Washington and Lee Journal of Civil Rights and Social Justice

Volume 27 | Issue 2 Article 7

Spring 2021

School Finance, Race, and Reparations

Preston C. Green III
University of Connecticut, preston.green@uconn.edu

Bruce D. Baker
Rutgers University, bruce.baker@gse.rutgers.edu

Joseph O. Oluwole
Montclair State University, oluwolej@montclair.edu

School Finance, Race, and Reparations

Preston C. Green III*, Bruce D. Baker**, Joseph O. Oluwole***

Table of Contents

---

* John & Maria Neag Professor of Urban Education, Professor of Educational Leadership and Law, University of Connecticut. On the behalf of my co-authors, I thank Idun Green for her editing and patience as we worked on this project.

** Professor of Educational Theory, Policy, & Administration, Rutgers University.

*** Professor of Educational Leadership, Montclair State University.

I. Introduction

Black Americans are suffering from the effects of slavery, Jim Crow, and other forms of discrimination that continue to the present day.[1] This negative treatment has impacted, *inter alia*,

1. *See generally*, Adjoa A. Aiyetoro, *Why Reparations to African American Descendants in the United States Are Essential to Democracy*, 14 J. GENDER RACE & JUST. 633, 635 (2011); Michael F. Bivens, *Restorative Justice, Slavery, and the American Soul, A Policy-Oriented Intercultural Human Rights Approach to the Question of Reparations*, 31 T. MARSHALL L. REV. 253, 254–55 (2006); Kyle D. Logue, *Reparations as Redistribution*, 84 B.U. L. REV. 1319, 1323 (2004); Carleton Waterhouse, *Total Recall: Restoring the Public Memory of Enslaves African-Americans and the American System of Slavery through Rectificatory Justice and Reparations*, 14 J. GENDER RACE & JUST. 703, 723 (2011); Eric Y. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 502 (1998).

their financial status,[2] their health,[3] housing,[4] and their educational attainment.[5] To remedy this harm, scholars, activists, and politicians have called for reparations.[6] William Darrity and Kristen Mullen define reparations as "a program of acknowledgment, redress, and closure of a grievance injustice," which in the case of Blacks "include[s] slavery, legal segregation (Jim Crow), and ongoing discrimination and stigmatization."[7]

Acknowledgment refers to "a formal apology and a commitment for redress on the part of the American people as a whole."[8] Redress—which can be in the form of restitution—refers to the "restoration of survivors to their condition before the injustice occurred or to a condition they might have attained had the injustice not taken place."[9] Finally, "[c]losure involves mutual conciliation between African Americans, the beneficiaries of slavery, legal segregation, and ongoing discrimination toward [B]lacks."[10]

With respect to restitution, Darrity and Mullen elaborate: "Specifically, restitution for African Americans would eliminate racial disparities in wealth, income, *education*, health, sentencing and incarceration, political participation, and subsequent opportunities to engage in American political and social life."[11] As this quote illustrates, addressing educational disparities is a key component of a reparations program. A key cause of Black-white

---

2. *See*, *e.g.*, Ronald Clifford, Note, *The African American Family v. The United States: A Template for the Lawsuit of Just Compensation*, 5 WHITTIER J. CHILD & FAM. ADVOC. 603, 619 (2006); A. Mechele Dickerson, *Designing Slavery Reparations: Lessons from Complex Litigation*, 98 TEX. L. REV. 1255, 1278–79 (2020).

3. *See*, *e.g.*, Dickerson, *supra* note 2, at 1271–74; Kevin Outterson, *Tragedy and Remedy: Reparations for Disparities in Black Health*, 9 DEPAUL J. HEALTH CARE L. 735 (2005).

4. Jonathan Kaplan & Andrew Valls, *Housing Discrimination as a Basis for Black Reparations*, 3 PUB. AFF. Q. 255 (2007).

5. ROY L. BROOKS, A NEW MODEL FOR REPARATIONS 36–97 (2004).

6. *See supra* notes 1–5 for citations.

7. WILLIAM A. DARRITY & KIRSTEN MULLEN, FROM HERE TO EQUALITY, REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY 11 (2020).

8. *Id.*

9. *Id.* at 12.

10. *Id.*

11. *Id.* (emphasis added).

educational disparities is school funding.[12] Black-white funding disparities were a hallmark of the separate-but-equal era.[13] These disparities endured after *Brown v. Board of Education* and continue into the present time.[14] Consequently, schools in predominantly Black communities are less able to provide an education to meet the needs of their students.[15]

In this article, we explain why and how school finance reform should be a part of a reparations program for Black Americans. This article proceeds in six parts. Part I explains how Black-white school funding disparities occurred during the separate-but-equal era. Part II discusses how these funding disparities have occurred in the aftermath of the *Brown* decision. Parts III and IV explore why school desegregation and school finance litigation, respectively, have failed to remedy these gaps. Part V lays out a reparations framework that state legislatures could adopt to provide restitution to schools and taxpayers harmed by state policies creating Black-white racial funding disparities. Part VI discusses the role that the federal government could play in a school finance reparations program.

II. Part I: Separate-But-Equal Era

According to economist Robert Margo, during the separate-but-equal era, "([B]lack-to-white) per pupil expenditures in southern public schools followed a U-shaped pattern over time: [A]n initial period of relative similarity in the late nineteenth century, followed by a pronounced shift toward inequality around

12. Preston C. Green III, Bruce D. Baker, & Joseph Oluwole, *Achieving Racial Equal Educational Opportunity through School Finance Litigation*, 4 STAN. J. C.R. & C.L. 283, 286 (2008) (stating that research studies show a correlation between funding and educational outcomes for minority students).

13. *See* ROBERT A. MARGO, RACE AND SCHOOLING IN THE SOUTH, 1880–1950: AN ECONOMIC HISTORY 6–33 (1990) (describing how funding disparities contribute to low socioeconomic status for American Blacks).

14. *See Nonwhite School Districts Get $23 Billion Less Than White Districts Despite Serving the Same Number of Students*, EDBUILD (Feb. 2019), https://edbuild.org/content/23-billion (explaining that gerrymandering school district boundaries divides communities racially and economically) [perma.cc/2CU4-38CV].

15. *See* Green et al., *supra* note 12, 308–11 (stating the correlation between lack of funding and poor educational outcomes).

the turn of the century that persisted for forty years, and then a trend toward equalization in the 1940s."[16] Black disenfranchisement and white demand for better schools caused this initial decline in relative funding equality.[17] Black disenfranchisement enabled Southern middle-class and wealthy whites to accept local property taxation because they did not have to fund Black schools.[18] Using a different scheme, poor whites, who lived in counties with large Black populations relied on state aid rather than local property taxes to finance better schools.[19] Counties would divert a disproportionate amount of funding of state aid, which was distributed based on total school aid population, to white schools.[20]

Margo cited a 1917 U.S. Bureau of Education report titled "Negro Education: A Study of the Private and High Schools for Colored People in the United States" to illustrate the huge funding and resource discrepancies between Black and white schools.[21] According to the report, "[f]or every dollar spent on teacher salaries per white child ages 6 to 14, 29 cents was spent per [B]lack child."[22] Because of this discrepancy in teacher salaries, Black schools experienced "a shorter school year, [and] classroom overcrowding (a higher teacher-pupil ratio)."[23] This report also documented shocking discrepancies in facilities and instructional materials:

> Many of the [B]lack schools were in privately owned buildings (churches, lodges, or rural cabins) donated to local school boards

---

16. MARGO, *supra* note 13, at 33.

17. *See id*. at 36. ("Growing demand and the concomitant institutional changes, which were coincident with disenfranchisement, led to increases in school budgets, frequently through the levying of local school property taxes.").

