failing to intervene on behalf of twelve women in *Bruno v. Codd*.[94] The lawyer who filed this case argued that prosecution and arrest were necessary to disband IPV.[95] Following this suit, NYC police promised to respond swiftly to IPV calls and to make an arrest whenever they have reasonable cause following an IPV dispute.[96] *Thurman v. City of Torrington* had a similar result. On June 10, 1983, Tracey Thurman, a white woman, was brutally attacked by her husband as nearby police officers watched.[97] Following this case, Thurman received a $2.3 million dollar judgement against the city of Torrington and United States' jurisdictions gradually enacted mandatory arrest policies in response to this case.[98]

VAWA further incentivized jurisdictions to implement these policies by making participating jurisdictions eligible for millions in federal grant funding.[99] At present, twenty-two states and the District of Columbia have enacted mandatory arrest laws, and the vast majority of police departments have implemented pro-arrest policies.[100] Ultimately, mandatory arrest laws created unintended consequences. These consequences included the rise in mandatory and "dual" arrests of female victims.[101] In jurisdictions that do not require police officers to determine

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[90] *See* Pauline W. Gee, *Ensuring Police Protection for Battered Women: The Scott v. Hart Suit*, 8 J. WOMEN IN CULTURE AND SOC'Y 554, 556—560 (1983) (provides a full discussion with background of the case).

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] Bruno v. Codd, 90 Misc. 2d 1047, 1048 (Sup. Ct. N.Y. Cnty. 1977) ("The complaint, supported by sworn statements in dozens of actual cases, alleges that police officers called to the scene of a husband's assault on his wife, uniformly refuse to take action, even if the physical evidence of the assault is unmistakable and undenied").

[95] *Id.*

[96] *See generally Police*, UNIV. OF MINNESOTA HUM. RTS. LIBR. (2003), http://hrlibrary.umn.edu/svaw/domestic/link/policereform.htm [https://perma.cc/M8VH-CSCU (explaining how the NYC police department changed its practices in domestic violence cases).

[97] Thurman v. City of Torrington, 595 F. Supp. 1521, 1522 (D. Conn. 1984).

[98] *Id.*

[99] Violence Crime Control and Law Enforcement Act of 1994, 18 U.S.C. §§1033—1034 (1994); *see also* H.R. 3355, 103rd Cong. (1994).

[100] *See generally* GRUBER, *supra* note 60, at 148 ("Although often held up as a stunning liberal victory, VAWA was no less carceral than the rest of the Crime Control Bill . . . VAWA's largest appropriation was grant money to states to encourage 'more widespread apprehension, prosecution, and adjudication of persons committing violent crimes against women . . . '").

[101] *See* GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 19.

the primary aggressor, dual arrests laws allow officers to arrest the victims along with their abusers.[102] The detrimental effects of dual arrests on the victim is wide-reaching, including loss of employment, loss of child custody, labeled as an offender, financial hardship, and future unwillingness to report subsequent victimization.[103] Additionally, certain jurisdictions have nuisance property laws, which could result in victims losing their homes as a result of seeking police protection in an IPV dispute.[104]

Consequently, pro-arrest laws have led to the increase in arrest rates of Black female survivors.[105] Criminologist Alesha Durfee attributed this increase to the "implementation of mandatory arrest policies and not simply an increased use of violence by women in intimate relationships."[106] Following the expansion of pro-arrest legislation in New Hampshire, Connecticut, Colorado, Minnesota, and Maryland, "[w]omen have been disproportionately affected by the increase in the number of arrests for IPV".[107] This disparity most likely occurs due to the prevalence of gender discrimination in the penal context and its effects on Black female survivors.[108]

Thus, the increased reliance on enforcement to solve IPV made Black women vulnerable to increased arrests, punitive social services, and rigid institutional regulation.[109] Sociologist Beth Richie states, "The buildup of a prison nation that surrounded the antiviolence movement enacted a set of public policies that favor the creation of a more conservative, punishment-oriented state . . . ."[110] Richie explained that this buildup of the prison nation exposed Black women to negative consequences as they simultaneously experienced male violence in communities of concentrated disadvantage.[111] As a result, Black women's outcomes spurred negative stereotypes about them.

3. The Discriminatory Mythologies Held by Legal Actors and Officers about Black Women

The combination of racial and gender discrimination fuels the detrimental perception of Black women by the legal system's officials.

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[102] *Id.*

[103] *Id.* at 20 ("Criminalization has also increased state control over women through the intervention of the child abuse and neglect system. . . . [M]andatory arrest and no-drop prosecution has been disempowering for some people subjected to abuse.").

[104] *See* GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 121.

[105] *See generally* Carolyn M. West, *"Sorry, We Have to Take You In:" Black Battered Women Arrested for Intimate Partner Violence*, 15 J. AGGRESSION, MALTREATMENT & TRAUMA 95, 102 (2007) (analyzing how mandatory arrest laws contributes to the increased rates of arrest among Black women subjected to IPV).

[106] Alesha Durfee, *Situational Ambiguity and Gendered Patterns of Arrest for Intimate Partner Violence*, 18 VIOLENCE AGAINST WOMEN 64, 75.

[107] See *Id.* at 67.

[108] *See* SACCO, *supra* note 21, at 18 ("VAWA 2013 . . . established a nondiscrimination provision to ensure that victims are not denied services and are not subjected to discrimination based on actual or perceived race, color, religion, national origin, sex, gender identity, sexual orientation, or disability.").

[109] *See* RICHIE, *supra* note 1, at 25.

[110] *Id.* at 103—104.

[111] *Id.* See *id.*

Judges,[112] juries, and officers perceive Black women as lascivious, dishonest, and predisposed towards criminally violent behavior.[113] This is apparent in the case of former police officer Daniel Holtzclaw.[114] Holtzclaw was convicted of serial sexual violence against thirteen low-income, Black women.[115] According to prosecutors, Holtzclaw deliberately targeted and raped these women because they were unlikely to be believed.[116] Additionally, a juror from a 2008 pornography trial said that he did not believe the testimony from Black women because of how they dressed and "the way they act."[117] Seemingly, some legal actors do not believe that Black women require or deserve adequate protection.[118] This treatment contributed to Black women's lack of trust in the legal system.

4. Black Women's Distrust of the Criminal Legal System

Black women's apprehension stems from the legal system's reliance on responses that criminalize Black women or exclude them from the decision-making process following IPV disputes.[119] Mandatory arrest laws, for instance, often deprive Black women of the ability to determine whether and how the state will intervene. The case of Renata Singleton, a Black female IPV survivor, is demonstrative of the specific ways that certain IPV laws fail Black women subjected to IPV.[120] Singleton resided in a mandatory arrest jurisdiction in Louisiana.[121] In this jurisdiction, some prosecutors often issued illegal subpoenas to compel IPV victims to meet with prosecutors and secure convictions.[122] After Singleton refused to meet with prosecutors following her boyfriend's arrest for assaulting her, prosecutors issued an allegedly fraudulent subpoena to coerce her to appear in court.[123] Singleton spent five days in jail because she could not afford the high bond set at $100,000.[124] In contrast, her abuser paid his $3,500 bond and served no time in jail.[125] Singleton's interactions with the legal system demonstrate the pattern of institutional harm that Black

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[112] *See generally* Christina Carrega, *Judge Reassigned For Allegedly Calling Black Woman Juror 'Aunt Jemima'*, ABC NEWS (Feb. 7, 2020), https://abcnews.go.com/US/judge-reassigned-allegedly-calling-black-woman-juror-aunt/story?id=68824246 [https://perma.cc/9NTV-8Q65] (describing the temporary suspension of a state judge who allegedly referred to a Black woman as "Aunt Jemima", which is a derogatory term for Black women).

[113] Maya Finoh & Jasmine Sankofa, *supra* note 25.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *See generally* Chandra Whitfield, *It's Complicated: Why Some Black Women Refuse To Call The Police When Their Black Male Partners Threaten Their Lives*, THE GRIO (Apr. 10, 2019), https://thegrio.com/2019/04/10/why-some-black-women-refuse-to-call-police-black-male-partners/ [https://perma.cc/E43M-9HT9] ("Some domestic violence advocates say that Black women also have a legitimate fear that they themselves may end up arrested or subjected to violence or mistreatment from responding officers if they call police for help, adding to already heightened anxiety levels."); *see also* GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 20 ("[M]andatory arrest may reduce reporting of intimate partner violence among women subjected to abuse who oppose the policy.").

[120] *See* GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 21.

[121] *Id.* at 20—21.

[122] *Id.* at 21.

[123] *Id.*

[124] *Id.*

[125] *Id.*

female survivors face as a result of the criminal enforcement responses to IPV.

Mandatory policies, such as mandatory arrest, create situations that discourage Black female IPV survivors from reporting abuse. Goodmark claims, "[s]tate intervention cannot guarantee safety for women of color so long as these women both fear and are actively harmed by engaging with the state."[126] Due to this, Black women may be afraid to call police officers.[127] In 2015, Janisha Fonville was shot and killed by responding officers whom Fonville called to render aid during an IPV dispute.[128] In a survey that analyzed survivors' experiences with law enforcement, the National Domestic Violence Hotline found that over half of the participants stated that calling the police would worsen their situation.[129] Taken together, the Holtzclaw, Singleton, and Fonville examples point to the *system-wide* harm that Black female survivors consistently face in this context. These present-day events illustrate that the warnings of women of color advocates went unheeded in the race to institutionalize criminalization as a response to IPV. This race culminated in the enactment of VAWA.

5. VAWA Endorsed a Clear Federal Preference for a Carceral Response to IPV

The impact of mainstream antiviolence efforts laid the groundwork for VAWA. During the late 1990s, when antiviolence reformers received growing interest and funding for carceral responses, attorneys, judges, and Congress began paying attention to these issues.[130] To aid this work, feminist legal scholars and attorneys collaborated to educate judges about gender bias in the courts, in addition to other legal issues.[131] Influenced by these movements to address IPV with punitive measures, Congress created a committee to evaluate gender issues in the federal judicial system.[132] Soon after, then-Senator Joe Biden sponsored the Violence Against Women bill that was signed into law by then-President Bill Clinton.[133] Following

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[126] Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J. OF L. & GENDER 53, 73 (2017) [hereinafter Goodmark, *Domestic Violence Be Decriminalized*].

[127] *See* Whitfield, *supra* note 119.

[128] *See* GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 21.

[129] Goodwin K. Amber & TJ Grayson, *Investing in the Frontlines: Why Trusting and Supporting Communities of Color Will Help Address Gun Violence*, 48 J. L. MED. & ETHICS 164, 165 (2020), https://law.yale.edu/sites/default/files/area/center/justice/investing_in_the_front_lines.pdf [https://perma.cc/FYJ8-WHAC] ("In a 2015 survey by the National Domestic Violence Hotline analyzing survivor experiences with law enforcement, over half of the participants said calling the police would make their situation worse").

[130] Jill Tiefenthaler et al., *Services and Intimate Partner Violence in the United States: A County-Level Analysis*, 67 J. OF MARRIAGE AND FAM. 565, 567 (2005) (In 1988, Congress created a committee to examine gender issues in the federal judicial system that was followed by the introduction of VAWA legislation in 1990. After much debate, VAWA became law in the summer of 1994 under the larger Omnibus Crime Control Act.").

[131] *Id.* at 567 ("[A] group of feminist legal scholars and attorneys founded Gender Bias Task Forces designed to educate judges about gender bias in the courts").

[132] *Id.* at 567 ("In 1988, Congress created a committee to examine gender issues in the federal judicial system . . .").

[133] Savannah Behrmann, *Democrats Want To Renew The Expired Violence Against Women Act, Again. Here's What You Need To Know*, USA TODAY (Mar. 16, 2021) https://www.usatoday.com/story/news/politics/2021/03/16/violence-against-women-act-joe-biden-backing-goes-back-house/4704243001/ [https://perma.cc/7N8H-74T9].

much debate, VAWA became federal law under the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103–322).[134] Although the bill initially stood alone, VAWA acknowledged congressional concerns regarding violent crime that disproportionately targeted women.[135] Although VAWA had various victim-centered responses to violence against women, it centralized the criminal legal system in its solutions.[136]

C. VAWA's Funding Structure, Relevant Agencies, and Grant Programs

VAWA's funding structure reveals that despite the consideration given to victims and survivors in VAWA's grant program, there is a stark disparity in the Act's funding between programs intended to support the work of law enforcement and programs specifically dedicated to victims and survivors.

1. VAWA's Legislative History and Purpose

VAWA's legislative history relates to the investigation and prosecution of violent crimes against women.[137] Then-senator Biden's advocacy was motivated by the desire to create the first U.S. federal legislation that recognized IPV as a crime.[138] VAWA represented an approach to strengthening responses at the local, state, tribal, and federal levels to IPV.[139] The Act provided training for police, prosecutors, and judicial officials on dealing with IPV abuse.[140] It also funded services to victims, such as shelters for abused women and children.[141] To efficiently distribute funds authorized by VAWA, the Office on Violence Against Women (OVW) was administratively created in 1995 within the DOJ.[142] The DOJ and Health and Human Services (HHS) also administer VAWA's programs.[143]

In its original form, VAWA had three primary purposes: 1) it amplified investigations and prosecution of sex offenses; 2) it created grant programs that involved different entities aimed at targeting IPV, such as law enforcement, public and private entities, service providers, and victims

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[134] Violence Against Women, 42 U.S.C. § 13925 (2012).

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] German Lopez, *The Controversial 1994 Crime Law That Joe Biden Helped Write, Explained*, VOX (Sep. 29, 2020), https://www.vox.com/policy-and-politics/2019/6/20/18677998/joe-biden-1994-crime-bill-law-mass-incarceration [https://perma.cc/7A7P-H34G].

[139] Laura L. Rogers, *The Violence Against Women Act – An Ongoing Fixture In The Nation's Response To Domestic Violence, Dating Violence, Sexual Assault, And Stalking,* DEP'T OF JUST. ARCHIVES (Feb. 19, 2020), https://www.justice.gov/archives/ovw/blog/violence-against-women-act-ongoing-fixture-nation-s-response-domestic-violence-dating [https://perma.cc/3WHS-VGGK].

[140] *See* 34 U.S.C. §12291(b)(11)(A) ("Of the total amounts appropriated under this subchapter, not less than 3 percent and up to 8 percent, unless otherwise noted, shall be available for providing training and technical assistance. . .").

[141] *See* 34 U.S.C. §12291(a)(51) ("The terms 'victim services' and 'services' mean services provided to victims of domestic violence, dating violence, sexual assault, or stalking, including . . . emergency and transitional shelter. . .").

[142] *See* Goodmark, *Reimagining VAWA*, *supra* note 19, at 87 ("Since 1995, the Department of Justice's Office on Violence Against Women . . . administers most VAWA grant programs . . .").

[143] *See* SACCO, *supra* note 21, at 30.

of crime; and 3) it established provisions for immigrants subjected to abuse.[144]

To strengthen its efficacy and expand its provisions, VAWA has undergone regular reauthorizations of appropriations for the VAWA grant programs every five years. The Act was reauthorized in 2000, 2005, 2013 and is currently up for reauthorization in the Senate. If authorizations for grants expire, Congress may continue to appropriate funding for VAWA.[145]

Each reauthorization expanded VAWA's provisions. VAWA's 2000 reauthorization created a pertinent legal assistance program that provided representation to IPV survivors, enhanced training for lawyers representing victims, and created other direct legal services.[146] This reauthorization also enabled IPV survivors who escaped their abusers and fled across state lines to obtain custody orders without returning to jurisdictions where they may be in danger.[147] Furthermore, the 2005 reauthorization offered more inclusive approaches.[148] For example, it included funding for rape crisis centers, linguistically-specific services, and housing protections.[149] This reauthorization set forth the Child Witness, Court Training and Improvements, and Culturally Specific programs.[150] Additionally, the 2013 renewal of VAWA strengthened protections for Native Americans and LGBT (lesbian, gay, bisexual, and transgender) survivors.[151] This reauthorization granted tribal courts prosecutorial power over non-Native Americans who abused Native American women on tribal lands.[152] Additionally, VAWA 2013 guaranteed that LGBT survivors could not be denied access to critical services on the basis of gender identity or sexual orientation.[153] VAWA's fundamental goals—preventing violence against women and responding to victims' needs—are advanced by the law's federal funding and grant programs. The Note will turn next to a discussion of VAWA's funding structure and its emphasis on enforcement.

2. VAWA's Current Funding Structure and Procedures

The purpose of VAWA's funding is to support programs under the Act that address domestic violence, dating violence, sexual assault, stalking, and additional crimes.[154] The funding distribution is organized through grant programs focused on law enforcement, social and educational programs.[155] Congress appropriates the majority of funds to

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[144] *Id*. at 2.

[145] *Id.* at ii ("Congress may consider . . . to reauthorize VAWA").

[146] *Legal Assistance for Victims Grant Program*, LAV PROGRAM, https://www.vawamei.org/wp-content/uploads/2018/03/LAV.pdf [https://perma.cc/3VQX-8ZT5] (last visited Nov. 1, 2021).

[147] *History of the Violence Against Women Act*, LEGAL MOMENTUM, https://www.legalmomentum.org/history-vawa [https://perma.cc/KN4L-8J5R] (last visited Aug. 23, 2021).

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *See* SACCO, *supra* note 21, at 18—20.

[152] *Id.* at 20.

[153] *Id.* at 18.

[154] *Id.* at ii.

[155] *Id.* at 12.

DOJ through the Office on Violence Against Women.[156] OVW administers technical and financial assistance to communities around the country to facilitate the creation of practices, policies, and programs aimed at eliminating IPV.[157] Also, funds are appropriated to federal agencies responsible for managing VAWA programs, such as the United States Department of Housing and Urban Development (HUD) and HHS.[158] Other federal agencies, such as the Centers for Disease Control and Prevention (CDC) and the Office of Justice Programs (OJP), manage VAWA's programs.

Funding for each fiscal year has increased since VAWA's passage. Under VAWA's 2000 reauthorization, Congress appropriated $3,300,000,000 over five years to combat IPV.[159] In 2003, the total authorized funding was $627,300,000, with $362,300,000 allocated to the DOJ and $263,000,000 allocated to HHS.[160] Within this allocation, $290,000,000 of the DOJ dollars fell under three specific grant programs: $185,000,000 to the Services, Training, Officers, and Prosecutors Violence Against Women Grant Program (STOP) that supports law enforcement and prosecution, $65,000,000 to Grants to Encourage Arrest Policies (also known as the Improving Criminal Justice Responses Program), and $40,000,000 to the Rural Domestic Violence and Child Abuse Enforcement.[161]

From 1995 to the fiscal year 2018, $5,700,000,000 in grants and cooperative agreements have been awarded, and much of this money was allocated to prosecutors, police, courts, and community-based agencies supporting the work of law enforcement.[162] Approximately 62% of VAWA funding was awarded to the criminal legal system in 1994.[163] By 2013, this percentage increased to around 85% of VAWA's funding.[164] VAWA's two largest grant programs were awarded a combined $266,000,000 to the

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[156] OVW FISCAL YEAR 2022 VIOLENCE AGAINST WOMEN ACT (VAWA) MEASURING EFFECTIVENESS INITIATIVE (MEI), DEP'T OF JUST. (DEC. 15, 2021) [hereinafter DEP'T OF JUST., OVW 2022 MEI], https://www.justice.gov/ovw/page/file/1461336/download [https://perma.cc/JFU4-UTVV].

[157] *See* SACCO, *supra* note 21, at 284 ("Many VAWA grant programs fund the same services and the same organizations. For example, nine separate VAWA programs may be used to fund emergency shelter or transitional housing . . . OVW administers 4 formula grant programs and 15 discretionary grant programs.").

[158] *Id.*at 4.

[159] Emily S. Rueb and Niraj Chokshi, *The Violence Against Women Act Is Turning 25. Here's How It Has Ignited Debate*, N.Y. TIMES (Apr. 4, 2019), https://www.nytimes.com/2019/04/04/us/violence-against-women-act-reauthorization.html [https://perma.cc/A5XH-XA8J].

[160] David M. Heger, *The Violence Against Women Act of 2000*, NATIONAL VIOLENCE AGAINST WOMEN PREVENTION RESEARCH CENTER (Jan. 16, 2001), https://mainweb-v.musc.edu/vawprevention/policy/vawa00.shtml [https://perma.cc/BSY6-8GNX].

[161] *Id.*

[162] *See* Goodmark, *Reimagining VAWA*, *supra* note 19, at 2.

[163] *Id.*

[164] Leigh Goodmark, *The Violence Against Women Act is unlikely to reduce intimate partner violence – here's why*, THE CONVERSATION (Oct. 17, 2018) [hereinafter Goodmark, *VAWA IPV*], https://theconversation.com/the-violence-against-women-act-is-unlikely-to-reduce-intimate-partner-violence-heres-why-103734 [https://perma.cc/L4LS-CCUK].

criminal legal system alone by 2017.[165] Simultaneously, the grants to social services have declined sharply. In 1994, 38% of funding went to organizations dedicated to servicing the needs of women subjected to IPV.[166] By 2013, only 15% of VAWA grants went to social services organizations due to the financial focus on enforcement policies and programs.[167] Surprisingly, even within VAWA's victim services grant programs that are seemingly less focused on enforcement, funding is still allocated to law enforcement. For example, the Rural Sexual Assault, Domestic Violence, Dating Violence, and Stalking Program, which aims to enhance the safety of rural IPV victims, funds police and prosecutors.[168]

3. The Procedural Mechanics of VAWA's Grant Programs

The purposes of VAWA's grant programs, funded by the law, re-emphasize VAWA's commitment to criminalizing IPV.[169] The 1994 iteration of VAWA created several grant programs, including programs that targeted 1) investigating and prosecuting domestic violence and related crimes; 2) improving investigations and prosecutions of domestic violence and child abuse in rural states; 3) encouraging states, tribes, and local governments to treat IPV as a crime and implement arrest policies; 4) building cooperation between law enforcement, public and private sector providers, and judicial officials; 5) preventing IPV and sexual assault; 6) preventing crime in public transportation and public and national parks.[170]

Currently, the Office on Violence Against Women administers nineteen grant programs authorized by VAWA and subsequent legislation.[171] Four of these grant programs are "formula" programs.[172] Formula programs provide funding to the states through the Office on Violence Against Women.[173] The enacting legislation specifies how the funds are to be distributed. For example, under the STOP Program, each territory and state must allocate 25% of the grant funds for law enforcement, 25% for prosecution, 30% for victim services, and 5% to state and local courts.[174] The remaining 15% may be allocated at the discretion of the state administering agency and within one of the program's purpose areas.[175] Moreover, the additional programs are "discretionary" programs.[176] The Office on Violence Against Women created program qualifications, parameters, eligibility, and deliverables per authorizing legislation for these programs.[177] To be considered for funding under discretionary programs, organizations must apply directly to the Office on

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[165] Alisha Haridasani Gupta, *Is the Legal System an Effective Solution to Domestic Violence?*, N.Y. TIMES (Jun. 17, 2021), https://www.nytimes.com/2020/12/15/us/domestic-violence-fka-twigs-shia-labeouf.html [https://perma.cc/8ZDK-746A].

[166] *See* GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 2.

[167] *Id.*

[168] 34 U.S.C. § 12341 (2020).

[169] *See* Goodmark, *Reimagining VAWA*, *supra* note 19, at 12.

[170] *Id.* at 3.

[171] *Id.* at 36.

[172] *Id.* at 28.

[173] *Id.*

[174] 34 U.S.C. § 10132 (2021).

[175] *Id.*

[176] *See* Goodmark, *Reimagining VAWA*, *supra* note 19, at 28.

[177] *Id.*

Violence Against Women.[178] For instance, OVW set the Legal Assistance for Victims Program guidelines and limited applicants to private nonprofit entities, publicly funded organizations not acting in a government capacity, and tribal organizations.[179]

The discrepancy in enforcement-focused funding and victim-centered funding directly affects Black women due to their relationship to the legal system.[180] To be sure, some of VAWA's grant programs are victim-focused, such as programs that provide direct intervention and related assistance to victims of sexual assault, the development of tribal coalitions focused on IPV, and transitional housing.[181] For example, the Transitional Housing Program supports programs that provide six to twenty-four months of housing for victims in need of shelter due to IPV-related abuse.[182] Nevertheless, like the Transitional Housing Program, many of VAWA's victim-centered programs have limited funding compared to VAWA's more enforcement-focused programs. In 2020, STOP received $152,900,000 in funding whereas $40,400,000 was granted to the Transitional Housing Program.[183]

Part II will delineate three specific grant programs that demonstrate VAWA's funding priorities. Section II.A will describe the mechanics of VAWA's STOP Program and how this program adversely affects Black female survivors. In tandem, Section II.B will then conduct a comparative analysis regarding the ICJR Program and the Culturally Specific Services Program (CSSP) to illustrate further how the inequality between VAWA's enforcement and victim-centered funding impacts Black women. CSSP, a program that could substantially aid Black women due to its focus on minority survivors, is underfunded because of the financial emphasis placed on enforcement. Although VAWA funds beneficial programs, the enforcement focus ultimately harms Black women subjected to abuse. Lastly, Part III will then address a two-prong solution that better protects Black women and tailored victim-centered services.

II. EXAMINING THE RELATIONSHIP BETWEEN VAWA'S GRANT PROGRAMS AND BLACK FEMALE SURVIVORS

The sizable gap in funding between grant programs that emphasize enforcement and grant programs that fund social services organizations is injurious to Black women because their identities have historically heightened their vulnerability to IPV and the criminal legal system.[184] Namely, the reliance on the criminal legal system of VAWA's funding structures exacerbates the negative relationship between Black women

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[178] *See* Goodmark, *Reimagining VAWA, supra* note 19, at 36.

[179] 34. U.S.C. § 20121 (2021).

[180] *See* Section I.B of this paper, *Black Women and the Criminal Legal System,* for more information on black women in the carceral system.

[181] *See generally* Davis, *supra* note 18 (noting the different victim services programs that VAWA offers).

[182] 34 U.S.C. § 12351

[183] *FY 2020 OVW Grant Awards by Program*, DEP'T OF JUST. (Nov. 23, 2022) [hereinafter DEP'T OF JUST., *OVW Grant Awards*], https://www.justice.gov/ovw/awards/fy-2020-ovw-grant-awards-program [https://perma.cc/9JBK-56F3].

[184] For more background on black women and the criminal legal system, s*ee* Section I.B of this paper, *Black Women and the Criminal Legal System*.

and the legal system, which harms Black women subjected to IPV. While previous literature has argued that VAWA is problematic, none have thoroughly focused on how the interactions between the Act's grant programs and minority victims, specifically Black women, contribute to the law's inefficiency.

A. VAWA's STOP Grant Program

1. Statutory Purpose and Procedural Explanation of the STOP Grant Program

While social movement actors and institutions in civil society once led in the dance to mitigate IPV, they quickly became "the subordinate partner in a dance now directed and dominated by the goals . . . of law enforcement."[185] VAWA's allocation of hundreds of millions of dollars to police, courts, and prosecutors has "creat[ed] a powerful motivation for law enforcement to take the helm of antiviolence efforts."[186] But how truly nonviolent can law enforcement's efforts be when used on a community whose relationship with the legal system has historically been violent? An analysis of the STOP Program, VAWA's largest grant program, may shed light on this question.

The STOP Program's structure and its increase in funding illustrate the grant program's emphasis on law enforcement and prosecution. The STOP Program was reauthorized and amended by VAWA 2000, VAWA 2005, and VAWA 2013.[187] In 2019, STOP received $215,000,000 in funding,[188] compared to the $45,000,000 in funding granted to the Civil Legal Assistance for Victims Grant Program.[189] The STOP Program promotes the "strengthening of effective law enforcement, prosecution, and judicial strategies and victim services" to improve the legal system's responses to IPV.[190] Eligible applicants for STOP Program grants include all states, the District of Columbia, and U.S. territories.[191] Once the states and territories receive the funds, the grants are then

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[185] *See* GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 18 (quoting Mimi E. Kim, *Dancing the Carceral Creep: The Anti-Domestic Violence Movement and the Paradoxical Pursuit of Criminalization, 1973-1986*, UC BERKELEY: INST. FOR THE STUDY OF SOCIETAL ISSUES (2015)).

[186] *Id.* at 15.

[187] *STOP Violence Against Women Grant Federal Program Guidelines*, WEST VIRGINIA DIV. OF JUST. AND CMTY. SERVICES, https://www.justice.gov/ovw/stop-violence-against-women-formula-grant-program [https://perma.cc/HR53-KXET] (last visited Dec. 24, 2022).

[188] *FY19 Appropriations Bill Becomes Law*, ASSOCIATION OF VAWA ADMINISTRATORS (Feb. 21, 2019), https://www.avadministrators.org/fy19-appropriations-bill-becomes-law/ [https://perma.cc/BFZ3-RLCB].

[189] *See Appendix: Budget of the U.S. Government, Fiscal Year 2018*, U.S. OFFICE OF MANAGEMENT AND BUDGET, 720 (2017), https://www.google.com/books/edition/Appendix_Budget_of_the_U_S_Government_Fi/6aTFO9nwmRcC?hl=en&gbpv=1&dq=vawa+owv+civil+legal+assistance+45,000,000&pg=PA720&printsec=frontcover#v=onepage&q=vawa%20owv%20civil%20legal%20assistance%2045%2C000%2C000&f=false [https://perma.cc/GX5M-XMDL].

[190] *STOP Program 2016 Report*, DEP'T OF JUST., OFFICE ON VIOLENCE AGAINST WOMEN 15 (2016) [hereinafter DEP'T OF JUST. OVW, *Stop 2016 Report*] https://www.vawamei.org/wp-content/uploads/2018/10/final_2016_stop_report_to_congress_august_2018.pdf [https://perma.cc/6HKX-MP4U].

[191] *Id.* at 2.

subgranted to programs and agencies.[192] These include state and local courts (including juvenile courts), state offices and agencies, units of local government, victim service providers, and tribal governments.[193] Each state then designates an official to serve as the STOP administrator to manage and oversee the process by which their state awards subgrants.[194]

As previously mentioned, STOP distributes funding based on a statutorily determined, population-based formula[195] and pursuant to the designated purpose areas. According to 34 U.S.C. § 10441(b), funds under this grant program must be used for one or more of the designated purpose areas, which include: 1) training law enforcement officers, judges, other court personnel, and prosecutor to more effectively respond to violent crimes against women, 2) developing, training, or expanding units of law enforcement officers, judges, other court personnel, and prosecutors specifically targeting violent crimes against women, and 3) installing or expanding data collection and communication systems to link police, prosecutors, and courts to identify, classify, and track arrests.[196] Some STOP funding goes to victim-centered initiatives. For example, STOP distributes funding to strengthen victim services and legal assistance programs, authorize specialized domestic violence court advocates in courts, and assist victims of domestic violence in immigration matters.[197] However, STOP's funding is still more skewed toward enforcement. In 2014, compliance with STOP required prosecutors and law enforcement to receive not less than 25% each of STOP funding, whereas community-based organizations must receive at least 10%.[198] The outcomes of STOP's enforcement focus detrimentally affect Black female survivors.

2. STOP Contributes to Harmful Outcomes for Black Female Victims and Survivors

STOP's enforcement focus harms Black women because STOP's funding contributes to the increased arrests and convictions of Black female survivors, furthers the community devastation of the Black community, and limits Black women's accessibility to STOP's support services.

a. The Punitive Consequences for Black Women Who Use Self-Defense in IPV Disputes

Firstly, Black women are disproportionately likely to be prosecuted and incarcerated when they defend themselves against their abusers.[199]

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[192] *Id.* at 18.

[193] *Id.*

[194] *Id.*

[195] *Id.* at 7—8 (Under STOP, each territory and state must allocate 25% of the grant funds for law enforcement, 25% for prosecution, 30% for victim services, and 5% to state and local courts).

[196] 34 U.S.C. § 10441 (2020).

[197] *Id.* at 15—16 .

[198] *OVW Fiscal Year 2014 STOP Formula Grant Program- Solicitation,* DEP'T OF JUST. 27 (Feb. 6, 2014) [hereinafter DEP'T OF JUST., *OVW 2014 STOP Solicitation*] https://www.justice.gov/sites/default/files/ovw/legacy/2014/02/24/stop-2014-solicitation.pdf [https://perma.cc/N4YF-5D7R].

[199] *See* NEW YORK MINUTE, *supra* note 35 ("The ACLU reported almost 60% of women state prisoners have a history of sexual abuse . . . Black women have struggled to be

Thus, STOP's strengthening of the criminal system causes more Black female survivors to suffer. In 2013 and 2014, STOP's funding resulted in 209,535 IPV dispute cases being accepted for prosecution and STOP-funded prosecution offices showing an overall conviction rate of 70%.[200] Additionally, in these same years, STOP funding led to 59,211 arrests.[201] Evidence suggests that Black female victims involved in IPV disputes are overrepresented in these prosecution, conviction, and arrest rates.[202] This reality results because a substantial number of Black female arrestees face punitive consequences after using self-defense against their abusers.[203] The 2013 case of Marissa Alexander is illustrative. Alexander was convicted and received a twenty-year sentence after firing a warning shot in self-defense during a violent confrontation with her abusive husband. To place this in perspective, while Alexander's Stand Your Ground defense was unsuccessful, George Zimmerman's exact defense was successful.[204] Whereas Alexander's act of self-defense injured no one, Zimmerman was not convicted for murdering an unarmed teenaged Black boy.[205]

While the excuse of self-defense is usually believed when applied to white victims who claim they felt threatened by minority aggressors, this defense is less likely to win when applied to Black women who acted in self-defense during an IPV dispute.[206] Although Alexander's conviction was ultimately overturned, her case illustrates how Black female "survivors are systematically punished for taking action to protect themselves and their children while living in unstable and dangerous conditions."[207] This inequality may result, in part, due to prosecutorial discretion.[208] As one

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seen as the victims instead of the aggressors due to the preexisting notions and stereotypes surrounding them").

[200] *See* DEP'T OF JUST. OVW, *Stop 2016 Report*, *supra* note 190, at 41.

[201] *Id.* at 73.

[202] *See* RICHIE, *supra* note 1, at 29 ("[R]esearch has . . . established a higher incidence rate of intimate partner violence for Black women").

[203] *See* Gross, *supra* note 14, at 32 ("Given black women's representation in the criminal justice system and their historic and ongoing vulnerability, there can be little doubt that gender violence is a key factor in their disproportionate representation. Indeed, 68 percent of incarcerated black women had been victimized by intimate-partner violence, and, compared to white women, black women are twice as likely to be killed by a spouse"); *see also* Kaba, *supra* note 83 ("Multiple studies indicate that between 71% and 95% of incarcerated women, with Black women overrepresented in these statistics, have experienced physical violence from an intimate partner.").

[204] *See generally* Josephine Ross, *Cops on Trial: Did Fourth Amendment Case Law Help George Zimmerman's Claim of Self-Defense?*, 40 SEATTLE UNIV. L. REV. 1 (2016) (discussing that George Zimmerman, a then-neighborhood watch coordinator, shot Trayvon Martin, an unarmed seventeen-year-old student. Following the trial, Zimmerman was charged with murder for Martin's death, but was eventually acquitted at trial due to his self-defense claim under Florida's Stand Your Ground statute).

[205] *Id.*

[206] *See generally* Gross, *supra* note 14, at 32 ("Given black women's representation in the criminal justice system and their historic and ongoing vulnerability, there can be little doubt that gender violence is a key factor in their disproportionate representation. Indeed, 68 percent of incarcerated black women had been victimized by intimate-partner violence, and, compared to white women, black women are twice as likely to be killed by a spouse").

[207] *See* Kaba, *supra* note 83.

[208] JAMES E. JOHNSON ET. AL., RACIAL DISPARITIES IN FEDERAL PROSECUTIONS 11 (2010) ("Unwarranted racial disparities in decision-making may result from outright conscious animus, including the use of race-neutral criteria (such as class or geography) as a pretext for impermissible consideration of race, or from unconscious racial stereotyping.").

scholar has articulated, "Black women were not entitled to the law's protection, though they could not escape its punishment."[209]

Through an intersectional lens, it becomes clear that Black women become trapped in cycles of victimization and criminalization due to racialized narratives that place them outside the hegemonic boundaries of womanhood, and thus, outside the bounds of the law's protection.[210] Through criminalization, Black women are held accountable for their own suffering, which is intensified by their vulnerability to poverty.[211] Black women are vulnerable to economic disadvantage, which increases their likelihood of being exposed to IPV. The overrepresentation of people of color in "economically stressed neighborhoods likely accounts for the high rates of intimate partner violence among low-income women of color."[212] The disproportionate exposure of Black women to both economic vulnerability and IPV increases the likelihood that they will have to resort to self-defense. Thus, it is not just their individual "choices" but also their social positioning that makes them more susceptible to being criminalized for protecting themselves. While Black women come into contact with the criminal legal system for statutory offenses in the same way others are charged with crimes, the analysis above demonstrates how the STOP Program contributes to the overcriminalization of Black female survivors through increased arrests, prosecution, and convictions.

b. STOP's Effects on the Black Community

Ultimately, the STOP Program contributes to the community devastation of the Black community. This community devastation relates to the breaking up of Black families, social networks, and community structures, which contributes to Black female survivors' overall vulnerability to subjugation in various spheres, such as economic security. The increase in funding to the legal system, facilitated in part by STOP's funding, strengthens officers' and prosecutors' ability to arrest, convict, and incarcerate Black male abusers, which creates community devastation for the Black community at large. Criminologist Elliott Currie expressed, "[T]he experiences of incarceration, especially in a society that already suffers from a hollowed opportunity structure and thin social supports, is often a disability, one that … cements great numbers of former offenders into a condition of permanent marginality."[213] This hollowing of a community is especially apparent within the Black community.

Using criminalization to respond to IPV creates serious harms to Black communities at large, including the mass incarceration of Black men.[214] For example, in Milwaukee, a mandatory arrest jurisdiction, men of color represented 24% of the population of the county's population but

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[209] *See* Gross, *supra* note 14, at 25.

[210] *Id.*

[211] Robin Bleiweis et. al., *The Basic Facts About Women in Poverty*, CAP (Aug. 3, 2020), https://www.americanprogress.org/article/basic-facts-women-poverty/ [https://perma.cc/HC29-NFCR].

[212] *See* GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 37.

[213] ELLIOT CURRIE, VIOLENCE AND SOCIAL POLICY, IN ROUTLEDGE HANDBOOK OF CRITICAL CRIMINOLOGY 472 (2012).

[214] *See* GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 19.

represented 66% of the defendants in IPV cases.[215] The evidence suggests that a sizeable portion of these men of color defendants are Black men because Black men dominate Milwaukee's minority population and have been incarcerated at rates highly disproportionate to their share of the state population at all age levels.[216] In relation, most IPV offenses are prosecuted as misdemeanors, and rates of misdemeanor prosecutions are significantly higher among men of color. [217] Despite this reality, separating victims from their abusers does pose benefits and could prevent future abuse. However, restorative programs could serve as an alternative. The disparate prosecution and incarceration of Black men inflicts egregious costs for Black women and their communities. Black women's vulnerability to community devastation intersects with another form of vulnerability that similarly, and overwhelmingly, exposes Black women to poverty: economic abuse.

Incarcerating Black men also erodes Black women's access to financial relief and hollows out the Black community. A report found that 86% of women who experience IPV also report economic abuse.[218] Economic abuse is the range of behaviors that allows a perpetrator to control another's access to economic relief.[219] In tandem, the vast majority of IPV survivors are Black women, so it is reasonable to deduce that Black women are disproportionately impacted due to their financial dependence on their abusers. The statistics confirm this reality. Black women are more likely to be low-income and thus more likely to be subjected to IPV.[220] Black women made up 22.3% of women living in poverty despite only representing 12.8% of the U.S. female population.[221] Women at or below the poverty level experience abuse almost twice as often as women at 101–200% of the poverty level.[222] Scholars Sonia M. Frias and Ronald J. Angel also note, "Those who are unemployed and who lack financial resources are more likely to suffer repeated violence, and they are less likely to leave their abusers permanently than employed women or those with more financial resources."[223] For these aforementioned reasons, it is safe to deduce that economic abuse increases Black women's disproportionate exposure to IPV.

Additionally, when fathers are incarcerated, the family's income declines by 22%, and research suggests that 65% of families cannot meet

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[215] *Id.*

[216] Lois M. Quinn & John Pawasarat, *Statewide Imprisonment of Black Men in Wisconsin* 1, ETI PUBLICATIONS (2014) (providing data on the Black male incarceration for the state of Wisconsin).

[217] *See* GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 19.

[218] THE COST OF COVID-19: ECONOMIC ABUSE THROUGHOUT THE PANDEMIC, SURVIVING ECONOMIC ABUSE 3 (2021).

[219] *Id.*

[220] *See* Goodmark, *Reimagining VAWA*, *supra* note 19, at 92 ("While criminalization of intimate partner violence can confer benefits upon victims of violence, its costs are quite high. Those costs are borne disproportionately by people of color and individuals with lower incomes . . .").

[221] *See* Bleiweis et. al., *supra* note 211, at 2.

[222] DONNA COKER ET. AL., RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING 7, ACLU (2015).

[223] Sonia M. Frias & Ronald J. Angel, *Stability And Change In The Experience Of Partner Violence Among Low-Income Women*, 88 SOC. SCI. Q. 1281 (2007).

all of their financial needs.[224] Children of incarcerated men also suffer as they are more likely to experience homelessness.[225] For the Black community, incarceration serves as a "nearly insurmountable barrier"; only 5% of Black applicants with a criminal record receive callbacks for job interviews.[226] The depression of former inmates' employment opportunities is particularly troublesome in the context of IPV. Research suggests that rates of IPV are directly correlated with male unemployment.[227] Thus, the longer he is unemployed, as a result of incarceration, the higher the rate of IPV. Black women are then disproportionally exposed to revictimization.

This community devastation is also debilitating to Black women because the investment in prisons reduces social services and resources granted to low-income communities.[228] In turn, this deprives Black communities of funding for health care, education, and housing. These are services that could dramatically stabilize these communities.[229] The majority of former prisoners are released into diminished neighborhoods whose stability is weakened by the loss of their members to prison.[230] The mass incarceration of Black men devastates Black communities at large because pumping more funding into carceral institutions through the STOP Program exacerbates this problem. This concentration of punitive measures in Black communities is detrimental to Black female survivors.

c. The Outcomes of STOP's Victim-Centered Services

Due to the outcomes created by STOP's victim-centered services, Black women are underrepresented in the universe of victims who receive services despite being overrepresented in the universe of people who experience IPV. Currently, 30% of STOP's funding is attributed to victim services, with the legislation requiring at least 10% for culturally specific victim services.[231] In 2013 and 2014, however, STOP's distribution of victim services went primarily to aiding white female survivors.[232] For example, in 2013 and 2014, STOP's victim services served approximately 55% of white male and female survivors.[233] This evidence also shows that 90% of the white survivors who received this funding in both years were female.[234] Thus, white female victims received the most funding of any other individual racial/ethnic group.[235] Although approximately 37.3% of non-Hispanic white women experience IPV in their lifetime,[236] they received

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[224] *See* GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 27.

[225] *Id.*

[226] *Id.*

[227] MICHAEL L. BENSON & GREER L. FOX, CONCENTRATED DISADVANTAGE, ECONOMIC DISTRESS, AND VIOLENCE AGAINST WOMEN IN INTIMATE RELATIONSHIPS 3-3 – 3-6 (2004), https://www.ojp.gov/pdffiles1/nij/199709.pdf [https://perma.cc/GC8Y-CZGJ].

[228] *See* GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 22.

[229] *Id.*

[230] *Id.* at 27.

[231] For information on VAWA's funding structure and its grant programs, see Section I.C.1 of this paper, Aren't I a Woman Deserving of Justice? Restructuring VAWA's Funding Structure to Create Racial and Gender Equity.

[232] *See* DEP'T OF JUST. OVW, *Stop 2016 Report, supra* note 190, at 85.

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] S.G. SMITH ET. AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2010–2012 STATE REPORT, CONTROL OF THE CENTERS FOR DISEASE CONTROL AND

more services on average. These victims are overserved relative to the percentage they occupy as victims, which may mean that others are being underserved. In the same years mentioned above, only 23% of Black victims benefitted from these services, and the majority of the Black victims were women.[237] As noted, Black women make up the vast majority of IPV victims yet received less aid on average than white women. The provision of aid to any victim of IPV is crucial and beneficial. However, when there exists a disparity in who receives remedies, the program and VAWA are not advocating on behalf of all survivors. Ultimately, this inequitable service provision disadvantages Black women subjected to IPV.

Even if race and gender disparities are removed from consideration, STOP's funding still is not adequately providing services to victims. A 2018 National Crime Victims' Rights Resource reported, "In more than 80% of intimate partner violent victimizations in 2015, the victim did not receive assistance from victim service agencies."[238] Additionally, even though victim-centered services organizations receive 30% of STOP funding, these organizations are still influenced by law enforcement. In 2013 and 2014, 46% of community agencies and organizations reported meeting weekly or monthly with law enforcement, 40% with the prosecutor's office, and only 30% reported weekly and monthly interactions with social services organizations.[239]

d. Additional Inefficiencies of the STOP Program

STOP also contains victim-centered provisions that would benefit Black women subjected to abuse, but they are not well-funded. The program contains the provision of shelters and beds to IPV survivors, which is a significant need for Black women as they disproportionately experience some of the highest rates of economic insecurity.[240] This economic insecurity undermines their ability to afford housing and thus makes some Black female IPV survivors dependent on their abusers.[241] STOP's funding seemingly mitigates this issue and gives Black women and other survivors a pathway to housing security. In 2013 and 2014, STOP funding allowed an annual average of 1,135 victims to receive 346,919 transitional housing bed nights and an annual average of 21,067 victims to receive 1,938,613 emergency shelter bed nights.[242] Nevertheless, housing is by far the one of the most common unmet need by IPV victims annually.[243] Donna Coker,

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PREVENTION 120 (2017), https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf [https://perma.cc/U7PZ-LS74].

[237] *See* DEP'T OF JUST. OVW, *Stop 2016 Report*, *supra* note 190, at 85.

[238] INTIMATE PARTNER VIOLENCE, OFFICE OF VICTIMS OF CRIME (2018), https://ovc.ojp.gov/sites/g/files/xyckuh226/files/ncvrw2018/info_flyers/fact_sheets/2018NCVRW_IPV_508_QC.pdf [https://perma.cc/64E8-DELW].

[239] DEP'T OF JUST. OVW, *Stop 2016 Report*, *supra* note 190, at 33.

[240] *See* RICHIE, *supra* note 1, at 1.

[241] *See generally* DOMESTIC VIOLENCE AND HOMELESSNESS, ACLU (2006), https://www.aclu.org/sites/default/files/pdfs/dvhomelessness032106.pdf [https://perma.cc/K6W9-JK9T] ("Poor women, who are more vulnerable to homelessness, are also at greater risk of domestic violence. Poverty limits women's choices and makes it harder for them to escape violent relationships.").