18. *See id*. ("Wealthy white landlords argued against local school taxes because they themselves bore, or so they believed, most of the cost and personally received few benefits.").

19. *See id.* ("[M]any middle-class white parents . . . were opposed to higher school taxes because they, as a group, owned much more taxable wealth than blacks[.]").

20. *See id*. at 37 ("State school funds were typically allocated to counties on the basis of the total school age population (or enrollment or attendance) in the county; the funds were distributed to district school boards which had considerable discretion in how to spend the money.").

21. *Id*. at 18.

22. *Id*. at 19.

23. *Id*.

> and pressed into service. The exterior surroundings "varied from untidy to positively filthy. Ash heaps often adorned the front yards, . . . at barely respectable distances leaned ugly outboxes in unscreened and shameful impudence. . . . School equipment (books, blackboards, chalk, maps globes) was undersupplied or nonexistent.[24]

Black-white school funding discrepancies were most extreme at the high school level.[25] There were only sixty-four public high schools for Black children throughout the South.[26] Indeed, "[a] southern [B]lack child wishing a post-secondary education had to seek it in one of the region's private high schools or else leave the region."[27] "Because most of the private schools were located in towns or cities while the [B]lack population was heavily rural," the report further observed, "a [B]lack child's opportunities for secondary education were severely circumscribed."[28]

Plessy v. Ferguson[29] provided the legal support for these inequitably funded, racially segregated schools during the separate-but-equal era.[30] In *Plessy*, the Court ruled that a Louisiana statute that required railroads transporting passengers to provide separate-but-equal accommodations for Blacks and whites did not violate the Fourteenth Amendment.[31] The Court reasoned that laws mandating racial separation were "within the competency of the state legislatures in the exercise of their police power."[32] The Court based its holding on the well-established practice of maintaining racially segregated schools, noting that "the most common instance" of the acceptable exercise of police power "is connected with the establishment of separate schools for

---

24. *Id.* at 19–20.

25. *Id.* at 20 (noting that differences in education between white and Black children were most pronounced at the high school level, where black children were severely limited by the low number of available public schools and typically had to seek out private schools).

26. *Id.*

27. *Id.*

28. *Id.*

29. *See* Plessy v. Ferguson 163 U.S. 537, 550–51 (1896) (upholding the constitutionality of racial segregation).

30. *See id.* (approvingly citing racially segregated schools).

31. *See id.* at 550–51 (finding the segregation of races does not violate the Fourteenth Amendment).

32. *Id.*

white and colored children."[33] The Court also could not find the Louisiana statute "unreasonable or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia."[34]

In an 1899 decision, *Cumming v. Board of Education of Richmond County, Georgia*,[35] the Court signaled that the mere existence of Black schools "was sometimes precarious."[36] In this case, a school board closed the high school for Black students while maintaining a high school for white students.[37] The board allegedly made this decision because it had insufficient funds to maintain a Black high school in light of the demand for a primary school for Black children.[38] The Court refused to enjoin the board from maintaining the white high school, finding that the closing of the Black high school was a permissible exercise of state discretion:

> [W]hile all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination . . . on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.[39]

It was not until the 1940s when the gap narrowed between Black and white schools with respect to length of school term, class size, and per-pupil expenditures.[40] This narrowing was due to legal challenges from the NAACP, monitoring of Black schools by the federal government, studies of school conditions by Black scholars,

---

33. *Id.*

34. *Id.* at 551.

35. *See* Cumming v. Bd. of Educ. of Richmond Cnty., Georgia 175 U.S. 528, 545 (1899) (holding that the discontinuation of high school services for Black children was constitutional).

36. MARGO, *supra* note 13, at 70.

37. *See Cumming*, 175 U.S. at 544 (laying out the facts of the school board's decision).

38. *See id.* at 544–45 (explaining the school board's decision on financial grounds).

39. *Id.* at 545.

40. *See* MARGO, *supra* note 13, at 26 (describing the relationship between school, race, and labor outcomes).

and changing public opinion.[41] Because of this pressure, the South responded "by paying closer attention to the equal part of separate-but-equal, fearing the loss of the separate part."[42] However, it was too late because the NAACP had shifted its strategy to target the morality of the separate-but-doctrine.[43] This change in approach would lead to the Supreme Court's ruling in the 1954 *Brown* decision, which overturned *Plessy*.[44]

III. Part II: Black-White School Funding Disparities in the Aftermath of Brown

In spite of decades of school and school finance litigation in the aftermath of *Brown*, racial funding disparities still remain to the present day.[45] A report by the nonprofit group EdBuild found that school districts serving predominantly nonwhite students received $23 billion less than white districts during the 2015–16 school year.[46] According to the report, the average nonwhite district received $2,226 less than a white school district per student.[47] Racial disparities remain even after controlling for wealth: Poor-white school districts still received almost $1,500 more per student than their poor-nonwhite counterparts.[48] In this part, we discuss how these racial funding gaps have persevered, focusing on Black-white differences.

---

41. *See id.* at 50–51 ("The initial court battles, focusing on desegregation of higher education and the elimination of separate wage scales for black and white teachers, were fought in the late 1930s and early 1940s[.]").

42. *Id.* at 51.

43. *See id.* (discussing the NAACP's strategy shift towards an argument that "de jure segregation was morally wrong").

44. *See id.* (stating that the NAACP's new focus on the morality of *de jure* segregation found success in *Brown v. Board of Education*).

45. *See* EDBUILD, *supra* note 14 (describing funding and racially disparities).

46. *Id.*

47. *Id.*

48. *Id.*

A. Property Taxes

The most obvious source of race-based, particularly Black-white disparities in school funding are those that result from differences in the taxable property wealth of taxing districts which provide revenue for schools serving Black versus those serving white students.[49] Local public-school districts in many states continue to rely heavily on local property taxes to support their schools.[50] Particularly through the first half of the twentieth century, numerous actors including government programs and officials as well as private developers engaged in highly orchestrated efforts to create and reinforce racially segregated housing development.[51] Many of these forces persist to this day, through practices ranging from discriminatory mortgage lending practices to exclusionary zoning.[52] The creation of the Federal Housing Authority in 1934, increasing the share of a home's value that could be taken on as a mortgage, and the term over which a mortgage could be paid significantly increased access to single family housing for young buyers.[53] But, due to both explicit and implicit criteria for accessing these loans, the beneficiaries were overwhelmingly white.[54] These included risk criteria developed by the Home Owners Loan Corporation (HOLC) for issuing insured loans that invariably classified homes in non-immigrant white neighborhoods as the lowest risk and homes in Black

---

49. *See* BRUCE J. BIDDLE & DAVID C. BERLINER, EDUCATIONAL LEADERSHIP: BEYOND INSTRUCTIONAL LEADERSHIP 48–59 (2002) (stating that public school funding originates from property taxes).

50. *See id.* ("Nearly half of the funding for public schools in the United States, however, is provided through local taxes, generating large differences in funding between wealthy and impoverished communities[.]").

51. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

52. *See* Kaplan & Valls, *supra* note 4, at 255 ("An important part of the story of racial inequality today is the history of housing and lending discrimination in the second half of the twentieth century.").

53. *See id* at 261 ("[A]lmost all of the growth in home-ownership between 1920 (46 percent) and 1960 (62 percent) came from under-60 buyers.").

54. *See id.* ("[B]oth explicit and implicit racial preferences built into the FHA loan system meant that the beneficiaries of FHA-insured loans were overwhelmingly White, and Black Americans had little opportunity to purchase homes on an equal footing with White Americans.").

neighborhoods as high risk and often ineligible for insured loans.[55] The expansion of access to homeownership, through both FHA and Veterans Administration (VA) backed loans became a primary path to building family wealth in the post WWII period, but due to restrictions in access to these loans, Blacks were largely excluded from this opportunity.[56]

In many cases, zones were relegated to Black homeownership based on established school boundaries, while in others, school district boundaries were redrawn (and redrawn) around Black or white neighborhoods to reinforce segregation.[57] Special legislation was passed in Missouri in 2006 permitting the remaining predominantly white northeastern corner of Kansas City, Missouri to unilaterally annex itself from the Black city district to its mostly white neighbor.[58] The organization of school district taxing jurisdictions across states remains a complicated patchwork, wherein race and racial segregation continue to play a significant role.[59] Most intensely segregated across taxing jurisdictions are Northeastern and Great Lakes area metropolitan areas where each highly segregated suburban enclave tends to act as its own school taxing jurisdiction.[60] In New England states, the town or municipality serves as the fiscal steward of the school district, more closely aligning governance of zoning policy with governance of schools.[61] Southern states operate mostly county-based systems, where counties in the aggregate tend to be more racially diverse

---

55. *See id*. at 262 (discussing the impact of a low insurance rating on the ability to receive an insured loan).

56. *See id*. (noting that the loans available to military veterans "largely excluded homes in urban areas, and favored new homes in the suburbs" which tended not to benefit African Americans).

57. *See* Kevin Gotham, *Missed Opportunities, Enduring Legacies: School Segregation and Desegregation in Kansas City, Missouri*, AM. STUD. 5–10 (2002) (stating that gerrymandering contributes to racial segregation).

58. *See* Elle Moxley, *The Data Shows Kansas City's School System Is Complicated, Segregated and Inefficient*, KCUR (May 9, 2019), https://www.kcur.org/education/2019-05-09/the-data-shows-kansas-citys-school-system-is-complicated-segregated-and-inefficient ("By 2017, 78 percent of schools in the system were segregated–25 district schools and 30 charter schools.") [perma.cc/UK2E-8F88].

59. *See id.* (quoting various national experts on the similarity of problems facing the district to nationwide issue).

60. *Id.*

61. *Id.*

than the cities and towns within them.[62] While this organizational feature should theoretically mitigate racial disparities, on the one hand, it allows the disparities to simply be hidden within counties, and on the other hand, southern states created separate independent, segregated city districts carved from their county hosts.

It is important to understand, however, that tax bases from which local revenue for schools is derived do not exist exclusively of residential property, nor is most of the variation in wealth from one to another taxing jurisdiction driven by variation in residential property values.[63] A significant share of local property tax bases includes commercial, industrial, utility and other non-residential properties.[64] Sometimes, high value properties are otherwise undesirable to have in your back yard—such as an oil refinery or other industrial facility—and thus we find these properties in the back yards of low value residential properties relegated for minority homeownership.[65] The presence and uneven distribution of these taxable assets often complicates analysis of the intersection between race, taxable wealth and school revenues.[66] This specific problem undermined establishing residents of school districts with weak tax bases as a suspect classification in *San Antonio Independent School District v. Rodriguez*,[67] where evidence was provided that significant shares of low-income families resided in districts with relatively high taxable property wealth.

Indeed, there is reason to believe that the poorest families are

---

62. *See* Kendra Taylor, Erica Frankenberg, & Genevieve Siegal-Hawley, *Racial Segregation in the Southern Schools, School Districts, and Counties Where Districts Have Seceded*, AERA OPEN, Sept. 3, 2019, at 1–10 ("Despite long-standing White resistance to desegregation, judicial pressure meant that the South's countywide school systems (or ones that include both cities and suburbs) historically have been some of the most integrated for Black and White students.").

63. DAVID H. MONK & BRIAN O. BRENT, RAISING MONEY FOR EDUCATION: A GUIDE TO PROPERTY TAX (1997).

64. *Id.*

65. *Id.*

66. *Id.*

67. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 23 (1973) (holding that financing schools using local property taxes was not unconstitutional).

> not necessarily clustered in the poorest property districts. A recent and exhaustive study of school districts in Connecticut concluded that "[i]t is clearly incorrect . . . to contend that the 'poor' live in 'poor' districts. . . . Thus, the major factual assumption of *Serrano*—that the educational financing system discriminates against the 'poor'—is simply false in Connecticut." Defining "poor" families as those below the Bureau of the Census "poverty level," the Connecticut study found, not surprisingly, that the poor were clustered around commercial and industrial areas—those same areas that provide the most attractive sources of property tax income for school districts. Whether a similar pattern would be discovered in Texas is not known, but there is no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute impecunity—are concentrated in the poorest districts.[68]

Finally, states impose various degrees of regulation over property taxes, including but not limited to regulating rates at which property taxes can be increased or regulating the amount of or growth in revenues that can be generated by local property taxes.[69] Some of these measures mitigate racial disparities in taxation and revenues generated while others exacerbate these disparities.[70] Importantly, every aspect of these systems of local property taxation for public schools is a function of state policy and governance—state policies defining taxing jurisdictions, methods of assessing taxable value, procedures for setting tax rates and collecting revenues.

B. Insufficient General State Aid

The second source of inequality in state school funding systems is essentially the state's failure to fully address the first. Every state has some general state aid formula, for which the

---

68. *Id*. at 23.

69. *See id.* at 15 *(*"Despite these recent increases, substantial interdistrict disparities in school expenditures found by the District Court to prevail in San Antonio and in varying degrees throughout the State.").