[242] DEP'T OF JUST. OVW, *Stop 2016 Report*, *supra* note 190, at 87.

[243] *See generally NNEDV's 14th Annual Domestic Violence Counts Report Illuminates Ongoing Gaps in Services and Need for Policy Changes*, NATIONAL NETWORK TO END DOMESTIC VIOLENCE (March 10, 2020), https://nnedv.org/latest_update/nnedvs-14th-

former battered women's shelter worker and law professor, declared, "You look at the relatively minuscule amount of money going to transitional housing compared to criminal justice and it's outrageous."[244] In 2012, VAWA's funding for transitional housing was about one-fifth the total allocated for law enforcement.[245] Thus, the STOP Program is not providing a sufficient amount of housing, and this further marginalizes Black female survivors.

e. The Effect of Criminalization on Deterring Abuse

Additionally, STOP may also be ineffective as studies have failed to find that laws that criminalize IPV actually deter abuse, and in some instances, these laws increase abuse.[246] Goodmark states, "But after twenty-six years of public funding [through VAWA], it appears that criminalizing intimate partner violence may not lower incidence rates."[247] For example, in Quincy, Massachusetts, a jurisdiction that "aggressively" enforced IPV laws, recidivism rates were high primarily because criminalization failed to prevent repeat abusers from engaging in abusive behavior.[248] Additionally, in a review of nineteen studies that measured the recidivism of batterers, social scientists found that the recidivism rate was 40%.[249] Another report found that arrests increase the frequency of IPV in the long run among offenders.[250]

B. The Funding Differences between VAWA's Improving Criminal Justice Responses Program and Culturally Specific Services Program

A comparative analysis of two additional grant programs illustrates that VAWA does contain funding of victim services, but the allocations to criminal enforcement dwarf this funding. Unlike VAWA's STOP Program, the Improving Criminal Justice Responses Program (ICJR), formerly known as the Grants to Encourage Arrest and Enforcement of Protection Orders Program, is a discretionary program. [251] ICJR is VAWA's second

annual-domestic-violence-counts-report/ [https://perma.cc/USV9-P878] ("Victims made 11,336 requests for services—including emergency shelter, housing, transportation, childcare, legal representation, and more—that could not be provided because programs lacked the resources to meet victims' needs.").

[244] Kate Pickert, *What's Wrong with the Violence Against Women Act*, TIME (Feb. 27, 2013), https://nation.time.com/2013/02/27/whats-wrong-with-the-violence-against-women-act/ [https://perma.cc/RG5U-XCN5].

[245] *2012 Biennial Effect Report to Congress on the Effectiveness of Grant Programs Under the Violence Against Women Act*, DEP'T OF JUST., OFFICE ON VIOLENCE AGAINST WOMEN 250 (2012) [hereinafter DEP'T OF JUST. OVW, *2012 Biennial*], https://www.justice.gov/sites/default/files/ovw/legacy/2014/03/13/2012-biennial-report-to-congress.pdf [https://perma.cc/4Y9T-BWHC].

[246] *See* GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 24.

[247] Leigh Goodmark, *Beyond Criminalizing Domestic Violence*, TRANSFORM HARM (March 27, 2021) [hereinafter Goodmark, *Beyond Criminalizing*], https://transformharm.org/ab_resource/beyond-criminalizing-domestic-violence/ [https://perma.cc/FA7P-K9DV].

[248] GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 25.

[249] JEFFREY FAGAN, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 19 (1995), https://www.ojp.gov/pdffiles/crimdom.pdf [https://perma.cc/M25T-RTR9].

[250] LAWRENCE W. SHERMAN ET. AL., THE VARIABLE EFFECTS OF ARREST ON CRIMINAL CAREERS: THE MILWAUKEE DOMESTIC VIOLENCE EXPERIMENT 139 (1992), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6733&context=jclc [https://perma.cc/W358-6PRN].

[251] 34 U.S.C. §§ 10461-10465 (2020).

largest grant program, receiving $53,000,000 in the fiscal year 2019.[252] In comparison, the Culturally Specific Services Program (CSSP), another discretionary program, received $7,550,000 in the same fiscal year.[253] CSSP is fairly representative of VAWA's other underfunded grant programs that do not heavily fund the legal system.[254] CSSP is also distinctive because it is a VAWA program that is specifically related to minority IPV victims.[255] Since ICJR and CSSP are discretionary programs and thus do not uniformly operate in all jurisdictions, they cannot be analyzed in the same manner as the STOP Program. This comparative analysis is meant to illustrate how VAWA prioritizes enforcement-focused grant programs to the detriment of programs focused on responding to the economic and social needs of underserved communities.

The statutory purposes of ICJR and CSSP are pertinent. ICJR encourages partnerships between the criminal system and local, state, and tribal governments and courts.[256] The first purpose area for which ICJR funds can be used is "to implement proarrest programs and policies in police departments, including policies for protection order violations and enforcement of protection orders across state and tribal lines."[257] ICJR funds can also be used for twenty-two other purposes.[258] The purpose of ICJR is to focus on enforcement by ensuring that IPV is treated as a serious violation of criminal law.[259] On the other hand, CSSP is intended to create opportunities for culturally specific community-based organizations to develop culturally-sensitive strategies that enhance access to services and

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[252] *See* SACCO, *supra* note 21, at 12.

[253] *Id.* at 13.

[254] *Id.* at 13 (noting that the Training and Services to End Violence Against Women with Disabilities Grant program received $6,000,000, Rape Survivor Child Custody Act received $1,500,000, Research and Evaluation on Violence Against Women received $3,500,000 in 2018).

[255] DEP'T OF JUST. OVW, *Stop 2016 Report*, *supra* note 190, at 18 ("Provide culturally specific services and training to underserved communities based on factors such as race, ethnicity, language, sexual orientation, or gender identity").

[256] *Id.* at 33—51 (explaining the different purpose areas under ICJR).

[257] OVW FISCAL YEAR 2021 IMPROVING CRIMINAL JUSTICE RESPONSES TO DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, AND STALKING GRANT PROGRAM- SOLICITATION 5—6, DEP'T OF JUST., OFFICE ON VIOLENCE AGAINST WOMEN (2021) [hereinafter DEP'T OF JUST. OVW, 2021 DV RESPONSES].

[258] *Id.* at 6—8; The following are some of the purpose areas included under ICJR: centralize and coordinate police enforcement, prosecution, or judicial responsibility for domestic violence, dating violence, sexual assault, and stalking cases in teams or units of police officers, prosecutors, parole and probation officers, or judges; coordinate computer tracking systems and provide the appropriate training and education about domestic violence, dating violence, sexual assault, and stalking to ensure communication between police, prosecutors, parole and probation officers, and both criminal and family courts; strengthen legal advocacy service programs and other victim services for victims of domestic violence, dating violence, sexual assault, and stalking, including strengthening assistance to such victims in immigration matters; educate federal, state, tribal, territorial, and local judges, courts, and court-based and court-related personnel in criminal and civil courts (including juvenile courts) about domestic violence, dating violence, sexual assault, and stalking and to improve judicial handling of such cases.

[259] *Id.* at 5.

resources for victims of racial and ethnic minority groups.[260] CSSP includes eight purpose areas.[261]

1. The Disparate Number of Victims Served between ICJR and CSSP

The funding disparities between the two grant programs translate to a disparity in the number of victims served. In 2018, the ICJR grantees reported serving 39,632 victims during each sixth-month reporting period.[262] In contrast, only 2,886 victims were served by the CSSP program in 2018.[263] This stark difference is troublesome, especially for Black female survivors who are disproportionately impacted by criminalization.

The limited number of victims served by CSSP, as opposed to ICJR, further marginalizes Black women by reducing their access to services due to poor funding. The increase in victims served by CSSP could diminish this reality for Black women. Minority female survivors of IPV experience significant barriers to seeking support, which is why the provision of services to the most victims by CSSP is necessary. For example, Black and Latina female survivors bear an additional obstacle in seeking support as these two communities have the highest rates of financial insecurity and asset poverty.[264] Additionally, Black women have fewer economic resources and less social capital, while they experience more social stigma and male violence.[265] In turn, this limits Black women's access to social, legal, and medical services.[266] On the other hand, as ICJR poses risk to Black women, CSSP could fill in that gap by pairing Black women with culturally-sensitive organizations. One of the areas in which CSSP funds can be used is to increase communities' access to culturally specific resources and

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[260] OVW FISCAL YEAR 2020 GRANTS TO ENHANCE CULTURALLY SPECIFIC SERVICES FOR VICTIMS OF DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, AND STALKING PROGRAM 1, DEP'T OF JUST., OFFICE ON VIOLENCE AGAINST WOMEN (2019) [hereinafter DEP'T OF JUST. OVW, 2020 CSSP GRANTS], https://www.justice.gov/ovw/page/file/1256526/download [https://perma.cc/BE3R-4LU8].

[261] *Id.* at 2; The following are some of the purpose areas included under CSSP: working with State and local governments and social service agencies to develop and enhance effective strategies to provide culturally specific services to victims of domestic violence, dating violence, sexual assault, and stalking; Increasing communities' capacity to provide culturally specific resources and support for victims of domestic violence, dating violence, sexual assault, and stalking crimes and their families; strengthening criminal justice interventions, by providing training for law enforcement, prosecution, courts, probation, and correctional facilities on culturally specific responses to domestic violence, dating violence, sexual assault, and stalking; enhancing traditional services to victims of domestic violence, dating violence, sexual assault, and stalking through the leadership of culturally specific programs offering services to victims of domestic violence, dating violence, sexual assault, and stalking.

[262] THE 2018 BIENNIAL REPORT TO CONGRESS ON THE EFFECTIVENESS OF GRANT PROGRAMS UNDER THE VIOLENCE AGAINST WOMEN ACT, DEP'T OF JUST., OFFICE ON VIOLENCE AGAINST WOMEN 121 (2018) [hereinafter DEP'T OF JUST. OVW, 2018 BIENNIAL], https://www.justice.gov/ovw/page/file/1292636/download [https://perma.cc/8ESZ-LTYQ].

[263] *Id.* at 99.

[264] *See* RICHIE, *supra* note 1, at 11 ("[T]he generally accepted measures of economic and social well-being—income, homeownership, high school graduation rates—predict ongoing disadvantages and persistent poverty, which profoundly shaped women's experiences of abuse.").

[265] *See* Harrell R. Rodgers, Jr., *Black Americans and the Feminization of Poverty: The Intervening Effects of Unemployment*, 17 J. OF BLACK STUDIES 402, 404 (1987).

[266] *Id.*

support.[267] However, this improvement is currently rendered unattainable by the severe underfunding of CSSP, which results in the program's inability to reach a sizable, or even decent, portion of minority survivors.

This stark difference in funding between the two grant programs is also troubling due to ICJR's focus on pro-arrest policies. While the lack of funding to CSSP inhibits its ability to reach a good portion of IPV survivors, ICJR increases arrests by promoting mandatory arrest policies,[268] which have historically affected Black women and men. As a result of these laws, arrest rates in IPV cases have increased from 7% to 15% in the 1970s and 1980s to 30% or more in 2008.[269] In Vermont, 20% of the 2014 prison population was incarcerated due to IPV.[270]

This preference for increased funding of social services is also supported by the fact that "[c]riminalization most benefits those who feel safer as a result of interventions but are immune from most of its costs . . . ."[271] These costs fall heavily on low-income people and people of color, who are most likely to be involved in the criminal legal system due to inadequate legal representation and life-affirming social services.[272] In conjunction, children are economically and emotionally harmed by their parents' involvement in the legal system, and communities suffer from the removal of their members in noticeable numbers.[273]

To illustrate further the ways in which VAWA's limited resources and services negatively impact survivors, a 2019 National Network to End Domestic Violence (NNEDV) report that surveyed IPV survivors found unfavorable outcomes for minority communities.[274] For example, the report found that minority survivors in New Jersey remain with abusers because the available shelters do not accommodate their cultures sensitively.[275] On a national level, the report stated that victims made 11,336 requests in one day for services, including emergency shelter and housing, that could not be provided due to a lack of resources.[276] This finding is relevant and damaging to Black women subjected to IPV. Black women are most disproportionately affected by discriminatory housing practices and are

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[267] *See* DEP'T OF JUST. OVW, 2018 BIENNIAL, *supra* note 262, at 11 (one of the purposes of CSSP is to describe "the barriers experienced by individuals from the identified culturally specific population who are victims of domestic violence, dating violence, sexual assault, and stalking while attempting to seek and access services.").

[268] *See generally* DEP'T OF JUST. OVW, 2021 DV RESPONSES, *supra* note 257, at 18 ("State, Unit of Local Government, and Tribal Government Applicants must certify that their laws or official policies: encourage or mandate arrests of domestic violence offenders based on probable cause that an offense has been committed.").

[269] Elise Inouye, *Mandatory Arrests – A Double-Edged Sword*, 15 UNIVERSITY OF HAWAII L. REV. 33, 33 (2017) https://hilo.hawaii.edu/campuscenter/hohonu/volumes/documents/MandatoryArrestsADouble-EdgedSword.pdf [https://perma.cc/54D9-H5XZ].

[270] GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 4.

[271] *Id.* at 32.

[272] *Id.* at 31.

[273] *Id.* at 32.

[274] NATIONAL NETWORK TO END DOMESTIC VIOLENCE, *supra* note 243, at 8 ("On September 12, 2019: There were 11,336 requests for services that participating programs were unable to provide due to a lack of resources. . . . Survivors often struggle to find affordable housing in urban areas").

[275] *Id.* at 5.

[276] *Id.* at 8.

twice as likely to face eviction compared to white people in at least seventeen states.[277] Black women are also most likely to be displaced from their housing following domestic violence calls to the police.[278] Not only are survivors affected by this, but their children are as well. The children of women who face evictions are far more likely to live in substandard housing, which leads to poor health outcomes.[279] Thus, this finding advances the argument that VAWA's policies contribute to dangerous realities for Black female survivors and their families.

In tandem, other minority survivors experience disadvantages encouraged by VAWA's current funding structure. In regards to immigrant survivors, advocates have "noticed a definite chilling effect in immigrant survivors' willingness to report, take legal action, and obtain life-saving resources for their families. There is much fear."[280] Another advocate shared, "a trans survivor opted to seek counseling services through our program since we are able to work with local therapists who have trauma-specific training. Unfortunately, we had already run out of funding for these counselors, and the survivor was unable to receive the help they needed."[281] These adverse outcomes for various minority communities demonstrate a lack of funding for the very victims whom VAWA, particularly through its progressive reauthorizations, is meant to serve. Social service-oriented programs may be better in addressing IPV generally as it pertains to minority survivors and Black female survivors specifically because these programs would create solutions that address the different, nuanced, and complex causes of IPV.

Through various anecdotes and statistics, as well as an analysis of STOP, ICJR, and CSSP, this Part has shown that VAWA's funding priorities are ineffective and injurious to Black women. "The overreliance on criminalization tips the programmatic and policy scales in ways that are harmful to people subjected to abuse, their partners, their families and their communities and prevents the development of a menu of options," said Goodmark.[282] It is time for a new, multifaceted solution that recognizes that there is "no one-size-fits-all solution to the problem of intimate partner violence."[283]

III. THE FISCAL ROAD TO RACIAL AND GENDER EQUITY

Virtually none of the provisions under *any* VAWA reauthorization focus on the reality that VAWA's funding priorities disproportionately impact Black female survivors. This Note argues that the best solution is a two-pronged approach. First, a legislative restructuring that reduces the funding allocated to law enforcement and prosecutors under STOP and ICJR while increasing the allocation to CSSP will solve the problems that

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[277] Chabeli Carrazana & Ko Bragg, *Americans Were Told To Stay Home. Black Women Are Most At Risk Of Losing Theirs.*, THE 19TH (Dec. 21, 2020), https://19thnews.org/2020/12/eviction-moratorium-black-women-housing/ [https://perma.cc/P56K-5PBX].

[278] *Id.*

[279] *Id.*

[280] NATIONAL NETWORK TO END DOMESTIC VIOLENCE, *supra* note 243, at 11.

[281] *Id.* at 13.

[282] GOODMARK, DOMESTIC VIOLENCE, *supra* note 22, at 10.

[283] *Id.*

stem from VAWA's funding priorities. Secondly, the introduction of economic and housing programs will be salient to this approach as these initiatives target the crucial needs of Black female survivors. Section III.A discusses why the best solution to this problem is for Congress to introduce a revised appropriations bill, which will create funding for the proposed economic and housing programs. Section III.B explains how this funding reconfiguration will improve the stability of Black female survivors. Finally, Section III.C proposes specific initiatives that the new funding structure will prioritize.

A. Restructuring the Current Funding Distributions of STOP, ICJR, and CSSP is Necessary to Mitigate the Inequities Exacerbated by VAWA

1. Restructuring VAWA's Funding Priorities Best Serves the Intent and Purpose of VAWA

VAWA provides for some culturally specific services to members of underserved communities, but none of these provisions are specifically tailored to Black female survivors. The law's most recent reauthorizations (in 2005 and 2013) expanded the purpose areas of several VAWA grants by addressing the specific needs of battered immigrants, Native Americans, and other minority communities.[284] For example, VAWA 2005's Sexual Assault Services Program introduced culturally specific resources to assist minorities victimized by sexual assault.[285] Additionally, the law's 2013 reauthorization granted authority to Native tribes to enforce protection orders over any person.[286]

The 2021 reauthorization of VAWA, which is awaiting Senate approval, introduces the most impactful changes for minority survivors.[287] This proposal calls for an increase of $40,000,000 in authorized funding for culturally specific organizations and measures to ensure that underserved populations are not prevented from accessing grants.[288] It also requires culturally competent training of healthcare providers that includes lessons

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[284] *See* John Conyers Jr., *The 2005 Reauthorization of the Violence Against Women Act Why Congress Acted to Expand Protections to Immigrant Victims*, 13 VIOLENCE AGAINST WOMEN 457, 457 (2007), https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/pdf/CONF-VAWA-Art-VAWA2005Reauthorization.pdf [https://perma.cc/YA3X-M8Q7] (provides an "overview of the history of congressional involvement with the Violence Against Women Act's (VAWA) provisions to protect immigrant victims of domestic violence"); *see also Office On Violence Against Women (OVW) VAWA 2013 Summary: Changes To OVW-administered Grant Programs*, DEP'T OF JUST., OFFICE ON VIOLENCE AGAINST WOMEN 4 (2013) [hereinafter DEP'T OF JUST. OVW, *VAWA 2013 Summary*], https://www.justice.gov/sites/default/files/ovw/legacy/2014/06/16/VAWA-2013-grant-programs-summary.pdf [https://perma.cc/7YGL-7XVZ] ("Refines focus of program by redefining 'culturally specific' to mean primarily directed toward racial and ethnic minority groups as defined in section 1707(g) of the Public Health Service Act ('American Indians (including Alaska Natives, Eskimos, and Aleuts); Asian Americans; Native Hawaiians and other Pacific Islanders; Blacks; and Hispanics'").

[285] Conyers, *supra* note 284, at 458.

[286] *See* DEP'T OF JUST. OVW, *VAWA 2013 Summary*, *supra* note 284, at 6 ("Reauthorizes funding for tribal sex offender and protection order registries").

[287] H.R. 1620, 117th Cong. (2021).

[288] *Id.*

on systemic racism and equity.[289] Despite the relevancy of these provisions, VAWA's provisions do not thoroughly address the needs of Black women.

Although both programs fall short of provisions aimed explicitly at Black female survivors, the STOP and ICJR programs have also been expanded to include culturally specific provisions. Under STOP, each state's tribes are included for funding purposes, and the program sets aside 10% of victim services funding for culturally specific community-based organizations.[290] The ICJR program sets aside 5% of program appropriations for Tribal Coalitions grants.[291] These expansions are compelling at first glance—and certainly a step in the right direction for minority communities—but STOP and ICJR's current funding structures do not offer enough guidance for Black female survivors or fully satisfy VAWA's intent. Shifting the funding granted from STOP and ICJR's enforcement-focused initiatives to culturally specific victim services under STOP, ICJR, and CSSP will better serve survivors.

2. Congress Is Best Suited to Restructure VAWA's Current Funding Structure

Congress could introduce an approved appropriations bill. For this procedural reason alone, Congress is best positioned to announce a restructured plan for these three grant programs. Importantly, there is a strong likelihood that Congress will take up this issue. Congress passed the most recent VAWA reauthorization in 2013.[292] The last significant congressional action occurred in 2021 when the House approved VAWA's 2021 reauthorization.[293] In March 2021, VAWA was referred to the "Committee on the Judiciary, and in addition to the Committees on Financial Services, Ways and Means, Education and Labor, Energy and Commerce, Veterans' Affairs, and Natural Resources" .[294] Congress reauthorized VAWA in March 2022.[295] However, each reauthorization to VAWA has experienced lengthy congressional debates. So while an amendment by Congress may be the surest way to introduce a reconfiguration of STOP, ICJR, and CSSP funding, bipartisan debates may challenge this proposal.

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[289] *Id.*

[290] For more background on the mechanics of VAWA's STOP Program and how this program adversely affects Black female survivors, see Section II.A.2 of this paper, *STOP Contributes to Harmful Outcomes for Black Female Victims and Survivors*.

[291] 34 U.S.C. §§ 10461(f) (2020).

[292] *See* DEP'T OF JUST. OVW, 2018 BIENNIAL, *supra* note 262, at 7 ("Reauthorized in 2000, 2005, and 2013, VAWA articulates Congress's commitment to effective strategies for preventing and responding to domestic and sexual violence . . .").

[293] H.R. 1585, 116th Cong. (2019–2020) (proposing amendments to VAWA).

[294] *All Actions: H.R.1620 — 117th Congress (2021-2022)*, LIBRARY OF CONGRESS, https://www.congress.gov/bill/117th-congress/house-bill/1620/all-actions?s=1&r=92 [https://perma.cc/CRD7-N3UQ].

[295] *Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA)*, THE WHITE HOUSE (March 16, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-reauthorization-of-the-violence-against-women-act-vawa/ [https://perma.cc/63MZ-AHZX] (last visited December 30, 2022).

3. Potential Difficulties that Congress May Face in Announcing a Restructured VAWA

The Democrats and Republicans who passed VAWA did so partially because of VAWA's tradition of investigating and prosecuting violent crimes against women. VAWA was also passed during a "tough on crime" period.[296] Due to this, there may be pushback to any calls to reduce VAWA's enforcement focus. On the contrary, VAWA's reauthorizations indicate that the law is evolving to be more victim-centered. For example, VAWA 2005 created the first federal funding stream committed to direct services for sexual assault victims. The shift away from enforcement is also reflected in the 2021 version of the law.[297] H.R.1620 focuses on restorative justice, instead of law enforcement, as a way to address victims' needs. It adds purpose areas to LGBTQ+ specific services that implement restorative practices "that are focused on victim autonomy, agency, and safety to provide resolution and restitution for the victim."[298] This version of the law also proposes ways to increase underserved populations' access to grants. Ultimately, although VAWA's origins are rooted in the criminal legal system, VAWA's expanded provisions indicate a move towards a less punitive and more restorative approach. VAWA's evolution indicates that policymakers and advocates are becoming aware of the fact that more victim services are needed. Secondly, opposing political parties may pose challenges to this proposed funding reconfiguration. Yet, this proposal has a strong likelihood of passing due to the country's recent push to interrogate the historically negative relationship between the Black community and the legal system.[299]

B. A Legislative Change Should Be Reasonable Within the Context of VAWA

1. Funding Changes Proposed for the STOP Program

Congress should reduce the 50% of VAWA funding allotted to law enforcement and prosecutors to 30%. Then, Congress should increase the funding allotted to victim services to 65%. Within this percentage, 35% of the funding should be specifically allocated to culturally specific victim services. To increase the protection of Black female survivors, this proposal recommends that 15% of the 35% should be allocated specifically to services and organizations aimed at empowering Black female survivors. STOP's specific funding centered on Black female survivors can provide proposals directly influenced by Black female advocates, attorneys, survivors, and policymakers who speak to the needs facing this community. The remaining 30% should be set aside for general victim services that will

[296] For more background on "tough on crime", reference Section I.B.4 of this paper, *Black Women's Distrust of the Criminal Legal System*.

[297] *See generally* Goodmark, *Violence Against Women Act*, *supra* note 16 ("For the first time, the act would pay for alternative justice measures designed to help victims of violence find justice without requiring them to turn to the legal system.").

[298] H.R. 1620, 117th Cong. (2021).

[299] *See* Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (Jun. 11, 2020), https://time.com/5851855/systemic-racism-america/ [https://perma.cc/285M-X2UK].

benefit all survivors. The 5% of funding currently granted to the courts can remain intact.

2. Funding Changes Proposed for the ICJR and CSSP Programs

ICJR's current $53,000,000 in funding should be reduced by $20,000,000, and the remaining $33,000,000 in ICJR funds should be attributed to CSSP's funding. Additionally, the House-approved 2021 reauthorization of VAWA proposed a $40,000,000 increase of CSSP.[300] This Note argues that this $40,000,000 increase plus the remaining $33,000,000 from ICJR's funding should be added to CSSP funding, bringing CSSP's newly proposed funding to $80,550,000.[301] This Note also argues that Congress should allocate $35,000,000 of this funding specifically to victim services centered on Black female survivors. This $35,000,000 may seem high; however, Black female survivors are widely underserved by VAWA so this figure is necessary to improve this community's outcomes. This proposal may also benefit other survivors and the U.S. economy overall. A former labor secretary under former President Bill Clinton and the former commission of the Financial Crisis Inquiry Commission posited that investing in Black women serves as "catalysts for economic growth and community development . . . and a win for the U.S. economy . . . ."[302] By reducing the overall funding of ICJR and shifting it to increase the funding of CSSP, Congress can diminish VAWA's contribution to the negative outcomes of Black female survivors and increase the provision of services, economic stability, and protection of Black women. Although it is not certain that ICJR's current total allocation takes away from CSSP's, it is clear that the amount of people who are served by each program is considerably dissimilar.[303]

C. Victim-Centered Services that Could Improve the Status of Black Women Subjected to Abuse

Programs and services that directly address the specific needs of Black female IPV survivors must also be implemented under these three programs in order for this proposed legislative change to adequately reduce the unfavorable outcomes of Black women. Studies have found that short-term advocacy services were beneficial to Black women following their exit from domestic violence shelters.[304] Thus, investing in long-term victim-centered services that are tailored to the needs of Black female survivors could prevent IPV and provide access to Black women who have already been subjected to abuse.

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[300] H.R. 1620, 117th Cong. (2021).

[301] This figure is reached by taking the sum of $7,550,000 (CSSP's 2019 enacted appropriations), $40,000,000, and $33,000,000.

[302] Alexis Herman & Heather Murren, *Invest In Black Women To Drive The Economy Forward*, FORTUNE (Feb. 3, 2021), https://fortune.com/2021/02/03/black-women-economy-diversity-equity-inclusion/ [https://perma.cc/Y8YN-85PX].

[303] For more background on the difference in populations served, see Section II.B.1 of this paper, *The Disparate Number of Victims Served between ICJR and CSSP*.

[304] Cris M . Sullivan & Maureen H. Rumptz, *Adjustment and Needs of African-American Women Who Utilized a Domestic Violence Shelter*, 9 VIOLENCE AND VICTIMS 275, 275 (1994), https://vaw.msu.edu/wp-content/uploads/2013/10/African-American-women-needs-after-shelter.pdf [https://perma.cc/QK2Q-WA9H].

1. Economic Security Programs to Aid Black Women Subjected to Abuse

Funding economic programs for Black women is pertinent due to the damaging relationship between Black women, poverty, and IPV.[305] As a result, VAWA should fund back-to-school, back-to-work, and other initiatives that directly provide forms of financial security to battered Black women. Currently, many states provide educational grants to adult students who can return to vocational schools or college.[306] These programs, such as New York's College Access Challenge Grant, dedicate grants to low-income adults and displaced workers.[307] The proposed increased funding to culturally specific victim services could create similar programs that will allow battered Black women to return to school to improve their employment prospects.

Relatedly, VAWA's funding should develop back-to-work programs. Such initiatives will create funding for Black female survivors who wish to establish and own small businesses. Black women experience the highest rates of unemployment in the United States.[308] In May 2020, the unemployment rate for Black women reached almost 20%.[309] Back-to-work programs will be valuable as Black women and women of color broadly have already shown to be among the group of fastest-growing female entrepreneurs in 2020 and 2021.[310] Caitlin Mullen argued that this occurs because "need, not opportunity, drives many Black women to become entrepreneurs if they feel they've been underpaid or left behind at conventional institutions."[311] This program would serve as an alternative to the back-to-school program as not all Black women may have the time or resources to participate in formal education.

The final economic security program this Note recommends is a program that directly provides money to Black female survivors. For Black women who cannot return to formal education or create their own business, this program will increase their stability and reduce the likelihood of their victimization. The effects of the 2020 COVID-19 stimulus relief checks illustrate the value of this recommendation. A study found that following the distribution of COVID-19 stimulus relief checks, rates of IPV decreased

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[305] *See* RICHIE, *supra* note 1, at 29 ("[R]esearch has . . . established a higher incidence rate of intimate partner violence for Black women").

[306] *Grants For Adult Students*, COLLEGE SCHOLARSHIPS, http://www.collegescholarships.org/grants/adult.htm [https://perma.cc/7YY7-N3ZX] (last visited on Dec. 1, 2021).

[307] *Id.*

[308] *See* JASMINE TUCKER, IT'S TIME TO PAY BLACK WOMEN WHAT THEY'RE OWED, NATIONAL WOMEN'S LAW CENTER 1 (2020), https://nwlc.org/wp-content/uploads/2020/07/BWEPD-2021-7.26.21.pdf [https://perma.cc/7GYV-5EH5] ("[T]he unemployment rate for Black women reached 16.6% in May 2020 . . .").

[309] *Id.*

[310] Ruth Umoh, *Black Women Were Among The Fastest-Growing Entrepreneurs—Then Covid Arrived,* FORBES (Oct. 26, 2020), https://www.forbes.com/sites/ruthumoh/2020/10/26/black-women-were-among-the-fastest-growing-entrepreneurs-then-covid-arrived/?sh=5c2010c36e01 [https://perma.cc/5SDZ-DNFE].

[311] Caitlin Mullen, *Women Of Color Drive New Business Growth During Pandemic*, BIZWOMEN (Apr. 14, 2021), https://www.bizjournals.com/bizwomen/news/latest-news/2021/04/minority-women-drive-business-growth-in-pandemic.html?page=all [https://perma.cc/4RMP-C5TY].

in April 2020 because abused women directly received money.[312] Thus, this proposal may effectively attack institutionalized obstacles that Black women face.

This proposal poses challenges. First, it excludes the participation of non-Black female survivors and non-female survivors who are just as likely to experience IPV or have already experienced IPV. Secondly, it excludes Black women who are above the poverty line. Lastly, it could create disparate results between Black women who are eligible for these three programs. For example, Black women who live in rural or underserved areas may not have access to local schools or customers. Although these challenges are relevant, these programs should still be adopted to address the economic factors that drive IPV against Black women.

2. Housing as a Major Provision to Aid Black Female Survivors

Due to Black women's high rates of evictions and homelessness and the relationship between housing and IPV, this Note recommends providing long-term transitional housing to Black female survivors. Currently, VAWA does contain provisions that provide housing support, but they are not sufficient.[313] Thus, this Note argues that there should be increased funding for the creation of housing that is specifically available to Black female survivors who are at risk of victimization due to housing insecurity. The Brooks Short-Term Housing Facility in Washington, D.C. could serve as a model.[314] This funding reconfiguration coupled with culturally specific services ought to be adopted because it more thoroughly protects Black female survivors while also balancing other survivors' interests and society's interest.

IV. CONCLUSION

The intersection of race and gender discrimination has aggressively motivated the violence Black women have faced in America. Further exposing this community to state-sanctioned criminalization pushes Black women into marginalization and keeps them there. In a country reflecting on its traditions and history, in order to make way for justice, attention must be paid to laws that inadvertently work to impede progress and equity. This two-pronged solution would benefit Black female survivors by reducing the inequitable treatment and violence that they face. In turn, these benefits would reflect a society that works to protect, not discard, all individuals, including women like Tiffany Wright.

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[312] Emily Leslie & Riley Wilson, *Sheltering In Place And Domestic Violence: Evidence From Calls For Service During COVID-19,* 189 J. PUB. ECON. 3 (2020) ("The increase in domestic violence persisted for several weeks before attenuating around the middle of April").

[313] *See* Goodmark, *Reimagining VAWA*, *supra* note 19, at 93 ("VAWA could supplement existing sources of emergency funding for victims of violence to meet the immediate needs that come with leaving a violent relationship—e.g., deposits for rental housing, money for food or transportation.").

[314] *The Brooks Short-Term Housing Facility*, FRIENDSHIP PLACE, https://friendshipplace.org/programs-outreach/ward-3-family-housing-facility/ [https://perma.cc/JF4A-5FZJ] (last visited Jan. 10, 2022).

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NOTE

PRISON LABOR AND THE FAIR LABOR STANDARDS ACT: RESOLVING THE CIRCUIT SPLIT ON WHETHER INCARCERATED WORKERS ARE ENTITLED TO THE FEDERAL MINIMUM WAGE

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At any given time, around half the incarcerated population in the United States works full-time. A large majority of incarcerated workers are engaged in "prison housework," doing laundry, working in the kitchen, or providing janitorial services, etc. A smaller portion of individuals work in prison industries to produce goods and services for both government agencies and private corporations. National estimates for the annual value of prison and jail industrial output come to around $2 billion. Despite this, the average wage for incarcerated individuals working in state-owned industries is anywhere between $0.33 to $1.41 per hour.

Mass incarceration and the prison industry have become seamlessly intertwined with America's racially stratified economy. Wal-Mart, Victoria's Secret, Boeing, Microsoft, and Starbucks are some of the many major U.S. companies that have partnered with prison industries in the past to profit off of free or underpaid labor. In the absence of clear Supreme Court ruling or guidance from Congress, it remains unclear whether incarcerated workers may be considered "employees" as defined by the Fair Labor Standards Act ("FLSA") and therefore subject to the federal minimum wage protections. Without any guidance, lower courts have developed a patchwork of conflicting standards and formalistic dichotomies to address the issue of FLSA coverage for incarcerated workers.

This Note analyzes the circuit split on the question of FLSA coverage and provides recommendations on how the Supreme Court should decide the issue. This Note goes on to advance a new "but-for" test for courts to adopt when deciding which kinds of incarcerated workers should be covered by the FLSA.

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INTRODUCTION

The California Department of Corrections and Rehabilitation ("CDCR"), in cooperation with the Department of Forestry and Fire Protection ("CAL FIRE"), operates thirty-five "conservation camps" where incarcerated inmate firefighters[1] earn between $2.90 and $5.12 per day according to the CDCR.[2] The official website states the primary mission of the conservation camps is to "support state, local and federal government agencies as they respond to emergencies such as fires, floods, and other natural or manmade disasters."[3] These incarcerated individuals who work as "volunteers," earn $1 an hour when fighting on an active fire line.[4] According to CAL FIRE's 2018–2019 annual report, incarcerated firefighters made up approximately 27% of the state's total firefighting personnel.[5] According to a report by CAL FIRE, the conservation camps, which date back to World War II, save California taxpayers around $100 million per annum.[6] In New York, at the height of the COVID-19 pandemic lockdowns, Governor Cuomo announced that incarcerated workers would begin producing New York State's own brand of hand sanitizers.[7] The production was overseen by Corcraft, a state-owned corporation run by the state Department of Corrections and Community Supervision ("DOCCS").

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[1] *Conservation (Fire) Camps*, CAL. DEPT. OF CORR. & REHAB., https://www.cdcr.ca.gov/facility-locator/conservation-camps [https://perma.cc/L9BY-X575] (last visited Feb. 11, 2022) ("The primary mission of the Conservation Camp Program is to support state, local and federal government agencies as they respond to emergencies such as fires, floods, and other natural or manmade disasters.").

[2] Nicole Goodkind, *Prisoners Are Fighting California's Wildfires on the Front Lines, But Getting Little in Return*, FORTUNE (Nov. 1, 2019, 12:03 PM), https://fortune.com/2019/11/01/california-prisoners-fighting-wildfires/ [https://perma.cc/YH2F-8E63].

[3] CAL. DEPT. OF CORR. & REHAB., *supra* note 1.

[4] Christie Thompson, *Formerly Incarcerated Firefighters Are Still Fighting California's Wildfires*, SLATE (Sept. 2, 2020, 6:00 AM), https://slate.com/news-and-politics/2020/09/formerly-incarcerated-firefighters-california-wildfires.html [https://perma.cc/45SK-7YX5] ("Before the pandemic, thousands of the state's wildfire crews came from state prisons—incarcerated people make around $1 an hour containing fires, clearing brush, and doing other dangerous labor.).

[5] *Cal Fire at a Glance*, CAL. DEPT. OF FORESTRY AND FIRE PROT. (Sep. 2018), https://web.archive.org/web/20200329195608/https://www.fire.ca.gov/media/4922/glance.pdf [https://perma.cc/8KD2-H83D].

[6] Matt Clarke, *California's Firefighting Prisoners in Short Supply*, PRISON LEGAL NEWS (Jan. 8, 2020) https://www.prisonlegalnews.org/news/2020/jan/8/californias-firefighting-prisoners-short-supply [https://perma.cc/AWF6-86D5] ("This underpaying of thousands of prisoners employed at fire camps – who constitute about a third of the state's wildfire fighters – saves California an estimated $100 million a year."); *see also* Jaime Lower, *What Does California Owe Its Incarcerated Firefighters?,* THE ATLANTIC (July 27, 2021), https://www.theatlantic.com/politics/archive/2021/07/california-inmate-firefighters/619567/ [https://perma.cc/MP8C-UXGR] ("Alisha Tapia . . . was incarcerated in Puerta la Cruz, an all-female fire camp north of San Diego. . . . She'd already worked two fire seasons in collaboration with the California Department of Forestry and Fire Protection in the middle of an extreme drought.").

[7] Christopher Robbins, *New York State's New Hand Sanitizer Is Made By Prisoners Paid An Average 65 Cents An Hour,* GOTHAMIST (Mar. 9, 2020), https://gothamist.com/news/new-york-states-new-hand-sanitizer-made-prisoners-paid-average-65-cents-hour [https://perma.cc/GQZ5-DGHA] ("Corcraft is the brand name for the Division of Correctional Industries, a state-owned company operated by the state Department of Corrections and Community Supervision (DOCCS), which runs New York's prisons. Around 2,100 people incarcerated by New York state work for Corcraft.").

Despite generating between $30–40 million in annual revenues[8], inmates working for Corcraft earned an average of 0.65 cents per hour and as little as 0.16 cents per hour.[9]

The United States, despite making up only 5% of the world's population, accounts for 25% of the world's prison population.[10] In 2014, the U.S. had a total prison population of about 1.6 million[11], not including those held in jails or under surveillance while on probation or parole.[12] Approximately 870,000 of those incarcerated worked full-time.[13] A large majority of these workers were engaged in "institutional maintenance," working, for example, in the kitchen, doing laundry, and providing janitorial services.[14] A smaller portion of these inmates, between 75–80,000, worked in prison industries to produce goods and services for both government agencies and private corporations.[15] In other words, incarcerated individuals are made not only to work for and sustain the very institutions that keep them locked up but also for large private corporations for little to no compensation, many of which go on to lobby Congress and local officials for harsher and more punitive sentencing laws and policing.[16]

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[8] *FOIL Disclosure: Despite Millions In Revenue From NYS Agencies – Over $340 Million Spanning Nine Fiscal Years –Corcraft Continues To Pay Incarcerated New Yorkers Pennies On The Dollar*, THE LEGAL AID SOCIETY 1 (Mar. 12, 2020), https://legalaidnyc.org/wp-content/uploads/2020/03/03-12-20-FOIL-Disclosure-Corcraft.pdf [https://perma.cc/V3KK-XUN4].

[9] Robbins, *supra* note 7.

[10] 13TH (Kandoo Films 2016).

[11] *Total Correctional Population*, BUREAU JUST. STAT. (May 11, 2021), https://bjs.ojp.gov/data/key-statistics [https://perma.cc/M77R-AMGU].

[12] In 2019, this number fell slightly to around 1.4 million. *See* E. Ann Carson, *Prisoners in 2019*, BUREAU JUST. STAT. 1 (Oct. 2020) https://bjs.ojp.gov/content/pub/pdf/p19.pdf [https://perma.cc/8H67-D675] (listing the 2019 total prison population at 1,430,805). When looking at the entire correctional system, a total of about seven million people were under state surveillance in 2020 (combining people incarcerated in prisons and jails and those on parole and probation). *See also* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/RT8F-W2JQ] ("The American criminal justice system holds almost 2.3 million people in 1,833 state prisons, 110 federal prisons, 1,772 juvenile correctional facilities, 3,134 local jails, 218 immigration detention facilities, and 80 Indian Country jails as well as in military prisons, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories.").

[13] Beth Schwartzapfel, *The Great American Chain Gang*, THE AMERICAN PROSPECT (May 28, 2014) [hereinafter Schwartzapfel, *Chain Gang*], https://prospect.org/justice/great-american-chain-gang/ [https://perma.cc/N98H-E2QA].

[14] *Id.* ("Despite decades' worth of talk about reform-of giving prisoners the skills and resources they need to build a life after prison-the vast majority of these workers, almost 700,000, still do "institutional maintenance" work. . . . They mop cellblock floors, prepare and serve food in the dining hall, mow the lawns, file papers in the warden's office, and launder millions of tons of uniforms and bed linens.").

[15] Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers*, 52 IDAHO L. REV. 953, 953 (2016).

[16] A 2021 annual report from CoreCivic (one of the largest corporations in private prisons) claimed an annual revenue of around $1.8 billion. *See* CORECIVIC 2021 ANNUAL REPORT 2 (2021), https://ir.corecivic.com/static-files/d3f1752e-87b8-4256-99ed-f3803c5817f8 [https://perma.cc/U69W-7M74] (Revenue in 2021 was $1,862,616); *see also* Martha C. White, *Locked-In Profits: The U.S. Prison Industry, By the Numbers*, NBC NEWS (Nov. 2, 2015, 5:28 PM), https://www.nbcnews.com/business/business-news/locked-in-profits-u-s-prison-industry-numbers-n455976 [https://perma.cc/L45T-ZFM7] (CoreCivic and GEO collectively

Mass incarceration and the prison industry have become seamlessly intertwined with America's racially stratified economy, touching upon every aspect of our lives as consumers. Wal-Mart, Victoria's Secret, Boeing, Microsoft, and Starbucks are some of the many major U.S. corporations that have partnered with prison industries to benefit from the lack of labor protections afforded to incarcerated workers.[17] National minimum estimates for the annual value of prison and jail industrial output come to approximately $2 billion.[18] Despite this, the average wage for prisoners working in state-owned industries is anywhere between $0.33 to $1.41 per hour.[19] While these incarcerated workers are full-time workers, they do not receive the same protections and benefits as non-incarcerated workers. In the absence of a clear Supreme Court ruling or guidance from Congress, it remains unclear whether incarcerated workers are covered by the Fair Labor Standards Act ("FLSA"). The FLSA was enacted in 1938 and mandates that employers pay their employees in accordance with the current federal minimum wage standards set by Congress.[20] Both Congress and the Supreme Court have been silent on the question of whether or not incarcerated workers, whether they work for institutions or for private industries, are included within the definition of "employee" under the FLSA, leaving the lower courts to develop a patchwork of conflicting standards and formalistic dichotomies to address the issue of FLSA coverage for prison laborers.

This Note argues that incarcerated workers should qualify as "employees" within the meaning of the FLSA and thus receive minimum wage protections. Part I provides background on prison labor in the U.S. and offers a summary of the six main forms of prison work. The six categories discussed in Part I are (1) non-industry work at the state level (2) work release programs (3) non-industry work at the federal level (4) industry work at the state level (5) industry work at the federal level and (6) the Prison Industry Enhancement Certification Program (PIECP). Part II then discusses the Fair Labor Standards Act and introduces the circuit split. Part III and IV analyzes the circuit split further and provides

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spent $8.7 million on lobbying efforts between 2010 and 2015); Mathew Clarke, *Study Shows Private Prison Companies Use Influence to Increase Incarceration*, PRISON LEGAL NEWS (Aug. 22, 2016), https://www.prisonlegalnews.org/news/2016/aug/22/study-shows-private-prison-companies-use-influence-increase-incarceration [https://perma.cc/4SRK-J83Y] (documenting how Corrections Corporation of America (CCA) and GEO have helped lobby for "truth-in-sentencing" "three-strikes" and "mandatory minimum" laws).

[17] Bob Sloan, *The Prison Industries Enhancement Certification Program: Why Everyone Should be Concerned*, PRISON LEGAL NEWS (Mar. 15, 2020), https://www.prisonlegalnews.org/news/2010/mar/15/the-prison-industries-enhancement-certification-program-why-everyone-should-be-concerned [https://perma.cc/988V-9QMC] ("In the beginning, small businesses that had trouble hiring or retaining employees due to low wages or fluctuating work schedules solicited partnerships with prison industries. This changed dramatically by the 1990s . . . .").

[18] Peter Wagner, *The Prison Index: Section III: The Prison Economy*, PRISON POLICY INITIATIVE (Apr. 2013) (citing JOEL DYER, PERPETUAL PRISONER MACHINE 19 (2000)), https://www.prisonpolicy.org/prisonindex/prisonlabor.html [https://perma.cc/HT6D-B29K].

[19] Wendy Sawyer, *How Much Do Incarcerated People Earn In Each State?*, PRISON POLICY INITIATIVE (Apr. 10, 2017), https://static.prisonpolicy.org/blog/2017/04/10/wages/ [https://perma.cc/3QHZ-9W6Y].

[20] Matthew J. Lang, *The Search for A Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prisoner Workers*, 5 U. PA. J. LAB. & EMP. L. 191, 192 (2002).

recommendations on how the Supreme Court should rule with respect to the sub-issues of congressional intent and certain bright-line rules that the Circuits have adopted. Finally, Part V proposes a new "economic reality" test for the Supreme Court to adopt.

I. UNPACKING THE SIX FORMS OF PRISON LABOR IN THE U.S.

A. Non-Industry Work: State Level

A common misconception about the prison industry, or what is often referred to as the "Prison Industrial Complex"[21] is that there are hundreds of thousands of prisoners across the U.S. working for private corporations. However, 700,000 out of 870,000 incarcerated workers in 2014 performed non-industry "prison housework," working in the kitchen, doing laundry, cleaning, and performing administrative tasks. [22] Non-industrial "housework" performed by prisoners in state facilities constitutes the largest section of prison labor. Additionally, the fact that incarcerated workers are not included in official employment statistics feeds into this public misconception.[23] Data on compensation and employment for inmates by state and federal corrections agencies is not always readily available or even recorded. .As a result, the prison industry tends to be misunderstood.