70. *See id.* at 58 ("[S]everal research projects have concluded that any financing alternative designed to achieve a greater equality of expenditures is likely to lead to higher taxation and lower educational expenditures in the major urban centers, a result that would exacerbate rather than ameliorate existing conditions in those areas.").

primary objective is usually to allocate state aid—derived from state sales and income taxes—to offset differences in the ability of local taxing jurisdictions to raise revenue for their schools.[71] These general formula aid programs, or "equalization aid" programs have existed since the 1920s.[72] When funded adequately, achieving their most basic function, these aid programs would permit every local jurisdiction in a state to raise a specific target amount of revenue—a foundation level—at equitable taxation, considering either or both taxable property wealth and income (ability to pay) of residents.[73] States largely still fall short of this goal, though on average, across the country, districts serving higher concentrations of children from families in poverty do spend roughly the same as districts serving lower concentrations of children from families in poverty.[74] There remains significant variation across and within states, with respect to poverty and with respect to race.[75]

C. Stealth Inequalities

Modern state aid formulas should generally go beyond wealth equalization and should also accommodate the differences in student needs and other costs associated with providing each child in the state with equal opportunity to achieve a common set of outcome goals.[76] Doing so introduces complexities into state school

---

71. *See generally* Bruce D. Baker, Ajay Srikanth, Robert Cotto Jr., & Preston C. Green III, *School Funding Disparities and the Plight of Latinx Children*, 28 EDUC. POL'Y ANALYSIS 135 (2020) (explaining the need for race-conscious school funding policies).

72. *See id.* at 3 ("In theory, state school finance systems are designed to a) remediate disparities between local public-school districts that arise from differences in wealth and revenue raising capacity of those districts and b) provide supplemental resources to districts serving needier student populations or facing other cost pressures.").

73. *See id.* at 18 (showing data suggesting equalization with equalized spending).

74. *See id.* (offering conclusions on the data showing inequality in Latinx populations).

75. *See id*. (tabling data which demonstrates the various disparities).

76. *See* PETER D. VEILLETTE, UNDERSTANDING STATE SCHOOL FINANCE FORMULAS 4 (1987) (explaining how race-conscious policies reduces the racial achievement gap).

finance formulas either in the form of adjustments to the general aid formula or addition of supplemental formulas or categorical grants.[77] Political acceptance of the concept of adjustments to advance equal educational opportunity, however, has led some states to craft and adopt adjustments to their school finance formulas that do the opposite, including adjustments which exacerbate wealth and income related disparities or reinforce past racial disparities.[78] Bruce Baker and Sean Corcoran referred to these as "stealth inequalities"—features of state aid formulas wherein the state itself had designed a system of allocating aid to make disparities worse, not better.[79] We provide examples of stealth inequalities exacerbating race-based disparities later in this article.

IV. Part III: School Desegregation Litigation

School desegregation and school finance litigation arose from the similar objective "of equalizing educational opportunities for poor and/or minority students."[80] School desegregation litigation sought to achieve this goal through integration while school finance litigation targeted the distribution of educational funding.[81] In this Part, we focus on why school desegregation failed to correct Black-white school funding disparities. Because of school desegregation litigation's focus on integration, one might conclude that there were no challenges to inequitable school funding.[82] However, there were instances where courts did address funding

77. *See id.* (discussing the operation of equalization formulas).

78. *See* Bruce D. Baker & Sean P. Corcoran, *The Stealth Inequalities of School Funding: How State and Local School Finance Systems Perpetuate Inequitable Student Spending*, CTR. FOR AM. PROGRESS (Sept. 2012), http://www.statewideonline.org/111312/files/StealthInequities%20Rutgers.pdf. [perma.cc/Q7H5-TEZY] (discussing the approaches of different states in using different aid formulas).

79. *See id.* (describing "stealth inequalities" as "inequities not solely due to differences in available resources.").

80. James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 258 (1999).

81. *See id.* at 259 ("[S]chool desegregation cases sought equality indirectly through integration.").

82. *Id.*

disparities in school desegregation litigation.[83] This part discusses these cases and explains why they were unsuccessful in remedying Black-white school funding disparities.

A. Hobson v. Hansen

In *Hobson v. Hansen*,[84] a federal district court addressed whether the District of Columbia complied with *Bolling v. Sharpe*,[85] a companion case to *Brown*.[86] The court held that the disparity in resources between Black and white elementary schools was considerably unequal and was thus unconstitutional as well.[87] The typical school building serving Black students was almost sixty years old, which was twenty years below the median age of other school buildings in the city.[88] Black schools operated at 115% of capacity, while white schools generally operated at 77% capacity.[89] Teachers in the Black schools had much less teaching experience and were twice as likely to have only temporary licenses.[90] In contrast, white schools had a large number of teachers with graduate degrees, a feature that was atypical of predominantly Black schools.[91] Median per-pupil expenditures for Black schools were $100 fewer than those of white schools.[92] Finally, students attending Black schools had much less access to kindergarten than students attending white schools.[93] However,

---

83. *See infra* Section IV.A

84. *See* Hobson v. Hansen, 269. F. Supp. 401, 405–06 (D.D.C. 1967) (holding that the school board and superintendent of public schools in Washington, D.C. unconstitutionally deprived Black children of their right to equal educational opportunities).

85. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding that segregation in public schools was a violation of the Due Process clause of the Fifth Amendment).

86. *See Hobson*, 269 F. Supp. at 405–06 (stating that the Court used *Hobson* to "test the current compliance of Washington D.C. public schools' compliance with the principles announced in Bolling and Brown v. Board of Education").

87. *Id.*

88. *Id.* at 495.

89. *Id.*

90. *Id.*

91. *Id.* at 495–96.

92. *Id.*

93. *See id.* (explaining access to kindergarten for Black children was

the court found that the disparities between Black and white schools were not caused by intentional discrimination, but rather by the indifference of school administrators.[94]

The court held that withholding equal educational opportunities from Black students in the District of Columbia denied them equal protection of the law.[95] In reaching this decision, the court fashioned a new separate-but-equal doctrine to address inequalities caused by *de facto* segregation.[96] As the court explained, "it should be clear that if whites and Negroes, or rich and poor, are to be consigned to separate schools pursuant to whatever policy, the minimum the Constitution will require and guarantee is that for their objectively measurable aspects these schools should be run on the basis of real equality, at least unless any inequalities are adequately justified."[97] The court supported this assertion by explaining, "Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."[98]

In the *Rodriguez* decision, however, the Supreme Court dramatically weakened the efficacy of the Equal Protection Clause for challenging racial funding disparities.[99] The *Rodriguez* Court

---

dependent on classroom space).

94. *See id.* at 442 ("The causes of the inequalities are relatively objective and impersonal. School officials can be faulted, but for another reason: that in the face of these inequalities they have sometimes shown little concern.").

95. *Id.* at 496. This case was decided under the Due Process Clause of the Fifth Amendment, which the Supreme Court held contains an equal protection component.

96. *See* Hobson v. Hansen, 269 F. Supp. 401, 496 (1967) (discussing how the court considered "whether these documented inequalities in the predominantly Negro schools den[ied] the children who [were] assigned by defendants to attend them equal educational opportunity and equal protection of the law" in reaching its conclusion).

97. *Id.*

98. *Id.* at 497.

99. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973) (holding that Texas's school funding plan, which created unequal wealth distribution between school districts, did not violate the Equal Protection Clause because the proper standard is whether the challenged state action rationally furthers a legitimate state purpose or interest. The court held that Texas's scheme

held that existing disparities in funding between school districts that resulted from Texas's reliance on local property taxation were permissible.[100] The Court rejected the claim that the school finance system should be subject to strict scrutiny because the plaintiffs were members of a suspect classification based upon wealth.[101] The Court also rejected the notion that strict scrutiny was applicable because education was a fundamental interest under the Constitution.[102]

Instead of strict scrutiny, the Court found that the rational basis test was the appropriate form of analysis.[103] The Court then concluded that the use of local property taxation was rationally related to encouraging local control of the public schools.[104] By becoming involved in educational decisions at the local level, community members demonstrated their depth of commitment to public education.[105] Local control also provided each locality with the means for participating "in the decision-making process of determining how local tax dollars will be spent."[106] Moreover, local control enabled school districts "to tailor local plans for local needs" and encouraged "experimentation, innovation, and a healthy competition for educational excellence."[107]

---

met this standard).

100. *Id.*

101. *See id.* at 19–29 (concluding that "the Texas system does not operate to the peculiar disadvantage of any suspect class . . . in recognition of the fact that this Court has never . . . held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny, appellees have not relied solely on this contention").

102. *See id.* at 29–39 (discussing fundamental rights generally and ultimately noting that the Court had "carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive").

103. *See id.* at 40 ("A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes.").

104. *See id.* at 55 ("The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest.").

105. *See id.* at 49 ("The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters.").

106. *Id.* at 50.

107. *Id.* at 51.

Although the Equal Protection Clause challenge in *Rodriguez* was based on wealth disparities, it is important to observe that the case served as an implicit rejection of the equality standard used in *Hobson*.[108] Indeed, Taunya Lovell Banks observes that "[r]ace, in the broadest sense, was the elephant in the courtroom."[109] She further points out that the plaintiffs in *Rodriguez*, who were "characterized as poor and Mexican-American, seemed to be arguing that state educational funding determinations based on wealth not only impair a fundamental right, but also are suspect under the Equal Protection Clause . . . when these decisions disproportionately impact racialized groups."[110] The Supreme Court removed all doubt about the validity of *Hobson* in *Washington v. Davis*[111] by holding that a statute or official practice was not rendered unconstitutional by having an adverse disparate impact on minority groups.[112] As the Court explained:

> [V]arious Courts of Appeals have held in several contexts . . . that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause . . . . [T]o the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.[113]

B. Milliken v. Bradley

It was not until the *Milliken v. Bradley*[114] litigation that the Supreme Court sanctioned the imposition of educational

---

108. *See* Hobson v. Hansen, 269 F. Supp. 401, 496 (1967) (holding that schools objectively measurable aspects be run on the basis of real equality, at least unless any inequalities are adequately justified).

109. Taunya Lovell Banks, *Brown at 50: Reconstructing Brown's Promise*, 44 WASHBURN L.J. 39, 59 (2004).

110. *Id.*

111. *See* Washington v. Davis, 426 U.S. 229, 252 (1976) (finding that a police department's use of employment test for hiring purposes did not violate Equal Protection Clause).

112. *Id.* at 244–45.

113. *Id.*

114. *See* Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 290 (1977) (holding

programming—and additional spending to implement these programs—as part of court-ordered desegregation plans.[115] In *Milliken I*,[116] the Court invalidated a desegregation plan that would have called for the integration of Detroit's predominantly Black school districts with the predominantly white suburban school districts.[117] The Court ruled in this manner because there was no evidence of intentional discrimination on the part of the latter districts.[118] As a result of *Milliken I*, racial residential segregation across established school district lines has remained a primary cause of racial segregation in schooling in many parts of the country.[119]

In *Milliken II*,[120] the Court approved a Detroit-only plan that included educational components such as remedial reading, in-service teacher training, nondiscriminatory testing reforms, testing, and counseling.[121] The Court upheld the plan because the federal judiciary "need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a longstanding

---

that prospective relief to bring about educational equality was not barred by the Tenth or Eleventh Amendment).

115. *See id*. at 267–68 (affirming the District Court order implementing the student assignment plan and associated educational components).

116. *See* Milliken v. Bradley (*Milliken I*), 418 U.S. 717, 752–53 (1974) (holding that it was improper to impose a multi-district remedy for a single-district de jure segregation action without evidence that the included districts acted in a way that effected segregation).

117. *See id*. at 748–53 (concluding that "the relief ordered by the District Court and affirmed by the Court of Appeals was based upon an erroneous standard and was unsupported by record evidence that acts of the outlying districts effected the discrimination found to exist in the schools of Detroit" and remanding the case").

118. *See id*. at 745 ("To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in Brown I and II or any holding of this Court.").

119. Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future*, 47 HOW. L.J. 795, 811 (2004); Sheryll D. Cashin, *American Public Schools Fifty Years after Brown: A Separate But Equal Reality*, 47 HOW. L.J. 341, 347 (2004); Ryan, *supra* note 80, at 261.

120. Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 290 (1977).

121. *See id*. at 290–91 (affirming the affirming the District Court order implementing the student assignment plan and associated educational components).

segregated system."[122] In the words of James Ryan, "If the schools were going to be separate as a result of *Milliken I*, *Milliken II* seemed to hold out the possibility that they might be equal."[123]

Despite the Court's apparent recognition that educational spending was necessary to overcome the effects of segregation, Gary Orfield and colleagues have labeled *Milliken II* remedies as a "limited form of reparations" that has not been implemented successfully.[124] "A fundamental weakness" of *Milliken II* remedies was "that the extra funding to segregated schools [was] not guaranteed to last."[125] Indeed, "[t]he programs suffer from impermanence because they often depend upon tenuous political support and politicized local or state budget processes."[126] Therefore, "the programs can be easily removed by courts or school districts even where there is no proof that the programs have done what they were supposed to—improve conditions for minority students."[127] That the programs' survival depends upon a thin web of political support and budgetary responsibilities is particularly troubling because these schools serve communities that are traditionally weak players in local politics."[128]

Missouri v. Jenkins[129] is perhaps the most striking example of the failure of *Milliken II* desegregation plans to implement a reparations plan for Black students.[130] In this case, a district court ruled that the Kansas City School District (KCMSD) and the state of Missouri had committed *de jure* segregation.[131] The judge then attempted to improve the "desegregative attractiveness" of the district's schools by implementing a district-wide magnet school

---

122. *Id.* at 283.

123. Ryan, *supra* note 80, at 261.

124. GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 12 (1997).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *See* Missouri v. Jenkins, 515 U.S. 70, 100 (1995) (holding that the district court overstepped its remedial authority in creating a magnet school program).