In reality, around 80% of all incarcerated workers held non-industry prison jobs. The remaining 20% worked in private or government-owned prison industries or in work release programs–the example of inmate firefighters in California would fall into this latter category. Work release programs, discussed in greater detail later on, apply to a relatively small percentage of the working prison population—those who are at the end of their sentence or are deemed low-risk and therefore eligible for work-release programs.

The most comprehensive survey of state wage policies available today is a 2017 survey provided by the Prison Policy Initiative.[24] The 2017 survey data has been reproduced in the table below. The data shows that

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[21] Named after the 'military-industrial complex' and popularized by scholars such as Angela Davis, the "Prison Industrial Complex" can be defined as the "overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social and political problems." *See What is the PIC? What is Abolition?*, CRITICAL RESISTANCE, http://criticalresistance.org/about/not-so-common-language/ [https://perma.cc/VJ82-67EC] (last visited Feb. 11, 2022).

[22] Schwartzapfel, *Chain Gang*, *supra* note 13; *see also* Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 870 (2008) (describing "prison housework" as "inmates contribut[ing] directly to prison operations by cooking meals, doing laundry, or cleaning the facilities.").

[23] Becky Pettit, *The Invisible Population: What the Unemployment Rate Doesn't Show*, GOOD WORLDWIDE INC. (Oct. 18, 2012), https://www.good.is/articles/the-invisible-population-what-the-unemployment-rate-doesn-t-show [https://perma.cc/KKC2-V9BB] (The unemployment rate "doesn't capture *underemployment*, other forms of labor inactivity, or unpaid labor. It also doesn't tell us anything about the employment prospects of some groups of the population most economically at-risk.").

[24] Sawyer, *supra* note 19; *see also State And Federal Prison Wage Policies And Sourcing information*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/reports/wage_policies.html [https://perma.cc/Z8GW-LC3F] (detailing "pay scales and wage policies that apply to incarcerated people working in state and federal prisons, along with sourcing information available as of April 10, 2017.").

national averages for state wages for non-industry work range from $0.14 to $0.63 per hour. In five states–Alabama, Arkansas, Florida, Georgia, and Texas–non-industry jobs are unpaid.

State Wages for Non-Industry Work ($00.00)					
	Lowest	Highest		Lowest	Highest
Alabama	0	0	**Montana**	0.16	1.25
Alaska	0.3	1.25	**Nebraska**	0.16	1.08
Arizona	0.15	0.5	**Nevada**	n/a	n/a
Arkansas	0	0	**New Hampshire**	0.25	1.5
California	0.08	0.37	**New Jersey**	0.26	2
Colorado	0.13	0.38	**New Mexico**	0.1	1
Connecticut	0.13	1	**New York**	0.1	0.33
Delaware	n/a	n/a	**North Carolina**	0.05	0.38
Florida	0	0.32	**North Dakota**	0.19	0.88
Georgia	0	0	**Ohio**	0.1	0.17
Hawaii	0.25	0.25	**Oklahoma**	0.05	0.54
Idaho	0.1	0.9	**Oregon**	0.05	0.47
Illinois	0.09	0.89	**Pennsylvania**	0.19	1
Indiana	0.12	0.25	**Rhode Island**	0.29	0.86
Iowa	0.27	0.68	**South Carolina**	0	0
Kansas	0.09	0.16	**South Dakota**	0.25	0.38
Kentucky	0.13	0.33	**Tennessee**	0.17	0.75
Louisiana	0.04	1	**Texas**	0	0
Maine	n/a	n/a	**Utah**	0.4	n/a
Maryland	0.15	0.46	**Vermont**	0.25	0.4

Massachusetts	0.14	1	**Virginia**	0.27	0.45
Michigan	0.14	0.56	**Washington**	n/a	0.36
Minnesota	0.25	2	**West Virginia**	0.04	0.58
Mississippi	0	n/a	**Wisconsin**	0.09	0.42
Missouri	0.05	n/a	**Wyoming**	0.35	1

On top of the lack of meaningful compensation, many states retain "hard labor" statutes mandating that prisoners in state correctional facilities work.[25] In these states, if an inmate refuses to work, they risk having their sentences lengthened or being placed in solitary confinement.[26] For example, in Texas—responsible for overseeing the largest state prison population in the U.S.[27]—inmates who refuse to work are punished and placed in "special cell restriction," where inmates remain in the cell for twenty-four hours a day.[28] Even in states where mandatory work requirements are not imposed upon prison populations, inmates are strongly encouraged to work and may receive "earned time" credits for labor performed while incarcerated, allowing them to cut down their sentences.[29] When forgoing work means forgoing the opportunity to reduce

[25] *See* N.C. GEN. STAT. § 148-26(a) (2020) ("It is declared to be the public policy of the State of North Carolina that all able-bodied prison inmates shall be required to perform diligently all work assignments provided for them. The failure of any inmate to perform such a work assignment may result in disciplinary action."); *see also Frequently Asked Questions*, TEXAS DEPT. OF CRIMINAL JUST., https://www.tdcj.texas.gov/faq/cid.html [https://perma.cc/VYT4-PS8U] (last visited Jan. 20, 2022) ("Inmates who continue to refuse to work lose their privileges and are placed in 'special cell restriction.'"); WASH. REV. CODE § 72.64.030 (2022) ("Every prisoner in a state correctional facility shall be required to work in such manner as may be prescribed by the secretary . . . .").

[26] Kanyakrit Vongkiatkajornsep, *Inmates Are Kicking Off a Nationwide Prison Strike Today*, MOTHER JONES (Sept. 9, 2016), https://www.motherjones.com/politics/2016/09/national-prison-strike-inmates/ [https://perma.cc/22GQ-V5CY] ("Nor can prisoners opt out of working, says Paul Wright, an editor at Prison Legal News. 'Typically prisoners are required to work, and if they refuse to work, they can be punished by having their sentences lengthened and being placed in solitary confinement,' Wright says.").

[27] *Texas 2019*, NAT'L INST. OF CORR. (2019), https://nicic.gov/state-statistics/2019/texas-2019 [https://perma.cc/5ZUH-QYGH] (Texas holds the record for the largest state prison population in the U.S., surpassing California with a total of 158,429 people who were incarcerated at the end of 2019.).

[28] *Frequently Asked Questions*, TEXAS DEPT. OF CRIM. JUST., https://www.tdcj.texas.gov/faq/cid.html [https://perma.cc/XZ4X-8632] (last visited Jan. 20, 2022).

[29] ALISON LAWRENCE, CUTTING CORRECTIONS COSTS: EARNED TIME POLICIES FOR STATE PRISONERS, NATIONAL CONFERENCE OF STATE LEGISLATURES 1 (July 2009), https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/13084 [https://perma.cc/74L3-TMUL]; *see also Earned and Good Time Policies: Comparing Maximum Reductions Available*, PRISON FELLOWSHIP, https://www.prisonfellowship.org/wp-content/uploads/2021/07/PrisonReformRedemptionActCampaignComparisonChart_f.pdf [https://perma.cc/8U6M-FDY7] (last visited Feb. 2, 2022) (comparing maximum sentence reductions available across states and in federal prison through earned and good time policies).

the time one spends in prison, the choice to work is often only a choice on paper.

Prisoners performing "housework" for state and federal facilities across the U.S. allows the department of corrections to save billions of dollars on annual salaries that would otherwise have to be paid out to hired cooks, janitors, prison law library staff members, and so on. As articulated by the Prison Policy Initiative, "[f]orcing people to work for low or no pay and no benefits allows prisons to shift the costs of incarceration to incarcerated people — hiding the true cost of running prisons from most Americans."[30] The ingenuity of the this model of forced and free prison labor is that corrections departments and the Federal Bureau of Prisons can market prison labor to the public as serving a rehabilitative function for the benefit of the inmate and society at large. In this way, forced unpaid labor is re-packaged as a social good. However, the pitch that prison labor serves a rehabilitative function and provides meaningful vocational training for the benefit of inmate is easily exposed as a façade when one looks at the reality of the type of labor performed by prisoners, and *who* it is performed for.

B. Non-Industry Work: Work-Release Programs

Outside of housework, cheap or free prison labor is routinely relied upon to close budget gaps for state and local municipal governments who find themselves short on funds to provide ordinary municipal services to inhabitants. This work is assigned to prisoners who are deemed low-risk as part of work-release programs. According to the Florida Department of Corrections, inmate worker squads provided 5.8 million hours of labor, and saved the state around $46 million in taxpayer money in the 2011–2012 budget year by performing work that includes road cleaning, ground and building maintenance, construction projects, and cleaning forests.[31] In California, the Conservation Fire Camps help save the state around $100 million taxpayer dollars a year.[32] In New Jersey, prisoners help cushion government budgets by clearing deer carcasses and litter from highways. In Georgia, inmates work in municipal graveyards.[33] Going back to the inmate firefighters in California, when World War II depleted a large proportion of the labor force that was used by CAL FIRE, the state turned to incarcerated workers and established the Conservation Camp program.[34] By replacing government workers with inmate laborers, the state can save on salaries and still provide these required services. In the face of budget cuts, or economic downturn, inmate laborers have historically become a crutch for local policymakers to fall back on.

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[30] Sawyer & Wagner, *supra* note 12.

[31] Willie Howard, *Inmates Saving Money For Palm Beach County Cities*, THE PALM BEACH POST (Nov. 30, 2013), https://www.palmbeachpost.com/story/news/crime/2013/12/01/inmates-saving-money-for-palm/7255655007/ [https://perma.cc/J8B4-7RBQ].

[32] Clarke, *supra* note 6.

[33] Robbie Brown & Kim Severson, *Enlisting Prison Labor to Close Budget Gaps*, N.Y. TIMES (Feb. 24, 2011), https://www.nytimes.com/2011/02/25/us/25inmates.html [https://perma.cc/C3LU-62A4].

[34] CAL. DEPT. OF CORR. & REHAB., *supra* note 1.

C. Non-Industry Work: Federal Level

At the federal level, inmates are required to work unless they provide a valid medical excuse.[35] Similar to state prisons, inmates in federal prisons may work either for the institution or for prison industries. Assignments to jobs are determined by institutional needs. Institution work assignments may include employment in food services, warehouse work, plumping, paint work, or groundskeeping. Inmates performing this non-industry "housekeeping" work earn $.12 to $.40 per hour of "satisfactory work performed."

D. Industry Work: State Level

Every state has its own separate prison industries program which engages state prisoners in a variety of work, ranging from manufacturing license plates to animal husbandry. These goods and services are then sold for profit to city, state, or federal agencies, and other private or public institutions. Prison industries are operated by state-owned corporations which function as an arm of the state's corrections department. In Louisiana, inmates work in garment factories under Louisiana's Prison Enterprises (PE).[36] In Tennessee, Tennessee Rehabilitative Initiative in Correction (TRICOR) operates a beef cattle farm and a row crop farm in two state prison facilities. In Texas, Texas Correctional Industries (TCI) oversees the production of graphic products, detergents, furniture, and textile and steel products.[37]

At TCI in Texas, one of the largest state prison industries in the country, incarcerated workers produced over $70 million in products in the 2020 fiscal year.[38] Those workers did not receive any wages from TCI for their labor. While TCI claims that these jobs provide inmates with marketable job skills, some critics of the industry have argued otherwise.[39]

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[35] *Work Programs*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp [https://perma.cc/T7HB-4Y8C] (last visited Feb. 5, 2022) [hereinafter *Work Programs*] ("Sentenced inmates are required to work if they are medically able.").

[36] David Reutter, *Prison Officials Praise Industry Programs Despite Downsides*, PRISON LEGAL NEWS (June 6, 2014), https://www.prisonlegalnews.org/news/2014/jun/6/prison-officials-praise-industry-programs-despite-downsides/ [https://perma.cc/2MXN-A9XW] ("Louisiana's Prison Enterprises, which operates a garment factory and other programs, reported a $1.27 million net profit in fiscal year 2012 on gross revenue of $17.9 million."); *see also Our Products*, PRISON ENTERPRISES, http://www.prisonenterprises.org/our-products [https://perma.cc/ZF7H-ZMHB] (last visited Feb. 11, 2022) (listing various products PE makes, including garments).

[37] *About Us*, TEXAS CORR. INDUS., https://tci.tdcj.texas.gov/info/about/default.aspx [https://perma.cc/KEK2-ZWXP] (last visited Feb. 11, 2022) ("TCI manufactures goods and provides services for sale, on a for-profit basis, to city, county, state and federal agencies, public schools, public and private institutions of higher education, public hospitals and political subdivisions.").

[38] TEXAS DEPT. OF CRIM. JUST., ANNUAL REVIEW FY2020 60 (2020) [hereinafter *Texas Annual Review FY 2020*], https://www.tdcj.texas.gov/documents/Annual_Review_2020.pdf [https://perma.cc/9BC8-JU2J] ("Sales for the . . . facilities . . . were $72.3 million for the fiscal year.").

[39] *Texas Correctional Industries: Providing Useful Work Skills or Slave Labor?*, PRISON LEGAL NEWS (Aug. 7, 2014), https://www.prisonlegalnews.org/news/2014/aug/7/texas-correctional-industries-providing-useful-work-skills-or-slave-labor [https://perma.cc/EQ5K-3KA5] ("Critics claim that many of the job skills learned by prisoners in TCI industry programs will be virtually useless after they're released because they involve outdated

They point out that the job skills picked up by inmates at TCI are not transferable to jobs outside of prison because the work entails the use of outdated techniques or work in industries that are not as prevalent in the outside world.[40] As one example, Texas only has a small number of detergent plants and license plate factories remaining in the state.[41] Comprehensive data from the 2017 PPI survey on wages for state prison industries is reproduced below.[42]

Stage Wages for State-Owned Industries ($00.00)					
	Lowest	Highest		Lowest	Highest
Alabama	0.25	0.75	**Montana**	n/a	n/a
Alaska	0.65	4.90	**Nebraska**	0.38	1.08
Arizona	0.20	0.80	**Nevada**	0.25	5.15
Arkansas	0	0	**New Hampshire**	0.50	1.50
California	0.30	0.95	**New Jersey**	0.38	2.00
Colorado	n/a	n/a	**New Mexico**	0.30	1.10
Connecticut	0.30	1.50	**New York**	Average 0.62	
Delaware	0.25	2.00	**North Carolina**	0.05	0.38
Florida	0.20	0.55	**North Dakota**	0.45	1.69
Georgia	0	0	**Ohio**	0.21	1.23
Hawaii	0.50	2.50	**Oklahoma**	0.00	0.43
Idaho	n/a	n/a	**Oregon**	0.05	0.47
Illinois	0.30	2.25	**Pennsylvania**	0.19	0.42
Indiana	n/a	n/a	**Rhode Island**	n/a	n/a
Iowa	0.58	0.87	**South Carolina**	0.35	1.80
Kansas	0.25	3.00	**South Dakota**	0.25	0.25

techniques or industries that are scarce in Texas. For example, there are relatively few soap and detergent plants or flag manufacturers in the state. Or license plate factories.").

[40] *Id.*

[41] *Id.*

[42] PRISON POL'Y INITIATIVE, *supra* note 24.

Kentucky	n/a	n/a	**Tennessee**	n/a	n/a
Louisiana	n/a	0.40	**Texas**	0	0
Maine	0.58	3.50	**Utah**	0.60	1.75
Maryland	0.20	0.82	**Vermont**	0.25	1.25
Massachusetts	n/a	n/a	**Virginia**	0.55	0.80
Michigan	n/a	n/a	**Washington**	0.70	2.70
Minnesota	0.50	2.00	**West Virginia**	n/a	n/a
Mississippi	0.20	1.30	**Wisconsin**	0.79	1.41
Missouri	0.30	1.25	**Wyoming**	0.50	1.20

The table above shows that on average, incarcerated people working for state-owned businesses earn between $0.33 and $1.41 per hour. This is around double what incarcerated workers performing regular prison housework make. However, merely 6% of incarcerated workers in state prisons earn this higher wage, which itself is a trivial amount compared to the federal minimum wage.[43]

E. Industry Work: Federal Prison Industries ("FPI" or UNICOR)

Under the federal prison system, prison industries are operated under Federal Prison Industries, Inc. ("FPI"). FPI, also known as UNICOR, is a corporation that is owned by the United States government and was established in 1934.[44] The creation of Federal Prison Industries in 1934 launched the modern era of using prison labor for private industry[45] at a time when private business did not previously have access to the prisoner workforce.[46] UNICOR's stated mission is to "protect society, reduce crime, aid in the security of the nation's prisons and decrease taxpayer burden by assisting inmates with developing vital skills necessary for successful reentry into society" and "reduce undesirable inmate idleness by providing a full-time work program for inmate populations."[47] UNICOR oversees all

[43] *Id.*

[44] Fink, *supra* note 15, at 961.

[45] Lan Cao, *Made in the USA: Race, Trade, and Prison Labor*, 43 N.Y.U. REV. L. & SOC. CHANGE 1, 14 (2019) ("The modern era of prison labor for private industry began in 1934, with the creation of the Federal Prison Industries ('FPI'), also known as UNICOR.").

[46] John Dewar Gleissner, *How to Create American Manufacturing Jobs*, 9 TENN. J.L. & POL'Y 166, 171 (2013) ("Private prison industries came to a screeching halt at the time of the Great Depression. The Hawes-Cooper Act of 1929, '[a]n Act to divest goods, wares and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases,' took away the interstate commerce status of prison-made goods, allowing states to bar them from sale.…Many states prohibited the sale of those goods.").

[47] FISCAL YEAR 2021 ANNUAL MANAGEMENT REPORT, FEDERAL PRISON INDUS. 6 (2021), https://www.unicor.gov/publications/reports/FY2021_AnnualMgmtReport.pdf [https://perma.cc/UN6A-UQ6E].

prison industries for the Federal Bureau of Prisons. UNICOR's annual report for fiscal year 2021 states that it "provides employment and training for inmates in the Federal Prison System while remaining self-sufficient through the sale of its products and services primarily to other federal departments, agencies, and bureaus."[48]

In 2021, UNICOR operated seven business segments: Agribusiness, Clothing,

Textiles, Electronics, Fleet, Office Furniture, Recycling, and Services. The company operated at sixty-three factories and two farms located across fifty-one prison facilities. UNICOR's top customers include other federal departments and agencies such as the Department of Defense (DOD), The Department of Homeland Security (DHS), and the Department of Justice (DOJ).[49] Total sales for the 2021 fiscal year amounted to $404.1 million. In order to accomplish this, UNICOR employed a total of 16,315 inmates who were compensated between $0.23 to $1.15 per hour.[50] After making a fraction of minimum wage, inmates were then required to contribute half of their earnings towards court-ordered fines, victim restitution, incarceration fees, child support, or any other monetary judgments.[51]

F. Industry Work: Prison Industry Enhancement Certification Program (PIECP)

The sixth and final category of prison labor involves incarcerated individuals who are employed by private corporations via the Prison Industry Enhancement Certification Program (PIECP)[52]. PIECP is the sole medium through which private companies may receive permission to contract with prisons to access their inmate workforce. Though PIECP projects account for only a small fraction of the total inmate laborer population (at the end of 2020, PIECP projects employed 5,000 inmates),

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[48] In UNICOR's annual report, as well as in the inmate handbook provided by the Federal Bureau of Prisons, inmate workers are consistently referred to as "employees." Despite the use of this terminology in the federal handbook, inmates who work for federal prisons are nonetheless not considered "employees" for the purposes of the Fair Labor Standards Act. *Id.* at I-1.

[49] UNICOR primarily sells its products to the federal government, so as to avoid unfair competition with private-sector companies. *Id.* ("Federal Prison Industries, Inc. (FPI) provides employment and training for inmates in the Federal Prison System while remaining self-sufficient through the sale of its products and services primarily to other federal departments, agencies, and bureaus."); *see also* Beth Schwartzapfel*, Modern-Day Slavery in America's Prison Workforce,* PRISON LEGAL NEWS (Sep. 9, 2014) [hereinafter Schwartzapfel, *Modern-Day Slavery*], https://www.prisonlegalnews.org/news/2014/sep/19/modern-day-slavery-americas-prison-workforce [https://perma.cc/PAN5-6H3N] ("UNICOR – sells products exclusively to the federal government, with the aim of minimizing competition with private-sector companies.").

[50] INMATE ADMISSION & ORIENTATION HANDBOOK, DEPT. OF JUST. & FED. BUREAU OF PRISONS 5 (2014) https://www.bop.gov/locations/institutions/gre/GRE_fpc_aohandbook.pdf [https://perma.cc/CB65-6APL].

[51] *Unicor Program Details*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp [https://perma.cc/3B9U-N5DV] (last visited Feb. 10, 2022) [hereinafter *Unicor Program Details*] ("The Inmate Financial Responsibility Program (IFRP) ensures that inmates who have financial obligations contribute 50% of their earnings.").

[52] *About PIECP,* NAT'L CORR. INDUS. ASS'N, https://www.nationalcia.org/about-piecp [https://perma.cc/R2QA-JRV8].

these job arrangements often garner the greatest media attention.[53] Victoria's Secret, Amazon, Wholefoods, and other private companies that used prison labor via PIECP have all drawn public scrutiny for their business practices.[54]

As a general rule, the Ashurst-Sumners Act, codified as 18 U.S.C. §1761(a), makes it unlawful to transport in interstate commerce, goods, wares, or merchandise produced by prison labor.[55] However, the Prison Industry Enhancement Certification Program, which was created by Congress in 1979[56] and codified under 18 U.S.C. §1761(c)(1), is an exception to the Act.[57] §1761(c)(1) provides that the Ashurst-Sumners Act will not apply to goods produced by inmates participating in "prison work pilot projects designated by the Director of the Bureau of Justice Assistance."[58] In other words, PIECP exempts certified departments of corrections from normal restrictions on the sale of offender-made goods in interstate commerce.[59]

Up to fifty jurisdictions around the country may be certified under PIECP. As of December 2020, forty-three states are certified to participate in the program.[60] Once states are certified, private industries can establish joint ventures with state departments of corrections to produce goods. In order to obtain certification, states have to satisfy certain criteria, including: workers have to be paid the prevailing wage (the Department of Labor defines prevailing wage as "the average wage paid to similarly employed workers in a specific occupation in the area of intended

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[53] For a full list of private companies that were contracted through PIECP in 2020, *see* PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM CERTIFICATION & COSTS ACCOUNTING CENTER LISTING, NAT'L CORR. INDUS. ASS'N (2020) [hereinafter *PIECP End of Quarter Statistics 2020*] https://df1d6e07-2d3a-49dd-bb43-170ddf635f64.usrfiles.com/ugd/df1d6e_8d3b0797c98b469c831c436f5db359b4.pdf [https://perma.cc/NN6R-FFTX].

[54] *See* Emily Yahr, *Yes, Prisoners Used to Sew Lingerie for Victoria's Secret — Just Like in 'Orange is the New Black' Season 3*, WASHPOST (June 17, 2015), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/06/17/yes-prisoners-used-to-sew-lingerie-for-victorias-secret-just-like-in-orange-is-the-new-black-season-3 [https://perma.cc/SR65-BA4A] ("In 1995, the National Institute of Justice released a study that confirmed garment manufacturer Third Generation contracted sewing work in the early '90s to a prison through a deal with South Carolina Correctional Industries. Victoria's Secret, along with other companies, wound up buying the apparel through Third Generation — that were actually made by inmates at the Leath Correctional Facility in Greenwood.").

[55] Ashurst-Sumners Act, Pub. L. No. 74-215, 49 Stat. 494 (1935) (codified at 18 U.S.C. §1761(a)) ("Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution, shall be fined under this title or imprisoned not more than two years, or both.").

[56] NAT'L CORR. INDUS. ASS'N, *supra* note 52.

[57] 18 U.S.C. §1761(c) (1)("In addition to the exceptions set forth in subsection (b) of this section, this chapter shall not apply to goods, wares, or merchandise manufactured, produced, or mined by convicts or prisoners wh1) are participating in—one of not more than 50 prison work pilot projects designated by the Director of the Bureau of Justice Assistance").

[58] *Id.*

[59] NAT'L CORR. INDUS. ASS'N, *supra* note 52.

[60] *PIECP End of Quarter Statistics 2020, supra* note 53.

employment,"[61] " which is often higher than the federal minimum wage), inmate participation should be voluntary, the program should not result in the displacement of civilian workers employed in the community, and the state has to consult with local labor unions and private industry.[62] Congress created these provisions in order to protect free-world workers and avoid unfair market competition.[63] Despite these mandatory requirements under PIECP, many of these rules have been violated or ignored by prisons and corporations across the country.[64]

For example, only prisoners employed in production work are entitled to minimum or prevailing wages.[65] Some companies, driven by profit-motivated incentives, have evaded paying wages by classifying jobs as "service" rather than "production."[66] One such example is the PIE program at the South Central Correctional Facility in Tennessee.[67] Prisoners working in the program produced T-shirts for corporate customers such as Taco Bell. While the prisoners who printed the shirts were classified as production workers and earned the minimum wage, those who packaged the shirts were classified as service workers and received $0.50 per hour.[68] In addition to PIE minimum wage policies, evasion of other policies is also rampant, such as the requirement to consult with local labor organizations prior to setting up shop.[69] Private companies have routinely shirked their responsibilities and requirements under PIECP undetected. This shirking of PIECP requirements is easy to do because compliance with PIECP is overseen by the National Correctional

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[61] *Prevailing Wage Information And Resources*, U.S. DEPT. OF LAB., https://www.dol.gov/agencies/eta/foreign-labor/wages [https://perma.cc/B3V5-RV2D] (last visited November 23, 2022).

[62] For a full list of certification criteria, *see* PROGRAM BRIEF: PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM, BUREAU OF JUST. ASSISTANCE 5 (2018), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/PIECP-Program-Brief_2018.pdf [https://perma.cc/8HGP-M7PS].

[63] *See* Sloan, *supra* note 17 ("The reasoning behind these stipulations, . . . was to allow competition be-tween prison industries and private sector manufacturers. . . . By making the requirements mandatory, Congress believed they could ensure that prison industries were competitive with free-world businesses without giving either an unfair advantage.").

[64] *Id.* ("There have been many examples of profiteering at the expense of regulatory compliance – such as with the current meltdown on Wall Street, the Enron and WorldCom scandals, and ponzi schemes like that of Bernie Madoff (which brought down the JEHT Foundation, a major funder of criminal justice programs).").

[65] *Id.* ("Further, prisoners who participate in PIE programs are only entitled to receive minimum or prevailing wages if they are engaged in production work.").

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* ("In 2006, Texas Correctional Industries partnered with a private company in a prison industry program that manufactured flatbed trailers at the Michael Unit in Tennessee Colony. The private sector PIECP partner was Direct Trailer and Equipment Company (DTEC), owned by a former Texas prison employee. The Texas Private Sector Prison Industries Oversight Authority had failed to contact local organized labor groups prior to authorizing the operation. They also failed to contact Lufkin Industries or Bright Coop – Texas-based companies that manufactured the same type of trailers as DTEC . . . . Texas lawmakers, concerned over the loss of jobs . . . quickly got involved. They discovered that failures by the state's Private Sector Prison Industries Oversight Authority had led to unfair competition – including prisoners being paid minimum wage with no employee benefits, and DTEC being allowed to lease the industry facility at the Michael Unit for $1.00 a year.")

Industries Association (NCIA).[70] This is significant because the NCIA is headed by the very same people that run the PIECP programs. Members of the NCIA mainly consist of administrators and employees of state prison industry programs and the corresponding private companies. NCIA members therefore have no incentive to hold their own companies and industries accountable.[71]

Due to the lack of meaningful oversight by the NCIA, companies move to evade the PIECP requirements. Moreover, under federal law, up to 80 percent paychecks of PIE employees may be deducted for room and board, taxes, family support, and victims' funds.[72] NCIA found that employees kept only 20% of their wages.[73] As put into words by Paul Wright —founder of Prison Legal News and formerly incarcerated individual— "So while businesses get rent-free space, prisoners are paying for their 'room and board.'"[74] Despite these downfalls and even after accounting for deductions, PIECP offers some of the highest-paying jobs available to inmates and tend to be highly coveted. Yet only a small percentage of incarcerated workers actually benefit: PIECP workers form less than 1% of the working prison population.[75]

An interesting point to note is that PIE programs are heavily opposed by labor groups as well, in addition to social justice advocates and carceral abolitionists. Unpaid or forced prison labor in general has historically been resisted and disliked by labor unions due to concerns over unfair competition.[76] These concerns are not unfounded. PIECP programs have indeed caused real-world job losses. One example is that of Talon Industries in Washington state, which specializes in water jet technologies. [77] In 1999, the company was forced to lay off twenty-three employees and went out of business due to competition from Microjet–a contractor that

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[70] *Id.* (The Bureau of Justice Assistance (BJA) outsourced the management of PIECP programs to the NCIA in 1995).

[71] *Id.* ("The association's board of directors is almost exclusively composed of prison industry officials . . . . NCIA includes the very PIECP participants that it is charged with monitoring; in effect, it is overseeing itself").

[72] 18 U.S.C § 1761(c)(2) ("[S]uch wages may be subject to deductions which shall not, in the aggregate, exceed 80 per centum of gross wages, and shall be limited as follows . . ."); *see also Texas Annual Review FY 2020*, *supra* note 38 (By way of example, during the 2020 Fiscal Year in Texas correctional facilities, PIE participants earned "$730,830 and contributed $79,741 in federal taxes, $73,084 to crime victims' compensation, $5,515 to restitution, $73,962 for family support, and $358,900 to room and board.").

[73] Beth Schwartzapfel, *Your Valentine, Made in Prison*, INT'L LAB. RTS. F. (Feb. 12, 2009) [hereinafter Schwartzapfel, *Prison Valentine*], https://laborrights.org/in-the-news/your-valentine-made-prison [https://perma.cc/3E72-H82A] ("The National Correctional Industries Association, the nonprofit organization that certifies PIE programs, found that participants kept only about 20 percent of their wages in the past two quarters.").

[74] *Id.*

[75] *Id.* ("The waiting list for work at Joint Venture is up to 200 people long.").

[76] *See* AM. FED'N OF LAB. AND CONG. OF INDUS. ORG., *The Exploitation of Prison Labor* (May 8, 1997), https://aflcio.org/about/leadership/statements/exploitation-prison-labor [https://perma.cc/3CZP-DFFE] (announcing the ACL-CIO's opposition to "the widespread use of prison labor throughout the public and private sectors in the United States in unfair competition with free labor.").

[77] Sloan, *supra* note 17 ("Also in Washington state, Talon Industries, a company that used water jet technology, was forced out of business in 1999 and had to lay off 23 employees due to competition from MicroJet, a private sector PIECP partner at the Monroe Corrections Center.").

produced airplane parts for Boeing–which operated a PIECP program at the Monroe Corrections Center.[78]

II. THE CIRCUIT SPLIT ON PRISON LABOR AND THE FAIR LABOR STANDARDS ACT

Having reviewed the six main forms of prison labor in the U.S. in Part I, Part II will now discuss the Fair Labor Standards Act in detail and discuss how the various circuit courts have come out in deciding whether or not incarcerated workers may be entitled to the federal minimum wage.

A. Background on the Fair Labor Standards Act

The Fair Labor Standards Act establishes minimum wage, maximum hours prior to overtime pay, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments.[79] Today, the federal minimum wage is set at $7.25, and the maximum hours of work, at regular pay, are capped at forty.[80] The FLSA also provides that in cases where an employee is subject to both state and federal minimum wage laws, the employee is entitled to the higher of the two.[81]

Congress enacted the FLSA near the end of the Great Depression in 1938 with the stated purpose of eliminating "as rapidly as practicable" the existence "in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[82] Congress found that these labor conditions burdened the free flow and goods in commerce, resulted in unfair competition, and led to labor disputes and strikes which further obstructed the free flow of goods in commerce.

The minimum wage mandate and overtime provisions of the FLSA are afforded to those workers who count as "employees" as defined by the statute.[83] Since its passage, the Act has undergone various amendments, where Congress has broadened the coverage of the FLSA to those employees who were not previously included. The largest expansion of FLSA coverage occurred in 1974, when Congress expanded the FLSA to cover all state and local government employees.[84] Congress has also passed amendments that exempt certain classes of employees from coverage, such

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[78] *Id.*

[79] *See* U.S. DEP'T OF LAB., *Wages and Fair Labor Standards Act*, https://www.dol.gov/agencies/whd/flsa [https://perma.cc/U7AC-NAPP] (last visited May 30, 2023).

[80] *Id.*

[81] *Id.*

[82] 29 U.S.C. § 202(a) (2000).

[83] *See* 29 U.S.C. § 203(e) (2000) (statutory definition of "employee"); *see also* 29 U.S.C. § 206 (2000) (minimum wage provision).

[84] *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, 59–60 (codified as 29 U.S.C. § 203). The amendment was initially found unconstitutional by the Supreme Court in 'at'l League of Cities v. Usery, 426 U.S. 833 (1976) which was later overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545—557 (1985) (ruling that states are not immune from minimum wage and overtime requirements of the Fair Labor Standards Act because there was nothing in those requirements that infringed upon state sovereignty or violated any constitutional provision).

as school teachers, full-time students, or part-time babysitters.[85] Prison laborers, however, are not mentioned anywhere in the full text of the FLSA. In no subsequent amendment has Congress addressed incarcerated workers, either exempting or extending them coverage.[86] Furthermore, in no other significant employment statute are prisoners explicitly excluded from the definition of "employee."[87]

The Supreme Court has declined the opportunity to rule on the matter, leaving the various circuit courts free to conflict with one another over the legal standards to be used. No court has yet gone as far to rule that prisoners are *per se* excluded from the category of "employee" within the meaning of the FLSA. Instead, the circuit courts have applied rather arbitrary dichotomies, varying interpretations of congressional intent, and diverging tests aimed at ascertaining the "economic reality" of the inmate to decide the issue of coverage on a case-by-case basis. The following sections will provide an overview of the existing circuit court decisions and an analysis of the various axes along which the issue of coverage versus non-coverage has been decided.

B. Introducing the Circuit Split: The Rise of the Bonnette Factors

The FLSA defines the term "employee" as "any individual employed by an employer."[88] To "employ" is defined as "to suffer or permit to work."[89] "Employer" means "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ."[90] Unsurprisingly, the circuit court decisions, which will be discussed below, exhibit ambiguity and confusion due to the little interpretive guidance these definitions provide. In *Goldberg v. Whitaker House Co-op., Inc.*, the Supreme Court clarified that the test for employment rests on the "economic reality" of the employment relationship for the purposes of the FLSA.[91] The Court has further stated that this "economic reality" test should be applied, "with the totality of the circumstances of the economic reality in mind."[92]

In 1983, the Ninth Circuit formulated its own "economic reality" test in *Bonnette v. California Health & Welfare Agency*.[93] *Bonnette* identified the following factors: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the

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[85] *See* 29 U.S.C. § 213(a) (2002) (exempting school teachers, outdoor salesmen, part-time babysitters); *see also* 29 U.S.C. § 214(a) (2002) (exempting "learners, apprentices, messengers").

[86] Lang, *supra* note 20, at 194 ("Not surprisingly, the generic nature of these definitions has rendered them unhelpful to courts looking for guidance in determining whether prisoner workers are 'employees' [under FLSA].").

[87] Zatz, *supra* note 22, at 875 ("Shifting focus from control to exclusions would accomplish little, however, because neither the FLSA nor any other major employment statute specifically excludes prisoners from the 'employee' category.").

[88] 29 U.S.C. § 203(e)(1) (2000).

[89] 29 U.S.C. § 203(g) (2000).

[90] 29 U.S.C. § 203(d) (2000).

[91] Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961) ("[T]he 'economic reality' rather than 'technical conce'ts' is to be the test of employment") (citations omitted).

[92] Lang, *supra* note 20 at 197 (characterizing Goldberg, 366 U.S. at 33 and Rutherford Food Corp. v. McComb, 331 U.S. 722, 722 (1947)).

[93] Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983).

rate and method of payment, and (4) maintained employment records."[94] Additionally, the determination of whether an employer-employee relationship exists does not depend on "isolated factors but rather upon the circumstances of the whole activity."[95] Shortly after *Bonnette* was decided, other circuits adopted these factors as well.

In 1983, the Second Circuit marked a turning point in the history of FLSA claims brought by prisoners when it decided *Carter v. Dutchess Community College.*[96] By applying the *Bonnette* factor test, *Carter* became the first federal case to be decided in favor of the inmate worker. Louis Carter was an incarcerated individual at Fishkill Correctional Facility in New York. While at FCF, he was selected to work for Dutchess Community College (DCC), which offered college-level courses to inmates at Fishkill. DCC hired Carter to work as a teaching assistant and conduct twenty classes which were all held within the prison compound. For this work, Carter was compensated at $1.20/hour. Carter filed suit, complaining that he was not compensated the federal minimum wage (at the time $3.10), in violation of the FLSA.[97] The district court granted summary judgment to the defendants, finding that no employment relationship existed between the inmate and the DCC (a private entity) because "ultimate control" over the inmates rested with the prison and not DCC. [98] The Second Circuit Court of Appeals reversed and remanded the ruling, stating that "the practical effect of the district court's decision is an absolute preclusion of FLSA coverage for prisoners."[99] The Second Circuit rejected the argument that in order to find an employer-employee relationship, the employing entity must have "ultimate control" over the worker, and found this framework to be inconsistent with Supreme Court precedent.[100] Instead, the Second Circuit held that a fact-intensive and case-by-case inquiry into the economic reality was necessary.[101] In its application of the *Bonnette* factors, the court stated that DCC may have exercised a sufficient number

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[94] Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984) (citing *Bonnette*, 704 F.2d 1465 at 1470).

[95] *See Bonnette*, 704 F.2d at 1469 (quoting McComb*,* 331 U.S. at 730).

[96] *See Carter*, 735 F.2d at 12.

[97] *Id.* at 10.

[98] *Id.* at 12 (The District Court's distinction between "qualified control" and "ultimate control" followed prior case law); *see* Alexander v. Sara, Inc.*,* 559 F. Supp. 42, 44 (M.D.La. 1983), *aff'd,* 721 F.2d 149, 149 (5th Cir. 1983) (holding that incarcerated individuals are not within the coverage of the Fair Labor Standards Act); *see also* Sims v. Parke Davis & Co., 334 F. Supp. 774, 786—787 (E.D. Mich. 1971) (holding that incarcerated individuals were not employees within the meaning of federal or state minimum wage laws); *see also* Huntley v. Gunn Furniture Co., 79 F. Supp. 110, 116 (W.D. Mich. 1948) (ruling that incarcerated plaintiffs failed to show that they qualified as employees under the definition of the Fair Labor Standards Act).

[99] *Carter*, 735 F.2d, at 12.

[100] *Id.* at 12—13 (In its opinion, the 2nd Circuit found this argument to run "counter to the breadth of the statute and to the Congressional intent." (citing *Falk v. Brennan,* 414 U.S. 190 (1973) (finding that a real estate management partnership, for the purposes of the minimum wage mandate of the FLSA, was an employer of maintenance workers since it hired and supervised the workers and thus exercised substantial control over the workers, even though these workers were at all times considered employees of the owners of the apartment buildings)).

[101] *Carter*, 735 F.2d, at 13.

of employer prerogatives over the inmate worker to warrant FLSA coverage and overturned the district court's grant of summary judgment.[102]

Importantly, in its opinion, the Second Circuit also noted that the category of prisoners is not included in the "extensive" list of workers who are expressly exempted from FLSA coverage.[103] The court took this as an indication that Congress had not intended to automatically exclude prison laborers from coverage. The opinion stated "[i]t would be an encroachment upon the legislative prerogative for a court to hold that a class of unlisted workers is excluded from the Act."[104] The court in *Carter* was among the first to promulgate this "workers not exempted" justification for extending coverage to prison laborers.

This position was supported by the Eleventh Circuit in *Patel v. Quality Inn South*, where the court argued that the framework of the FLSA "strongly suggests that Congress intended an all-encompassing definition of the term 'employee' that would include all workers not specifically excepted."[105] The Supreme Court also supported this notion in *Powell v. U.S. Cartridge Co.*, where it stated that the specificity of the exemptions laid out in the FLSA "strengthens the implication that employees not thus exempted…remain within the Act."[106]

The Fifth Circuit also followed *Carter* in its decision in *Watson v. Graves* when it held that inmates who were not sentenced to hard labor and were working for a private construction business as part of a work release program were "employees" of that business for the purposes of the FLSA and entitled to minimum wage.[107] While the Second Circuit simply remanded the case for further proceedings, the Fifth Circuit went a step further and rendered a decision on the ultimate issue, becoming the first circuit to extend FLSA coverage to prisoners.[108]

The Fifth Circuit, while purporting to use the four factor *Bonnette* test, decided the case by considering additional factors like unfair competition and seemed to follow a totality-of-the-circumstances approach.[109] In coming to its conclusion, the court noted that the private company had "*de facto*" power over hiring and firing and controlled the inmate's work schedules.[110] However, the prison technically set the pay

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[102] *Id.* at 15 ("DCC made the initial proposal to 'employ' workers; suggested a wage as to which there was 'no legal impediment'; developed eligibility criteria…was not required to take any inmate it did not want; decided how many sessions, and for how long, an inmate would be permitted to tutor; and sent the compensation directly to the inmate's prison account.").

[103] *Id.* at 13 (citing 29 U.S.C. § 213 (1982)).

[104] *Id.; see also Id.* at 12 (The Second Circuit added that "[t]he statute is a remedial one, written in the broadest possible terms so that the minimum wage provisions would have the widest possible impact in the national economy.").

[105] Patel v. Quality Inn South, 846 F.2d 700, 702 (C.A.11 (Ala.),1988)

[106] Powell v. U.S. Cartridge Co., 339 U.S. 497, 517 (1950).

[107] Watson v. Graves, 909 F.2d 1549, 1550 (5th Cir. 1990).

[108] Lang, *supra* note 20, at 200.

[109] *See e.g.* Danneskjold v. Hausrath, 82 F.3d 37, 41 (2d Cir. 1996) (explaining the 5th Circuit's divergence from the 4 factor test); *see also* Zatz, *supra* note 22, at 874 ("[Watson] emphasized the economic significance of inmate labor to the contractor and the local construction industry by virtue of the la'or's competitive impact").

[110] *See Watson*, 909 F.2d at 1555.

rate for inmates, and neither the private company nor the prison maintained any employment records. Furthermore, the Warden of the prison could technically overrule hiring decisions. The court held that these facts "do not preclude application of the FLSA…when we analyze the economic realities of the Inmate's employment in light of the policies behind FLSA."[111] Diverging from the Second Circuit, the court in *Watson* went beyond the four factor test and held that the inmate workers gave the employer an economic advantage and that by evading minimum wage requirements, the company was unfairly competing with other construction contractors in the area.[112] In support of its decision, the court stated, "we must also look to the substantive realities of the relationship, not to mere forms or labels ascribed to the laborer by those who would avoid coverage."[113] Additionally, the Fifth Circuit Court has also found persuasive the supporting argument that prisoners are not expressly exempted from coverage under the FLSA .[114]

C. Introducing the Circuit Split: The Fall of the Bonnette Factors

After the decisions *Carter* and *Watson*, Circuit courts began to roll back their use of the *Bonnette* test in the context of prison laborer FLSA claims—perhaps in response to, or in fear of, how favorable the factor test was turning out to be towards inmate workers.[115] The first blow came in 1991 when the Ninth Circuit decided *Gilbreath v. Cutter Biological, Inc.*[116] In *Gilbreath*, with facts similar to those of *Watson*, inmate workers brought suit against both Arizona Correctional Enterprises (ARCOR), a part of Arizona Department of Corrections, and Cutter, a private corporation that ran a plasma treatment center on-site at the prison in order to recover minimum wage. The court found that prisoners working within the prison for the private plasma treatment center were not "employees" within the meaning of the FLSA. In doing so, *Gilbreath* refused to apply the *Bonnette* factors. Instead, the court hinged its decision on the proposition that neither the DOC nor Cutter, individually or jointly, met the statutory definition of an employer as per the Act. Gilbreath also focused on the fact that "[t]he inmate assistants were not on a work release program, did not work off premises and were not free not to work,"[117] and that there was no evidence that the State defendants had a pecuniary rather than a

[111] *Id.*

[112] *Id.* ("Jarreau incurred no expense for overtime, unemployment insurance, social security, wor'er's compensation insurance, or other employee benefit plans because he had no 'employees.'").

[113] *Id.* at 1554.

[114] *Id.* ("Furthermore, the category of prison inmate is not one of the groups Congress expressly excluded from coverage by FLSA. For the court to exempt an entire class of workers on the basis of a technical label could upset the desired equilibrium in the work place.") (internal citation omitted).

[115] After *Carter* and *Watson*, the Ninth Circuit decided Hale v. Arizona, 967 F.2d 1356 (9th Cir. 1992) [hereinafter *Hale (I)*], wherein the Circuit Court applied the *Bonnette* factors and extended FLSA coverage to prisoners who were working for the state to make produce goods in the prison that would be sold outside of the prison. *Hale v. Arizona* had the potential to be a landmark ruling however it was later reversed en banc upon a re-hearing. *See* Hale v. State of Arizona, 993 F.2d 1387 (9th Cir. 1993) [hereinafter *Hale (II)*].

[116] Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320 (9th Cir. 1991).

[117] *Id.* at 1331; *see also* ARIZ. REV. STAT. ANN § 31-251(a) (2018) (Under Arizona State law, prisoners are required to "engage in hard labor for not less than forty hours per week.").

penological interest in the inmates' labor.[118] This section of reasoning suggests that the Ninth Circuit was placing greater weight on whether the labor was performed on or off the prison premises, and whether or not the inmates were subject to mandatory labor requirements.

After *Gilbreath*, the Seventh Circuit decided *Vanskike v. Peters*, and held that a prisoner performing prison housework (such as working in the kitchen or as a janitor) was not entitled to minimum wage under the FLSA.[119] The *Vanskike* opinion greatly undermined efforts to extend FLSA protections to incarcerated workers.[120] Daniel Vanskike, an inmate at the Stateville Correctional Center in Illinois, filed a *pro se* complaint alleging that he performed "forced labor," including kitchen and janitorial work while incarcerated, and the Department of Corrections failed to compensate him minimum wage. In coming to its conclusion, the Seventh Circuit declined to apply *Bonnette*'s four-factor standard. In its reasoning the court stated that, if literally applied to Vanskike's situation, all four *Bonnette* factors may be satisfied by the DOC.[121] However, the "*Bonnette* factors fail to capture the true nature of the relationship for . . . they presuppose a free labor situation."[122]

The Seventh Circuit reasoned that the DOC's "control" over Vanskike stemmed from his incarceration itself, rather than any bargained-for exchange of labor for consideration. While the *Bonnette* factors focus on the degree of control the employer exercises over the employed, "the problematic point is that there is *too much* control to classify the [prison-inmate] relationship as one of employment."[123] Rather than using any criteria for employment, or judicially appraisable factors, the Seventh Circuit in remarkably circular logic focused only on Vanskike's status as an inmate. The court, in its footnotes, went on to reject the argument that workers not specifically exempt come within the scope of the Act, because this argument "assumes that prisoners plainly come within the meaning of the term 'employees.'"[124] In doing so, it disagreed with the Second and Fifth Circuit's prior interpretation of congressional intent.