130. *See generally id.*

131. Jenkins v. Missouri, 593 F. Supp. 1485, 1505–06 (D. Mo. 1984) (noting that the state had the "constitutional obligation to affirmatively dismantle any system of de jure segregation" and that the state and school district "defaulted in their obligation to uphold the Constitution").

program.[132] The Supreme Court ruled that the magnet school program exceeded the district court's remedial authority.[133]

Critics of increased school finance spending have cited the *Jenkins* case as evidence that there is no correlation between increased educational funding and educational outcomes.[134] Their argument is based on three premises: (1) KCMSD received a great deal more money than any other large school district in the country over an extended period; (2) because the exorbitant spending did not lead to improved student outcomes, the plan is a national model for why spending large sums of money on predominantly Black schools is non-productive and inefficient; and (3) the state of Missouri covered a disproportionate share of the costs of the desegregation plan which indirectly harmed the state's other school districts.[135]

Preston Green and Bruce Baker have challenged these claims regarding the *Jenkins* case.[136] Their empirical analysis of KCMSD spending revealed that "peak funding lasted for a relative short period of time."[137] Because KCMSD was a high-spending school district for such a short time, it could not be considered the "poster child" for the assertion that "money doesn't matter" with respect to student outcomes.[138] Further, Green and Baker determined that the KCMSD's property taxpayers consistently paid a much higher share of the district's state and local operating revenue than other districts across the state.[139] Finally, Green and Baker found that

---

132. *Jenkins*, 515 U.S. at 75.

133. *See id.* at 92–93 (differentiating the magnet school remedy in this case from previous upheld cases).

134. *See* Preston C. Green III & Bruce D. Baker, *Urban Legends, Desegregation and School Finance: Did Kansas City Really Prove That Money Doesn't Matter?*, 12 MICH. J. RACE & L. 57, 58 (2006) ("A number of courts that have invalidated their school finance systems did so after finding a correlation between educational funding and academic outcomes. Conservative critics have countered that Missouri v. Jenkins. . . proves that no such correlation exists.").

135. *Id.* at 82–84 (summarizing arguments against increased education funding).

136. *See id.* at 80 ("[A]nalysis of the Jenkins litigation reveals that Judge Clark attempted to enforce remedies on KCMSD and the state of Missouri by relying on the federal court precedents made by Milliken I and Milliken II.").

137. *Id.* at 100.

138. *Id.*

139. *Id.*

the redistribution of statewide additional state revenues to KCMSD amounted to $78 per pupil—a relatively small sum.[140]

Green and Baker then ask how the premises of the *Jenkins* critique could be so "distorted." As they explain, this assessment:

> [F]ails to take into account the history of KCMSD and the state of Missouri. We have observed that the residential structure and demographics of KCMSD were carefully crafted by city officials and real estate developers into racially segregated enclaves for the first 60 years of the 20th century. We have also noted that in the 1960s, KCMSD was a relatively high spending district, but because of the school funding system's reliance on property taxation and KCMSD's racial and socio-economic composition, the district would soon be unable to meet its educational needs. Moreover, we explained that Judge Clark responded to KCMSD's financial concerns in the *Jenkins* litigation by imposing an extremely high property tax rate on the district.[141]

Thus, Green and Baker reason, it was easy to understand "that the *Jenkins* litigation only temporarily shifted KCMSD's relative funding levels compared with either a national peer group of metropolitan districts or a local labor market peer group."[142] This analysis of *Jenkins* is consistent with Orfield's critique of *Milliken II* plans—they are a form of limited reparations that do not last long enough to undo the harm caused by consistent underfunding.

V. Part IV: School Finance Litigation

As noted above, school finance litigation seeks to achieve equal educational opportunities for minority and poor students by targeting the distribution of educational funding.[143] Legal scholars have identified three waves of school funding challenges.[144] In the

---

140. *Id.*

141. *Id.* at 100–01.

142. *Id.* at 101.

143. *See* Green et al., *supra* note 12, at 284 ("The goal of school finance litigation is 'to increase the amount and equalize the distribution of academic opportunities and performance of students disadvantaged by existing finance schemes.'").

144. *See generally*, Carlee Poston Escue, William E. Thro, & R. Craig Wood, *Some Perspectives on Recent School Finance Litigation*, 268 ED. LAW REP. 601, 601 (2011); David Hinojosa, *"Race-Conscious" School Finance Litigation: Is a*

first wave, plaintiffs claimed that school funding disparities violated the Equal Protection Clause of the Fourteenth Amendment.[145] The Supreme Court closed this door in its *Rodriguez* decision discussed above.[146] In the second wave, litigants based their school finance challenges on state equal protection clauses.[147] They sought to distinguish their claims from *Rodriguez* by arguing that education was a fundamental right, thus triggering the strict scrutiny standard instead of the more lenient rational basis analysis.[148] Although plaintiffs had success in the early stages of this wave, courts grew resistant to this legal theory by the end of the second wave.[149] During the third wave, plaintiffs asserted that states have provided insufficient resources either to achieve minimal educational outcomes or to prepare students to "become positive contributors to the economic, social and democratic fabric."[150] Plaintiffs have had more success in the third wave, winning two-thirds of cases during this period.[151]

Although school finance litigation has generally steered clear of race, there have been several instances where plaintiffs have directly challenged school funding policies that have caused racial disparities and demanded that states take race into account to

---

Fourth Wave Emerging?, 50 U. RICH. L. REV. 869, 871 (2016); William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1188 (2003); Ann Williams Shavers, *Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Litigation*, 82 NEB. L. REV. 133, 137 (2003); William Thro, *School Finance Litigation as Facial Challenges*, 272 ED. LAW REP. 687, 694 (2011).

145. *See* Hinojosa, *supra* note 144, at 872 ("[T]hese cases filed claims under the Equal Protection Clause of the United States Constitution's Fourteenth Amendment.").

146. *See id*. (explaining how *Rodriguez* ended the first wave).

147. *See id*. (pointing to the development of suits based on state constitutional claims).

148. *See id*. (identifying the strategic advantage of equal protection claims with strict scrutiny).

149. *See id*. at 873 (pointing to courts growing reluctance to hear the state equal protection claims).

150. *Id*.

151. *See id*. ("[F]avor of the plaintiffs with wins in two-thirds of cases over the past twenty-two years.").

remedy them.[152] The remainder of this part summarizes these cases.

A. Alabama: Lynch v. Alabama

In *Lynch v. Alabama*,[153] the plaintiffs alleged that the state's property tax system was "rooted in [the State's] historic racially discriminatory policies . . . and cripple the ability of certain rural, nearly all-[B]lack public systems in Alabama to raise revenues" in violation of the Equal Protection Clause.[154] One especially problematic constitutional provision was Amendment 373, which established a property classification system "for determining the value of the property that is subject to a given tax rate."[155] This amendment allowed Class III property, "which includes agricultural, forest, and single residential property," to be taxed at ten percent of its value instead of fair market value.[156] This amendment severely limited the ability of rural "Black Belt" school districts to obtain educational funding because "very little of the property's true fair market value [is] subject to taxation."[157]

The plaintiffs attempted to establish discriminatory intent by attempting to connect Amendment 373 to the state's antipathy against funding public education for Black students.[158] This hostility was evidenced, *inter alia*, in the 1901 Constitution, which prevented Blacks from raising revenue for schools by disfranchising them and placing restrictions on property

---

152. *See id.* at 870 (listing *Martinez v. New Mexico* and *Silver v. Halifax County School Board Association* as two examples of such cases and discussing each in context).