Vanskike proved to be a seminal case within the field of prisoner FLSA litigation. Virtually all decisions afterwards ruled against inmate workers, often relying on the Seventh Circuit opinion. Many of these courts have refused to apply the "economic reality" test or rejected application of the *Bonnette* factors.[125]

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[118] *Gilbreath*, 931 F.2d at 1331.

[119] Vanskike v. Peters, 974 F.2d 806, 807 (7th Cir. 1992) ("We do not question the conclusions of *Carter, Watson* and [*Hale (I)*] 'that prisoners are not categorically excluded from the F'SA's coverage simply because they are prisoners. We must nevertheless reject Vansk'ke's contention that he is an 'employee' for purposes of the FLSA…'").

[120] *Id.* at 806.

[121] *Id.* at 809.

[122] *Id.*

[123] *Id.* at 810.

[124] *Vanskike*, 974 F.2 at 807 n.2.

[125] *See* Gambetta v. Prison Rehab. Indus. & Diversified Enter., Inc., 112 F.3d 1119, 1224 (11th Cir. 1997) (holding that inmates working for state prison industries are not covered by the FLSA); *see also* Franks v. Okla. State Indus., 7 F.3d 971, 973 (10th Cir. 1993) (affirming dismissal of prisoner's FLSA claim because "the economic reality test was not

One such case that was decided post-*Vanskike* was the 1993 case of *Hale v. State of Arizona*.[126] In a rehearing en banc, the Ninth Circuit ruled that prisoners who were working for state prison industries (in this case, ARCOR Enterprises, an arm of the Arizona Department of Corrections) and were required to work under state law were not employees of the prison for the purposes of the FLSA. The Ninth Circuit rejected the *Bonnette* factors test, which, the court itself had created. The opinion stated "regardless of how the Bonnette factors balance, we join the Seventh Circuit in holding that they are not a useful framework in the case of prisoners who work for a prison-structured program because they have to."[127] The court held that the *Bonnette* factors assumed a free labor situation which did not apply to the prisoner context, and that the relationship between the prison and prison laborer is penological rather than pecuniary.[128]

As illustrated above, even within the same circuit, the existing opinions are inconsistent on whether to apply the *Bonnette* "economic reality" test, when to apply it, and how to apply it.[129] The result has been an arbitrary patchwork of federal caselaw on an issue that affects civil and constitutional rights of around 1.4 million American citizens currently held in state and federal prisons.

In deciding whether or not to apply the *Bonnette* factor test, the cases discussed above have considered a variety of factors and bright-line rules. Put into broad categories, the Circuit Courts have looked at congressional intent by looking to both the stated purpose of the FLSA and the Ashurst-Sumners Act, whether the labor was voluntary or compelled, and whether the work was done inside or outside the prison walls. Part III will discuss these cases in further detail and argue that congressional

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intended to apply to work performed in the prison by a prison inmate."); McMaster v. Minn., 30 F.3d 976, 980 (8th Cir. 1994) ("plaintiffs, who are required to work as part of their sentences and perform labor within a correctional facility as part of a state-run prison industries program are not 'employees' of the state or prison within the meaning of the Fair Labor Standards Act."); Reimonenq v. Foti, 72 F.3d 472, 475 (5th Cir. 1996) ("We find that the 'economic reality' test, which is cast as a 'control' question designed to identify the responsible employer in a free-world work environment, is unserviceable, and consequently inapplicable, in the jailer-inmate context."); *Danneskjold*, 82 F.3d at 41 (finding that prison labor that produces goods or services for institutional needs of prison is not subject to FLSA and rejecting use of the *Bonnette* factors in the prison labor context); Harker v. State Use Indus., 990 F.2d 131, 133 (4th Cir. 1993) (ruling that the Fair Labor Standards Act does not apply to prison inmates performing work at a prison workshop within the penal facility as part of rehabilitative program); Loving v. Johnson, 455 F.3d 562, 563 (5th Cir. 2006) (in the case of an inmate working in the prison laundry, held a prisoner doing work in or for the prison is not an "employee" under the FLSA); Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005) (holding that minimum wage provision of FLSA did not apply to inmates of private prison).

[126] *See generally Hale (II)* at 1393 (The question the court approached is "whether inmates working for a prison, in a program structured by the prison pursuant to state law requiring prisoners to work at hard labor, are 'employees' of the prison within the meaning of the FLSA.").

[127] *Id.* at 1394.

[128] *Id.* at 1394—1395.

[129] This is in part due to the numerous categories of prison labor which were discussed in Part I of this paper. Not every Circuit Court has had the chance to consider all six categories of prison work.

intent points in favor of extending coverage to inmate workers. Part III will also argue that distinctions such as voluntary vs. compelled and inside vs. outside constitute arbitrary and formalistic dichotomies that should be abandoned by the Supreme Court in resolving this split. Finally, Part IV will propose a new "economic reality" test for the Court to adopt in the prison labor context.

III. HOW THE SUPREME COURT SHOULD INTERPRET CONGRESSIONAL INTENT

A. Congressional Intent & The Purpose of the FLSA

In order to determine congressional intent, the Circuit Courts have gone back to the stated purpose of the FLSA. In particular, courts have interpreted the following two goals to be the main purposes of the Act: (1) The "maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" and (2) eliminating "unfair method[s] of competition in commerce."[130] The following paragraphs will discuss these goals in turn and argue that these two stated purposes of the FLSA should lead the Supreme Court to take a stance on the circuit split in favor of incarcerated workers. This section will then introduce a third goal which has so far been overlooked– that of preventing labor strikes—and argue that this purpose too points in favor of extending FLSA coverage to incarcerated workers.

1. Goal 1: Ensure Minimum Standards of Living

With respect to the first goal, the Circuit Courts that have addressed the argument have all found it inapplicable to the prison worker context. The living standards argument—which the Second Circuit rejected in *Carter*—contends that the FLSA does not apply to prisoners because their living conditions are determined by state policy and thus "have no need for bargaining strength since their right to work in the first place is a matter of legislative grace."[131] For example, the Ninth Circuit in *Hale (II),* the opinion stated "we agree with Arizona that the problem of substandard living conditions, which is the primary concern of the FLSA, does not apply to prisoners, for whom clothing, shelter, and food are provided by the prison."[132] Similarly the Seventh Circuit in *Vanskike*, wrote "the payment of minimum wage for a prisoner's work in prison would not further the policy of ensuring a 'minimum standard of living" and that "[p]risoners' basic needs are met in prison, irrespective of their ability to pay."[133]

The Supreme Court must recognize that this argument is incomplete because it presumes that incarcerated individuals will not

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[130] 29 U.S.C. § 202(a) (2000).

[131] *Carter*, 735 F.2d at 13 (Though the court recognized the "surface appeal of this logic," it explicitly rejected it, finding that it was not dispositive.).

[132] *Hale (II)* at 1396.

[133] *Vanskike*, 974 F.2d at 810; *see also* Alexander v. Sara, Inc., 721 F.2d 149, 150 (5th Cir. 1983) (holding that the labor of inmates sentenced to hard labor belongs to the institution, so there is no need to protect "the standard of living and general well-being of the worker in American industry"); Miller v. Dukakis, 961 F.2d 7, 9 (1st Cir. 1992) (holding that "prisoners, are cared for (and their standard of living is determined, within constitutional limits) by the state.").

someday reenter the labor force. According to a 2020 report published by the Brennan Center for Justice,[134] formerly incarcerated individuals earn approximately $6,700 annually, while their similarly situated peers earn approximately $13,800.[135] At the time of the report, there were an estimated 7.7 million formerly incarcerated individuals alive in the U.S. The report calculated that when applying the "average earnings penalty," formerly incarcerated individuals lose out on around $55.2 billion annually.[136] Upon release, formerly incarcerated people struggle to achieve "minimum standards of living" due to institutional barriers to employment, housing, and government benefits.[137] Coupled with the existing data on the positive correlation between poverty and crime,[138] incarceration only leads to further impoverishment which significantly reduces the chances of successful reintegration and increasing the chances of ending back up in prison, once again using taxpayer money to incarcerate the same offenders.

A second important consideration is that contrary to the Seventh Circuit's position in *Vanskike,* the basic needs of inmate workers are often *not* met in prison and *do* depend on their ability to pay. Wages earned by inmate workers are generally placed in inmate trust funds or go directly to their commissary accounts.[139] Inmates across states rely on these funds to purchase basic requirements such as food, clothing, medicine, and hygiene products from the commissary that are not otherwise adequately provided by the prison. In a 2018 report on commissaries, the Prison Policy Initiative noted that commissaries "present yet another opportunity for prisons to shift the costs of incarceration to incarcerated people and their families, often enriching private companies in the process."[140] By examining data from commissaries in Illinois, Washington, and Massachusetts, the report

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[134] TERRY-ANN CRAIGIE ET AL., CONVICTION, IMPRISONMENT, AND LOST EARNINGS: HOW INVOLVEMENT WITH THE CRIMINAL JUSTICE SYSTEM DEEPENS INEQUALITY (2020) https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal [https://perma.cc/MZ46-PYTU].

[135] *Id.* at 14.

[136] *Id.* at 15; *see also id.* at 6 ("These earnings losses worsen economic disparities between Black, Latino, and white communities. White people who have a prison record see their earn-ings trend upwards, while formerly imprisoned Black and Latino people experience a relatively flat earnings trajectory. Because Black and Latino people are also overrepresented in the criminal justice system, these economic effects are concentrated in their communities and exacerbate the racial wealth gap.").

[137] *See id.* at 4 ("This report demonstrates that more people than previously believed have been caught up in the system, and it quantifies the enormous financial loss they sustain as a result; those who spend time in prison miss out on more than half the future income they might otherwise have earned."); *see also id.* at 13 ("As explored in more detail below, some jobs require occupational licenses, and thousands of rules limit access to licenses for people with a criminal record. . . . According to one 2018 survey, 95 percent of employers conduct some form of background check on job candidates. . . .[A]pplicants with a criminal record are around 50 percent less likely to receive a call-back interview, depriving them of even the chance to explain their history.").

[138] Bernadette Rabuy & Daniel Kopf, *Prisons Of Poverty: Uncovering The Pre-Incarceration Incomes Of The Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015) https://www.prisonpolicy.org/reports/income.html [https://perma.cc/A9YH-Y7VX] ("[I]n 2014 dollars, incarcerated people had a median annual income of $19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages.").

[139] *See* Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL'Y INITIATIVE (May 2018) https://www.prisonpolicy.org/reports/commissary.html [https://perma.cc/WG5Q-E8YP].

[140] *Id.*

found that food and hygiene products made up the bulk of purchases by inmates.[141]

Lastly, providing or withholding minimum wage from incarcerated workers directly impacts the standards of living of free-world citizens and workers alike. Incarcerated workers are not completely cut off from their families and communities. One of the biggest impacts of incarceration on families is the loss of financial support. When more than one in four black men—including fathers—are estimated to be incarcerated at least once over their lifetime[142], the effects of incarceration tear through families[143], and whole communities. Poverty is thus allowed to spread laterally as community members lose the ability to support one another, dampening economic wellbeing overall for societies far beyond the prison walls.

2. Goal 2: Eliminating Unfair Competition

Circuits have been more divided on whether concerns of "unfair competition" as outlined in the FLSA are applicable to prisoners. The *Vanskike* court recognized that "it cannot be denied . . . the unfair competition rationale, broadly conceived, triggers some concerns in the context of prison labor."[144] The court noted, perceptively, that the unfair competition rationale would extend beyond the production of goods and to services such as janitorial or kitchen work, "For every prisoner who is assigned to sweep a floor or wash dishes for little or no pay, there is presumably someone in the outside world who could be hired to do the job . . . ."[145] The court feared that taken to its logical conclusion, this approach to the FLSA's second purpose would require that all prisoners be paid minimum wages for *any* work done in prison. This result, it concluded, could not have been contemplated by Congress.[146] In contrast, in *Carter*, the court determined that minimum wage protections were important to

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[141] *Id.* ("In FY 2016, people in Massachusetts prisons purchased over 245,000 bars of soap, at a total cost of $215,057. That means individuals paid an average of $22 each for soap that year, even though DOC policy supposedly entitles them to one free bar of soap per week. Or to take a different example: the commissary sold 139 tubes of antifungal cream."). Moreover, prison commissaries often sell goods for far higher prices than they would be sold for in the outside world. *See* Cao, *supra* note 45, at 20–21 (stating that "[p]rison vendor companies provide exorbitantly priced goods and services to prisons, including basic food items like cereal and canned soup sold for five times its free world retail price.").

[142] *See* THOMAS P. BONCZAR & ALLEN J. BECK, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON, BUREAU OF JUST. STAT. 3 (Mar. 1997) https://bjs.ojp.gov/content/pub/pdf/Llgsfp.pdf [https://perma.cc/G4RG-352X] ("An estimated 28.5% of black men, 16.0% of Hispanic men, and 4.4% of white men are expected to serve a State or Federal prison sentence. In general, women have lower lifetime chances of incarceration than men; however, black women (3.6%) have nearly the same chance as white men (4.4%) of serving time in prison . . . .").

[143] LAUREN E. GLAZE & LAURA M. MARUSCHAK, PARENTS IN PRISON AND THEIR MINOR CHILDREN, BUREAU OF JUST. STAT. (Aug. 1, 2009) https://static.prisonpolicy.org/scans/bjs/pptmc.pdf [https://perma.cc/N8MR-EX3R] ("Parents held in the nation's prisons—52% of state inmates and 63% of federal inmates—reported having an estimated 1,706,600 minor children, accounting for 2.3% of the U.S. resident population under age 18.").

[144] *Vanskike*, 974 F.2d at 812.

[145] *Id.* at 811.

[146] *See id.* (The court argued that this proposition was improper because Congress had already passed the Ashurst-Sumners Act for the purposes of regulating unfair competition in the prison context. If this proposition was accepted, it would render the FLSA superfluous).

eliminate unfair competition, among employers as well as workers looking for jobs, "we believe that courts should refrain from exempting a whole class of workers, based on technical labels, from the coverage of the FLSA, because such action would have the potential for upsetting the desired equilibrium in the workplace."[147] In the absence of Congressional or Supreme Court guidance, courts are also unclear on what exactly the FLSA is preventing unfair competition *of*; whether it refers to unfair competition in the product market or in the job market, with some courts only considering one over the other.[148] Yet still, some courts have rejected the "unfair competition" rationale entirely.[149]

The Supreme Court should interpret the "unfair competition" rationale in favor of extending coverage to prison workers in a manner similar to the Fifth Circuit in *Watson* and the Second Circuit in *Carter*. The holdings in *Carter* and *Watson*, however, were narrowly limited to those inmate workers in certain work-release programs. Subsequent Circuit Court opinions that have denied coverage and rejected the "unfair competition" rationale have done so by distinguishing the situation of the inmate-plaintiff from those in *Carter* and *Watson*.[150] However, even where prisoners are working for industries, whether publicly or privately owned, the risk of unfair competition does not disappear. If inmates were not producing license plates for state or federal prison industries, these same public corporations would employ free-world laborers. Indeed the Seventh Circuit recognized this logic, "Assuming… that [Vanskike] works to manufacture license plates, then the state (as producer) has an advantage over other potential producers of license plates in the economy, because it is able to produce that item at low cost."[151] The Seventh Circuit went on to acknowledge that this rationale would even extend to prison housework, "[f]or every prisoner who is assigned to sweep a floor or wash dishes for little or no pay, there is presumably someone in the outside world who could be hired to do the job…"[152] The result that this rationale extends to all sectors of prison labor is not a slippery slope as the court in *Vanskike*

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[147] *Carter*, 735 F.2d at 13; *see also Watson*, 909 F.2d at 1555 (emphasis added) ("[C]onstruction contractors in the area could not compete with Jarreau's prices because they had to pay at *least* minimum wage for even unskilled labor, not to mention all of the above listed overhead costs avoided by Jarreau. It takes little imagination to recognize that job opportunities for non-inmate workers in the area was severely distorted by the availability of twenty dollar per day workers from the parish jail . . . .").

[148] *Hale (II)* at 1396 ("Even though 'unfair competition,' broadly conceived, encompasses both product and labor markets, the effect in the labor market is what prompted congressional concern with unfair competition in the FLSA."); *but see Watson*, 909 F.2d at 1554 (arguing that "[t]he Act was drafted . . . to eliminate unfair competition among employers competing for business in the market and among workers looking for jobs").

[149] *Miller*, 961 F.2d at 9 ("payment of sub-minimum wages . . . presents no threat of unfair competition to other employers, who must pay the minimum wage to their employees, because the Treatment Center does not operate in the marketplace and has no business competitors."); *Cf. Gilbreath*, 931 F.2d at 1326 (rejecting the unfair competition argument on the grounds that the main purpose of prison labor is vocational training rather than profit).

[150] *Vanskike,* 974 F.2d at 8108 (*"Carter* and *Watson* involved situations quite different from the one here. In both cases the prisoners performed work for private, outside employers.").

[151] *Id.* at 811.

[152] *Id.*

suggests. Rather, it's an accurate reflection of the economic reality faced by outside corporations and workers.

It is difficult to deny that prisoners are still part of the national economy when the value of prison industrial output alone is estimated to be at least $2 billion.[153] In the past few years, congress members have expressed concerns over the unfair competition posed by UNICOR.[154] Small businesses and other privately owned corporations have struggled to compete with UNICOR for government contracts, and have been forced to close plants or lay off workers.[155] While private companies pay minimum wage, provide medical insurance, 401(k) plans, as well vacation days, UNICOR, as well as state prison industries, do not have to pay out any of these.[156] Further, while some courts[157] have tried to argue that prison labor primarily serves a rehabilitative and vocational purpose rather than a pecuniary one, state and federal prison industries that are shielded from private competition, have no incentives to use state-of-the-art manufacturing or production technologies. As a result, prisoners employed in these programs do not gain modern job training that would allow them to obtain employment upon release.[158]

As another indicator of congressional intent, in wake of the Act's passage, the House explained in a report, "[n]o employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wages … higher than those applicable to his competitors. No employee . . . need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes."[159] After considering this report, Judge Nelson in his dissent in *Gilbreath v.*

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[153] Wagner, *supra* note 18 ("Minimum estimate of annual value of prison and jail industrial output: $2 billion").

[154] Derek Gilna, *Businesses, Members of Congress Not Happy with UNICOR*, PRISON LEGAL NEWS (Mar. 15, 2014), https://www.prisonlegalnews.org/news/2014/mar/15/businesses-members-of-congress-not-happy-with-unicor [https://perma.cc/LM6D-C9L3] ("UNICOR has become not only a job training program but a manufacturing behemoth that employs some 12,300 prisoners and made approximately $606 million in gross revenue in fiscal year 2012. . . . Indeed, several companies have lost federal contracts due to competition from UNICOR, resulting in job losses among freeworld workers."); *see also* H.R.2098, 113th Cong. (2013), https://www.congress.gov/bill/113th-congress/house-bill/2098 [https://perma.cc/BF6Z-5RLR] (Congress introduced H.R. 2098, Federal Prison Industries Competition in Contracting Act of 2013, which would require UNICOR's board of directors to "not later than September 30, 2014, increase the maximum wage rate for inmates performing work for or through Federal Prison Industries to an amount equal to 50 percent of the minimum wage," and "not later than September 30, 2019, increase such maximum wage rate to an amount equal to such minimum wage.").

[155] Gilna, *supra* note 154 ("American Apparel has to compete head-to-head with UNICOR on almost all of its contracts with the federal government, and the company said unfair competition from low-paid prisoner labor forced it to close a plant in May 2012 and lay off 175 workers.").

[156] *Id.*

[157] *Gilbreath*, 931 F.2d at 1332.

[158] Gilna, *supra* note 154 ("Manufacturing in America has changed over the decades but UNICOR does not use state-of-the-art manufacturing techniques because it has no need or motivation to do so – even though this means prisoners employed in UNICOR programs don't receive modern job training that will help them obtain post-release employment.").

[159] *Gilbreath,* 931 F.2d at 1332 (Nelson, J., dissenting) (citing H.R. Rep. No. 2182, 75th Cong., 3d Sess. 6–7 (1938)).

Cutter Biological, Inc. correctly concluded that "Congress intended the FLSA to have the widest possible impact in the national economy…[t]his national purpose is subverted when a court permits one company within an industry to avoid the strictures of the Act."[160] Taking into account the record of real-world factory shutdowns and layoffs due to anti-competitive behavior by prison industries, the existing caselaw, as well as evidence of Congress's intent in passing the Act, the Supreme Court should find that the "unfair competition" rationale of the FLSA necessarily applies to the prison labor context, and encompasses both the product and labor market.

3. A third overlooked Goal: The Prevention of Labor Strikes

The relevant portion of the FLSA reads that one of its aims is to eliminate "the existence…of labor conditions detrimental to the maintenance of the minimum standard of living" which lead to "labor disputes burdening and obstructing commerce and the free flow of goods in commerce."[161] No circuit court has yet addressed the congressional concern over "labor disputes," however, such concerns are equally relevant to prison workers and free-world workers alike.

Only a few years ago on September 9th, 2016, the U.S. experienced the largest prison strike in history.[162] As many as 50,000[163] prisoners across twenty-four states staged a coordinated strike and refused to show up for work on the 45th anniversary of the infamous Attica Uprising in New York.[164] Demands generally focused on "fair pay for their work, humane living conditions, and better access to education and rehabilitation programs."[165] The national strike included not only workers' strikes, but

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[160] *Id.* at 1334.

[161] 29 U.S.C.A § 202(a)(4) (West).

[162] Beth Schwartzapfel, *A Primer on the Nationwide Prisoners' Strike*, THE MARSHALL PROJECT (Sep. 27, 2016) [hereinafter Schwartzapfel, *Prisoners' Strike*], https://www.themarshallproject.org/2016/09/27/a-primer-on-the-nationwide-prisoners-strike [https://perma.cc/3W4Q-9K2L] ("According to strike organizers, more than 24,000 inmates in at least 12 states did not show up for work that day, and protests are ongoing in a handful of places."); *see also 2016 Prison Strike Call To Action,* INCARCERATED WORKERS ORG. COMM. (Jan. 11, 2017) https://incarceratedworkers.org/resources/2016-prison-strike-call-action [https://perma.cc/3TT2-4WPD] ("On September 9th of 1971 prisoners took over and shut down Attica, New York State's most notorious prison. On September 9th of 2016, we will begin an action to shut down prisons all across this country. We will not only demand the end to prison slavery, we will end it ourselves by ceasing to be slaves.").

[163] Max Blau & Emanuella Grinberg, *Why US Inmates Launched a Nationwide Strike*, CNN (Oct. 31, 2016), https://www.cnn.com/2016/10/30/us/us-prisoner-strike/index.html [https://perma.cc/2329-B7YW].