153. *See* Lynch v. Alabama, No. 08-S-450-NE, 2011 WL 13186739 (N.D. Ala. Nov. 7, 2011), *aff'd in part*, *vacated in part*, *remanded sub nom.*, I.L. v. Alabama, 739 F.3d 1273 (11th Cir. 2014) (affirming the district court's rejection of the claim that Alabama's tax policies had a continuing segregative effect on its system of higher education).

154. I.L. v. Alabama, 739 F.3d 1273, 1277 (11th Cir. 2014).

155. *Id.* at 1282.

156. *Id.*

157. *Id.* (internal quotes and citations omitted).

158. *Id.* at 1286–87 (discerning no error in the "district court's finding that Amendment 373 was not racially motivated").

taxation.[159] A federal district court disagreed.[160] While there was overwhelming evidence that the state passed the 1901 constitution with "virulent, racially-discriminatory intent,"[161] the court reasoned that Amendment 373 was "a reaction to the increases in property appraisals and assessments mandated by [a prior court decision], and the accompanying threat of a tremendous increase in the property taxes paid by large landowners."[162]

On appeal, the Eleventh Circuit affirmed the district court's ruling that racial discrimination was not a substantial or motivating factor behind the enactment of Amendment 373, finding that the lower court did not clearly err in choosing to credit the evidence supporting this conclusion.[163]

B. Kansas: Montoy v. Kansas

In the *Montoy v. Kansas* litigation,[164] school districts enrolling large shares of Black and Latinx students alleged that the state's school finance formula violated equal protection and educational provisions.[165] A significant portion of the state's school funding woes can be traced to a series of funding and organizational policies that worked in tandem to create unequal and inadequate

159. *See* Lynch v. Alabama, No. 08-S-450-NE, 2011 WL 13186739, at *256–66. (N.D. Ala. Nov. 7, 2011) *aff'd in part*, *vacated in part*, *remanded sub nom.*, I.L. v. Alabama, 739 F.3d 1273 (11th Cir. 2014) (noting that the 1901 Constitution was "about race and nothing but race" and passed with the intention of ensuring white supremacy).

160. *See id.* at *332 ("[T]he amendments ratified in 1972 and 1978 were not measures adopted for the purpose of depriving black public school students of adequate funding for education.").

161. *Id.* at *327.

162. *Id.* at *332.

163. I.L. v. Alabama, 739 F.3d 1273, 1287 (11th Cir. 2014) (pointing to the lower court's extensive discussion of the state's history of race relations).

164. *See* Montoy v. Kansas, No. 99-C-1738, 2003 WL 22902963, at *7 (Kan. Dist. Ct. Dec. 2, 2003), *aff'd in part*, *rev'd in part*, 120 P.3d 306 (Kan. 2005) (holding that compliance with Kansas Const. art. 9, §§ 1 and 2 could only be achieved if sufficient funds were derived, through regular dependable taxes, to permit district schools to provide basic education in a general and uniform system of public schools.)

165. *See id.* at *9 (summarizing the arguments before the Kansas Supreme Court and the questions on remand).

funding systems.[166] Indeed, *Brown* addressed a Kansas policy that empowered cities with populations larger than 15,000 to operate racially segregated schools.[167] *Brown* invalidated this legislative practice.[168]

In the aftermath of *Brown*, the state legislature enacted a series of racially neutral state aid and district policies that had the effect of perpetuating Kansas's "separate and unequal" systems of public education.[169] Nine years after this decision, the state legislature passed the School Unification Law of 1963, which encouraged rural school districts to consolidate with each other.[170] But these districts did not consolidate with nearby urban districts with high concentrations of minority students.[171] The legislature in turn provided more funding to these consolidated rural districts than their urban neighbors through state aid for low-enrollment school districts.[172] The state also provided more funding to predominantly white suburbs than their urban counterparts through state aid adjustments including "extraordinary growth" and "new facilities aid," designed to account for district growth.[173]

In the *Montoy* litigation, a state trial court issued a preliminary order holding that the state's funding disparities had an unconstitutional disparate impact on minority and English-learner students in violation of the state and federal equal protection clauses.[174] The court also ruled that the state had failed

---

166. *See id.* at *37 ("Plaintiffs . . . alleged that the total funds provided by the Legislature, even if all its base allotments, weights, LOBs, capital outlays, sales taxes, and other allowances and supplements are combined, [was] grossly inadequate in the aggregate to provide a suitable education to all Kansas children[.]").

167. Green et al., *supra* note 12, at 306.

168. *See id.* at 306–07 ("Brown negated the legislature's ability to preserve segregated schools within these city boundaries.")

169. *See id.* at 307 (noting that "[t]he state legislature subsequently enacted a series of funding and organizational policies that worked in tandem to create racially unequal funding systems" after *Brown*).

170. *See id.* (stating that the School Unification Law of 1963 was designed to decrease the number of school districts in the state).

171. *See id.* (explaining the effect of unification leading to de facto segregation).

172. *Id.*

173. *Id.*

174. Montoy v. Kansas, No. 99-C-1738, 2003 WL 22902963, at *49 (Kan. Dist. Ct. Dec. 2, 2003), *aff'd in part*, *rev'd in part*, 120 P.3d 306 (Kan. 2005) ("The Court

to satisfy its duty under the education clause to provide Kansas's children with a "suitable education."[175] In reaching this latter conclusion, the court observed with alarm the fact that "minorities, disabled, [and] non English speakers . . . are failing at alarming rates" on the state's assessment system."[176] For example, "83.7 percent of Kansas African American students, 81.1 percent of Kansas Hispanic students, 64.1 percent of Kansas Native American students, 87.1 percent of Kansas limited English proficiency students, and 77.5 percent of Kansas impoverished students" were failing the tenth-grade mathematics assessment.[177]

The court also found that increases in educational funding would enable districts to employ strategies, such as reducing class sizes and hiring better trained teachers that could raise the academic performance of minority and disadvantaged students.[178] It also rejected the defendants' attempt to justify the academic performance of Kansas's marginalized students with a reference to lynchings:

> Even more troublesome is Defendants' well-phrased and superficially attractive argument that even if one chooses to examine alarming student failure rates of Kansas minorities, poor, disabled, and limited English, one finds these failure rates compare "favorably" with similar failure rates for such persons elsewhere. Reduced to its simplest and clearest terms, this argument suggests that there is "no problem" in Kansas since our vulnerable and/or protected students aren't performing any worse than such students are performing elsewhere. This argument seems to the Court to be on a par with the following statement: "Persons of color should be comforted by the fact that lynchings in Kansas are no more frequent than lynchings in many other states."[179]

---

hereby concludes, for all the reasons stated, but almost entirely as a matter of fact, that the current school funding scheme stands in blatant violation of Article 6 of the Kansas Constitution and the equal protection clauses of both the Kansas and United States Constitutions[.]").