[164] *Id.*; *see also* History.com Editors, *Uprising at Attica Prison Begins,* HISTORY (July 21, 2010), https://www.history.com/this-day-in-history/riot-at-attica-prison [https://perma.cc/W4NM-823E] (The Attica Prison Uprising, also known as the Attica Prison Massacre, refers to the events of September 9, 1971, where around 1,200 prisoners seized control of the maximum-security Attica Correctional Facility near Buffalo, New York and held thirty-nine prison guards and employees hostage. When "negotiations stalled, state police and prison officers launched a disastrous raid on September 13, in which 10 hostages and 29 inmates were killed in an indiscriminate hail of gunfire. Eighty-nine others were seriously injured.").

[165] Schwartzapfel, *Prisoners' Strike*, *supra* note 162; *see also* INCARCERATED WORKERS ORG. COMM., *supra* note 162.

also boycotts of prison commissaries and other paid services, peaceful demonstrations, and hunger strikes.[166]

Two years later, prisoners organized a second nationwide strike. The 2018 prison strike started on August 21st and ended on September 9th and consisted of work stoppages and hunger strikes. The strike was partially in response to prison riot at the Lee Correctional Institution that occurred in April of that year wherein seven inmates were killed.[167] The strike was organized by Jailhouse Lawyers Speak and the Incarcerated Workers Organizing Committee (IWOC).[168] On the official IWOC website, the second demand out of a list of ten calls for "[a]n immediate end to prison slavery," and states "[a]ll persons imprisoned in any place of detention under United States jurisdiction must be paid the prevailing wage in their state or territory for their labor."[169] As Amani Sawai, a spokesperson for Jailhouse Lawyers Speak, explained, "The main leverage that an inmate has is their own body…[I]f they choose not to go to work and just sit in in the main area or the eating area, and all the prisoners choose to sit there and not go to the kitchen for lunchtime or dinnertime, if they choose not to clean or do the yardwork, this is the leverage that they have. Prisons cannot run without prisoners' work."[170] Nationwide work stoppages, boycotts, and hunger strikes in prison and prison industries are a clear burden and obstruction to the free flow of commerce, bringing these events plainly within the scope of the kinds of labor disputes the FLSA was intended to address. Thus far, no federal court opinion considering FLSA

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[166] Schwartzapfel, *Prisoners' Strike*, *supra* note 162 ("In one facility in Michigan, several hundred inmates staged a peaceful protest march in the yard, but after the march ended and the protesters returned to their units, chaos broke out, with several units being vandalized. In South Carolina, some inmates are organizing to stop paying the prison for goods and services like commissary items and phone calls. There were also reports of hunger strikes in several facilities."); *see also* Alice Speri, *Prisoners In Multiple States Call For Strikes To Protest Forced Labor*, THE INTERCEPT (April 4, 2016), https://theintercept.com/2016/04/04/prisoners-in-multiple-states-call-for-strikes-to-protest-forced-labor/ [https://perma.cc/T8JY-DTT7] ("'Beginning on April 4, 2016, all inmates around Texas will stop all labor in order to get the attention from politicians and Texas's community alike.'").

[167] German Lopez, *America's Prisoners Are Going on Strike in At Least 17 States*, VOX, Aug. 22, 2018, https://www.vox.com/2018/8/17/17664048/national-prison-strike-2018 [https://perma.cc/QP5S-Q96T] ("In total, seven inmates were killed and at least 17 were seriously injured, according to the Associated Press. An inmate told the AP that bodies were 'literally stacked on top of each other,' claiming that prison guards did little to stop the violence between inmates.").

[168] *Id.*

[169] *Prison Strike 2018,* INCARCERATED WORKERS ORG. COMM., https :// incarceratedworkers.org/campaigns/prison-strike-2018 [https ://perma.cc/7VAA-TZLV].

[170] Lopez, *supra* note 167; *see also* Brooke Fryer, *US Inmates Sent to Solitary Confinement Over 'Prison Slavery' Strike*, NITV, Sep. 5, 2018, https://www.sbs.com.au/nitv/nitv-news/article/2018/09/05/us-inmates-sent-solitary-confinement-over-prison-slavery-strike [https://perma.cc/YQU4-L934] ("Inmates across the United States have been sent to solitary confinement for participating in organizing a nationwide prison strike."); Jamiles Lartey, *US Inmates Claim Retaliation by Prison Officials as Result of Multi-State Strike*, THE GUARDIAN (Aug. 31, 2018), https://www.theguardian.com/us-news/2018/aug/31/us-inmates-prison-strike-retaliation [https://perma.cc/Q45C-8GFB] ("It is claimed that inmates – especially those seen as organizers – have been subject to solitary confinement, revocation of communication privileges and long-distance transfers, in attempts to weaken the effects of work stoppages and to chill dissent.").

protections for prison laborers has had the benefit of reflecting upon these two massive nationwide strikes which have occurred within a two-year span of each other. Any further adjudication on the matter by the federal courts and the Supreme Court must consider these events and find the third goal of preventing labor disputes on par with the other two primary purposes of the FLSA.

B. Congressional Intent & The Ashurst-Sumners Act

A seemingly compelling argument that courts have made to reject claims of unfair competition involve readings of the Ashurst-Sumners Act[171] in conjunction with the FLSA.[172] The Ashurst-Sumners Act of 1935 was passed three years prior to the FLSA. The Ashurst-Sumners Act made it unlawful to knowingly transport in interstate or foreign commerce goods made by prison labor, subject to limited exceptions for agricultural commodities, parts for the repair of farm machinery, or products manufactured for government use.[173] In *Vanskike*, the Seventh Circuit held that "[t]he second purpose of the FLSA coincides with the single purpose of the Ashurst–Sumners Act—preventing unfair competition—and the latter statute, by its exception for goods used by government, belies the notion that any and all uses of prison labor by the government unduly obstruct fair competition."[174] Subsequent opinions by the Ninth and Fourth Circuits in *Hale (II)* and *Harker v. State Use Industries* (4th Cir. 1993) have employed the same reasoning.[175] Even assuming that this logic is sound, it would only exempt a small subset of prison labor from the FLSA—those prisoners working in state and federal prison industries.[176] Additionally, the existence of a legal carve-out for government use does not mean that the government practice of using prison made goods does *in actuality* pose the same risks of unfair competitions as private usage of prison labor. As the court in *Vanskike* opined, Congress may have allowed this "governmental advantage" as a means of partially recuperating the costs of incarceration to the state.[177] In any case, providing minimum wage protections would not eliminate this governmental advantage, as state and federal prison industries would still be ensured a constant source of labor, and would not be held responsible for other benefits such as paid vacation days or 401(k) plans and so on, that would have to be extended to free-

[171] Ashurst-Sumners Act, Pub. L. No. 74-215, 49 Stat. 494 (1935) (codified as amended at 18 U.S.C. §§ 1761-1762).

[172] Lang, *supra* note 20 at 197.

[173] 18 U.S.C. § 1761(b) ("This chapter shall not apply to agricultural commodities or parts for the repair of farm machinery, nor to commodities manufactured in a Federal, District of Columbia, or State institution for use by the Federal Government, or by the District of Columbia, or by any State or Political subdivision of a State or not-for-profit organizations.").

[174] *Vanskike*, 974 F.2d at 811.

[175] *Hale (II)* at 1394; *Harker*, 990 F.2d at 134 ("Under Harker's interpretation, Congress would have passed the FLSA knowing that it made Ashurst-Sumners superfluous. What need would there be to criminalize the transport of prison-made goods if they did not enjoy the unfair economic advantage of being produced by cheap (non-FLSA) labor?").

[176] Part I.D, I.E., and I.F of this paper provides an in-depth view of prison industry work at the state and federal levels. The Act says nothing about prison "housework" which constitutes the majority of prison labor, nor does it address work-release programs. A carveout is made for private prison industries operating under PIES on the condition that workers are compensated with prevailing wages.

[177] *Vanskike* 974 F.2d at 811–812.

world workers. Lastly, the temporal context of the Ashurst-Sumners Act is relevant to deciphering congressional intent. At the time of its passage in 1935, the total prison population was around 144,180.[178] By 2020, this number has increased by a factor of nine to around 1.2 million.[179] In comparison the total American labor force in 1936 was 53.7 million.[180] Before the start of the COVID-19 pandemic, this number had reached a peak of 164.4 million persons in February 2020, representing an increase of three times.[181] As the data illustrates, prison laborers today represent a far greater fraction of the total U.S. labor force than they did at the time of the Act's passage. In other words, a significantly greater fraction of working adults today—likely far greater than Congress could have contemplated in 1935—are left outside the reaches of the FLSA and are subject to otherwise illegal employment conditions and compensation schemes, resulting in widespread consequences for both the product and labor markets.

IV. THE SUPREME COURT MUST REJECT THE USAGE OF BRIGHT-LINE RULES

A. Bright Line Rules: Voluntary vs. Compelled Labor

In resolving the circuit split, the Supreme Court must abandon voluntariness as a factor in deciding the issue of FLSA coverage to prisoners. The idea that coverage should hinge on whether or not the inmate labor was "voluntary" or "compelled" was influentially articulated by the Seventh Circuit in *Vanskike*. In its opinion, the court found backing for this distinction in the loophole[182] of the 13th Amendment, "Indeed, the Thirteenth Amendment's specific exclusion of prisoner labor supports the idea that a prisoner performing required work for the prison is actually engaged in involuntary servitude, not employment."[183] In *Gilbreath*, the Ninth Circuit similarly ruled "it is highly implausible that Congress intended the FLSA's minimum wage protection be extended to felons serving time in prison. This is a category of persons . . . whose civil rights are subject to suspension and whose work in prison could be accurately characterized in an economic sense as involuntary servitude."[184] Later, in *Hale (II)*, the Ninth Circuit again reiterated "Convicted criminals do not have the right freely to sell their labor and are not protected by the Thirteenth Amendment against involuntary servitude. Because the

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[178] PATRICK A. LANGAN ET AL., HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS YEAREND 1925–86 6 (May 1998), https://www.ojp.gov/pdffiles1/Digitization/111098NCJRS.pdf [https://perma.cc/M7AY-MUHU].

[179] *See* BUREAU JUST. STAT., *supra* note 11.

[180] STANLEY LEBERG ET. AL, LABOR FORCE, EMPLOYMENT, AND UNEMPLOYMENT, 1929–39: ESTIMATING METHODS, U.S. BUREAU OF LAB. STAT. 51 (JULY 1948), https://www.bls.gov/opub/mlr/1948/article/pdf/labor-force-employment-and-unemployment-1929-39-estimating-methods.pdf [https://perma.cc/6NWS-UAAT].

[181] *Civilian Labor Force Level [CLF16OV],* FRED, FEDERAL RESERVE BANK OF ST. LOUIS https://fred.stlouisfed.org/series/CLF16OV [https://perma.cc/9YGP-E93P] (last accessed June 10, 2023).

[182] U.S. CONST. amend. XIII, § 1 (Section 1 of the Thirteenth Amendment provides "[n]either slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

[183] *Vanskike*, 974 F.2d at 809.

[184] *Gilbreath*, 931 F.2d at 1324.

plaintiffs in *Hale (II)* were compelled to perform hard labor under Arizona law, they were not comparable to free-world employees.[185] The Fourth Circuit decided *Harker v. State Use Industries* based on similar logic, "[b]ecause the inmates are involuntarily incarcerated, the DOC wields virtually absolute control over them to a degree simply not found in the free labor situation of true employment."[186] In *Henthorn v. Department of Navy*, the D.C. Circuit Court of Appeals also signed on to the dichotomy, explaining, "In cases such as *Watson* and *Carter* where the prisoner is voluntarily selling his labor in exchange for a wage paid by an employer other than the prison itself, the Fair Labor Standards Act may apply…however, in cases such as *Hale* and *Vanskike,* in which the prisoner is legally compelled to part with his labor as part of a penological work assignment…the prisoner may not state a claim under the FLSA, for he is truly an involuntary servant to whom *no* compensation is actually owed."[187]

Notably, the FLSA does not explicitly require any degree of voluntariness or agency that the worker must possess in order to qualify as an employee. The agency of the worker does not have any bearing on the prevalence of risks for unfair competition or substandard living conditions – in other words, this factor does not hold any consequences for commerce or the economy. Following the logic in *Henthorn* would result in disparities in the application of the FLSA from state to state, depending on whether states have mandatory hard labor laws. Where prisoners are commonly transferred between facilities across state lines, this arbitrary deprivation of employee protections is even more apparent. Inmates in different jurisdictions could be performing the same exact labor and working the same hours, however, because in one state a conviction carries an additional sentence of hard labor, one inmate would get minimum wage protections under federal law and the other would not. Creating such a distinction thus allows states to evade federal law by implementing their own hard labor statutes. This results in an encroachment on Congress's power and produces clear-cut dilemmas of vertical federalism. For these reasons, the voluntary vs. compelled distinction that many circuit courts have adopted or endorsed must be rejected by the Supreme Court.

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[185] *Hale (II)* at 1394 (internal quotations omitted) ("Under Arizona law, the state has the authority to require that each able-bodied prisoner . . . engage in hard labor for not less than forty hours per week").

[186] *Harker*, 990 F.2d at 133; *see also* Henthorn v. Dep't of Navy, 29 F.3d 682, 686 (D.C. Cir. 1994) ("We hold that a prerequisite to finding that an inmate has 'employee' status under the FLSA is that the prisoner has freely contracted with a non-prison employer to sell his labor"); *Watson*, 909 F.2d at 1556 ("By stark contrast, Watson and Thrash were not required to work as a part of their respective sentences. Therefore, their labor did not "belong" to the Livingston Parish Jail and was not legitimately at the disposal of the Sheriff or the Warden."); *Cf. Carter*, 735 F.2d at 15 (2d Cir. 1984) ("While perhaps not the full panoply of an employer's prerogatives, this may be sufficient to warrant FLSA coverage. . . . We hold only that Carter has demonstrated genuine issues regarding material facts as to whether he is covered by the FLSA, and we emphatically hold that the fact that he is a prison inmate does not foreclose his being considered an employee for purposes of the minimum wage provisions of the FLSA").

[187] Henthorn v. Dep't of Navy, 29 F.3d 682, 686 (D.C. Cir. 1994).

B. Bright Line Rules: Inside vs. Outside of Prison Walls

Most circuits have found that whether the labor was performed outside or inside the prison to be a deciding factor in the issue of coverage. The inside vs. outside distinction has two meanings: (1) whether the work was physically located inside or outside the prison walls and (2) whether the work was done for outside or inside employers. In a majority of the cases where prison laborers were found not to be "employees" under the FLSA, the prisoners worked for prison authorities within the prison compound.[188] Where courts *have* found prison laborers to be covered by the FLSA, the workers were employed outside the prison for private employers.[189] For example, in *Carter* the Second Circuits limited its holding to "outside employers."[190] In *Gilbreath v. Cutter Biological, Inc.,* the Ninth Circuit rigidly held that even if inmates were working for a private employer, if the physical location of the work was within the prison, the FLSA would not apply.[191]

The only court to reject the inside vs. outside dichotomy was the D.C. Circuit in *Henthorn v. Department of Navy.* In the opinion, the D.C. Circuit noted that either type of inside vs. outside distinction "raises some difficult questions."[192] The court went on to ask rhetorically,

> [S]hould a prisoner working for a private employer who sets up shop within the prison compound not be paid minimum wage because he does not leave the prison grounds to do his work, while a prisoner performing the same work for the same employer but in a facility outside the prison should receive FLSA protection? . . . In the same manner, should a prisoner working in a privately-run bookstore outside the prison be paid the minimum wage, but not an inmate working outside the prison in a public library?[193]

Though the court eventually decided against the inmate-plaintiff, *Henthorn* accurately highlighted the formalistic nature of such a dichotomy. The dichotomy sheds no light on the substance of the employer-employee relationship or the actual work being carried out. The Supreme Court should find, as in *Henthorn*, that such a distinction provides no

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[188] *Id.* at 685 ("Cases that have held that prisoner-laborers were not 'employees' under the FLSA have generally involved inmates working for prison authorities or for private employers within the prison compound.").

[189] *Id*. ("[C]ases in which courts have found that the FLSA does govern inmate labor have involved prisoners working outside the prison for private employers."); *see also Carter*, 735 F.2d at 13–14 (prisoner working as a teaching assistant at a community college that paid his wages directly to him could be an 'employee' under FLSA).

[190] *Carter,* 735 F.2d at 14—15.

[191] *Gilbreath,* 931 F.2d at 1325–31 (holding that inmates employed at a private plasma center located within the prison were not protected by the FLSA); *see also Danneskjold*, 82 F.3d at 39 (The Second Circuit also modified *Carter* in a subsequent holding and rejected the inside vs. outside as well as voluntary vs. compelled distinction within the context of "services" by holding that "the FLSA does not apply to prison inmates in circumstances in which their labor provides services to the prison, whether or not the work is voluntary, whether it is performed inside or outside the prison, and whether or not a private contractor is involved.").

[192] Henthorn v. Dep't of Navy, 29 F.3d 682, 685 (D.C. Cir. 1994).

[193] *Id.* at 685–686.

adequate basis for deciding the question of FLSA coverage. In lieu of these various dichotomies that the Circuit Courts have fashioned, the following section will propose a new "Economic Reality" test for the Court to adopt in the prison laborer context.

V. A NEW "ECONOMIC REALITY" TEST: A "BUT-FOR" TEST

As established in the preceding sections, the FLSA's stated purposes, preventing unfair competition, ensuring minimum standards of living, and preventing labor strikes apply to all categories of prison labor that were outlined in Part I. After establishing as a general principle that incarcerated workers *do* come within the scope of the FLSA, the next step is to determine a method to evaluate which work satisfies the test for employment for the purposes of FLSA's minimum wage provisions. As Part IV showed, the bright-line rules that the Circuit Courts have resorted to thus far have been proven to be formalistic and unhelpful and must be replaced with a new test.

Based on the premise that the stated goals of the FLSA apply with equal force to prison laborers and free-world workers, a straightforward and simple test the Supreme Court should adopt is whether, in connection with the labor performed, an incarcerated worker would be considered an "employee" under the FLSA *but for* their inmate status. In other words, if a certain kind of employment would be protected by the FLSA in the free world, it should also be protected within the prison system. By using this approach that is based on an anti-discrimination framework between incarcerated and non-incarcerated workers, the Supreme Court need not provide any further rulings on what specific test for "employment" the lower courts are to adopt. Circuits that have adopted the *Bonnette* factors may continue using those factors while other Circuits that rely on other common law definitions for "employee" may use those. Where the FLSA does not exempt prisoners as a class nor has Congress ever referred to them in subsequent changes to the Act, the main goal is to prevent any discriminatory application of the Act between inmates and non-inmates. Under this test, it may still be validly found that certain inmates do not qualify as employees. For example, in *Danneskjold v. Hausrath* (2d Cir. 1996),[194] Danneskjold worked for a college consortium as a clerk-tutor where he assisted and tutored student inmates and assisted professors with academic matters and corrected papers. The Second Circuit found that Danneskjold did not qualify as an "employee." Where in the non-prison context, teachers and graduate teaching assistants are exempt from the FLSA,[195] under the new *but for* test, Danneskjold may likewise be found to not qualify as an employee under the Act. This test provides uniformity and is a simple solution as it incorporates the test for "employee" that courts have already been accustomed to using in the non-prison context. Furthermore, it ensures that incarcerated workers are not punished for

[194] *Danneskjold*, 82 F.3d at 40.

[195] *See Fact Sheet #17S: Higher Education Institutions and Overtime Pay Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB. (2019), https://www.dol.gov/agencies/whd/fact-sheets/17s-overtime-educational-institutions [https://perma.cc/68L3-EZ8C].

incarceration itself by being further denigrated to the status of involuntary servitudes.

CONCLUSION

While the U.S. prison system is a government institution that is used to regulate crime, it is also a network of facilities across the country that harbors a hidden and unpaid labor force. It comprises hundreds and thousands of full-time incarcerated workers who, at minimum, produce $2 billion worth of industrial output while receiving anywhere from zero to a few dollars an hour.

Our prison system relies on incarcerated workers to fund itself by assigning individuals to "prison housework" and by forcing workers to contribute a portion of their earnings to room and board. Corporations that are focused on increasing their bottom-line try to save on labor costs by replacing free world workers with incarcerated workers. Even city and state governments, especially in the face of labor shortages and budget cuts, have routinely used incarcerated workers to provide municipal services, once again, without the benefit of minimum wage and other employee protections that are otherwise guaranteed to workers by the FLSA.

Historically, incarcerated workers have not been covered by the FLSA. Since its enactment in 1938, both Congress and the Supreme Court has been silent on whether incarcerated workers are included within the definition of "employee" under the FLSA. Furthermore, the Circuit Courts have failed to agree upon any concrete test to determine the FLSA coverage for incarcerated workers. Instead, they have developed conflicting standards and formalistic distinctions. The result has been the creation of a system that ensures a constant influx of individuals who may be subjected to involuntary servitude.

The Supreme Court must resolve the discrepancies between the Circuit Courts and rule in favor of extending the FLSA's minimum wage provisions to prison laborers. Rather than adopting any distinct factor test for determining employment in the prison context, the Supreme Court should simply adopt the *but-for* discussed above in order to minimize discrimination between free-world and prison laborers, thus effectively eliminating the lingering existence today of involuntary servitude for the punishment of a crime.

Short of amending our constitution and abolishing the Thirteenth Amendment, finding a way to incorporate prisoners into an existing federal framework for labor protections is the most expedient way to push back against the exploitation of incarcerated workers. Entitling incarcerated workers to minimum wage protections under the FLSA would make the entire institution of prison labor far less profitable for private or publicly owned corporate entities that profit from the prison industry. Corporations form a strong and powerful constituency that has for decades, lobbied for harsher punishment and sentencing schemes that have exacerbated the problem of mass incarceration, over policing, and overcrowding in prisons. Offering FLSA coverage to incarcerated workers would prevent state governments and the federal government from using prisoners to perform

"housework" in order to offset the costs of a financially unsustainable penal framework. The significance, therefore, of affording inmates protection under the FLSA, is to eliminate several of the financial incentives that exist to continuously funnel and keep individuals——who disproportionately come from minority communities—— through the criminal legal system.

At present, the judiciary is better equipped to resolve this issue than is the legislature.[196] One may argue that Congress could pass additional legislation to broaden the reach of the FLSA to cover incarcerated workers. However, in line with the analysis in this Note, there is no need for the FLSA to be revised. It has been nearly a century since Congress first passed the FLSA. To date, in no subsequent amendment has Congress explicitly exempted prisoners from coverage, despite many opportunities to do so. Furthermore, in no other significant employment statute are prisoners explicitly excluded from the definition of "employee." The congressional intent behind and language of the FLSA are sufficiently clear—they have simply been misinterpreted by the Circuit Courts. The Supreme Court must now step in to correct the confusion amongst the lower courts and rule that the language and congressional intent behind the FLSA point towards extending coverage to incarcerated workers.

[196] *See* Brakkton Booker, *Democrats Push 'Abolition Amendment' To Fully Erase Slavery from U.S. Constitution*, NPR (Dec. 3, 2020), https://www.npr.org/2020/12/03/942413221/democrats-push-abolition-amendment-to-fully-erase-slavery-from-u-s-constitution [https://perma.cc/G8V2-MNE7]. In 2020, Congress made recent efforts to amend the 13th Amendment to eliminate the loophole that permits the continued existence of involuntary servitude. A joint resolution, called the "Abolition Amendment" was introduced by Democrats in the House and Senate to remove the punishment clause from the 13th Amendment. No Republican however in either chamber signed on to the measure, and there have been no significant efforts to reintroduce this resolution in subsequent sessions of Congress till date. Given the political polarization of the current era, Congress is unlikely to pass such a resolution in the foreseeable future. Any workarounds to the 13th Amendment must therefore come from the judiciary.