175. *Id.* at *43.

176. *Id.* at *40.

177. *Id.*

178. *Id.* at *48 (noting that the court believed the testimony of Kansas educators regarding what resources they would need to successfully educate their students).

179. *Id.* at *43.

On appeal, the Kansas Supreme Court reversed the lower court's finding that the school finance system violated state and federal equal protection provisions.[180] The court rejected the racial disparity claim because the plaintiffs did not establish a discriminatory purpose.[181] But the court did agree with the finding that the state school finance system "fails to provide adequate funding for a suitable education for students of their and other similarly situated districts, i.e., middle- and large-sized districts with a high proportion of minority and/or at-risk and special education students."[182] The major concern was that the formula was based on political compromises that had "distorted" the various cost adjustments, including those for low enrollment, at risk, and bilingual education programs.[183] In reaching this decision, the court found that the state had failed to satisfy its own definition of "a suitable provision for finance" of the public schools, which was based on state accreditation standards and student academic performance measures.[184] The court also referenced a legislatively-commissioned study which found that the school finance system needed an additional $853 million to satisfy the legislature's standard.[185]

To satisfy the constitutional mandate, the court observed that "[i]t is clear increased funding will be required; however, increased funding may not in and of itself make the financing formula constitutionally suitable."[186] Other considerations included "[t]he equity with which the funds are distributed and the actual costs of education, including appropriate levels of administrative costs."[187] The Kansas Supreme Court retained jurisdiction to give the legislature time to correct the constitutional deficiencies with the

---

180. *See* Montoy v. State, 120 P.3d 306, 308 (2005) (reversing the district court various grounds).

181. *See id*. (finding no discriminatory purpose necessary for equal protection purposes).

182. *Id*. at 310.

183. *Id.*

184. *Id.* at 309.

185. *See id.* at 309–10 (discussing the Augenblick & Myers study as evidence that suitable education is not being provided); *see also Montoy*, 2003 WL 22902963, at *39 (describing in further detail the same study).

186. *Montoy*, 120 P.3d at 310.

187. *Id.*

current school funding formula.[188] In the meantime, the current school funding formula would remain in effect.[189]

Although the trial and state supreme court decisions specifically cited the racial composition of the school districts that received constitutionally inadequate funding, in subsequent decisions, the Kansas Supreme Court mandated remedies in terms of aggregate dollars.[190] There was no reference to how this money should be dispensed in a manner that targeted Black schools.[191]

C. Mississippi: Williams v. Reeves

In the ongoing *Williams v. Reeves*[192] lawsuit, plaintiffs are alleging that Mississippi has failed its educational obligations to Black students under the Mississippi Readmission Act of 1870.[193] The statute imposes a number of "fundamental conditions" for the state's readmission into the Union, including one that prohibited the state from "amend[ing] or chang[ing]" its constitution in a manner that "deprive[s] any citizens of the United States of the school rights and privileges secured by the constitution of said State."[194] The plaintiffs, who are low-income Black women whose children attend state public schools, claim the present version of the education clause violates the "school rights and privileges"

188. *See id.* (staying all further proceedings to allow the legislature the time to take steps necessary to fulfill its "constitutional responsibility").

189. *See id.* at 310–11 (withholding the formal opinion until corrective legislation is enacted to ensure the legislature complies with the holding).

190. *See* Montoy v. State, 112 P.3d 923, 940 (Kan. 2005) (discussing Kansas students and districts in general without reference to predominately Black districts).

191. *Id.*

192. *See* Williams *ex rel* v. Bryant, No. 3:17-CV-404-WHB-LRA, 2019 WL 3757948 (S.D. Miss. Jan. 4, 2019), *aff'd in part*, *vacated in part*, *remanded sub nom.* Williams *ex rel* v. Reeves, 954 F.3d 729, 739 (5th Cir. 2020), *reh'g denied*, 981 F.3d 437 (en banc) (holding the Mississippi Constitution violated the Mississippi Readmission Act but that the judicial declaration asked for could not proceed under standing precedent).

193. *See id.* (discussing how the complaint alleges that amendments made to the education clause of the Mississippi Constitution violate the Mississippi Readmission Act and resulted in disparity in the education provided to students attending either predominately white or predominately Black schools).

194. An Act to Admit the State of Mississippi to Representation in the Congress of the United States 41st Cong. Ch. 19, 16 Stat. 67, 68 (1870).

provision of the statute.[195] In 1987, the state amended the 1868 version of the education clause, which required the states to establish "a uniform system of free public schools" by removing the reference to uniformity.[196] Thus, the education clause merely imposes a duty on the legislature to provide a system of "free public schools."[197] According to the plaintiffs, the deletion of the uniformity requirement has "caused them to suffer a number of injuries, including illiteracy, a diminished likelihood of high school graduation, low rates of college attendance and college completion, and an increased likelihood of future poverty."[198] A federal district court dismissed the lawsuit because of Eleventh Amendment immunity.[199] But the Fifth Circuit reversed, pointing out that a party may sue a state official in their official capacity if the suit seeks prospective instead of retrospective relief.[200] In an *en banc* ruling, the Fifth Circuit refused to rehear the panel decision.[201]

D. New Mexico: Martinez v. New Mexico

In this consolidated lawsuit, the plaintiffs asserted that the state had failed to provide at-risk students—including Native American and English Language Learners (ELL)—an adequate education pursuant to the State's education clause requiring the state to provide a "uniform system of public schools."[202] The

195. *Williams II*, 954 F.3d at 732.

196. *Id.* at 733.

197. *See id.* (referencing the 1987 version of the Mississippi Constitution).

198. *Id.*

199. *See Williams I*, 2019 WL 3757948 at *2 (finding that Mississippi would be a real and substantial party in interest to the case because the requested declaratory judgement would result in changes being made to the Mississippi Constitution).

200. *See Williams II*, 954 F.3d at 738 (discussing that as long as the claim seeks prospective relief for ongoing harm, the fact that a current violation can be traced to a past action does not bar relief).

201. *See Williams II*, 981 F.3d at 437–38 (writing that eight judges voted in favor of rehearing while nine judges voted against rehearing).

202. *See* Martinez v. New Mexico, No. D-101-CV-2014-00793, 2018 WL 9489378, at *2 (N.M. Dist. Ct. July 20, 2018) (discussing the constitutional obligation of the state to provide sufficient education for children categorized as "at-risk").

plaintiffs also brought a state equal protection clause challenge against the state.[203]

In 2018, a state trial court agreed with the plaintiffs' education clause claim, finding that the evidence showed that the education provided to the state's at-risk students was inadequate.[204] The court outlined the failure in terms of educational inputs, such as instructional materials, reasonable curricula, and quality of teaching.[205] With respect to instructional materials, the court referenced, *inter alia*, the defendants' failure to comply with the New Mexico Indian Education Act, a statute that required the state to provide "culturally relevant instructional materials for Native American students enrolled in public schools."[206] Districts with significant Native American populations failed to achieve the expected cooperation between district's schools and tribal communities.[207] The court also took notice of the State Department's failure to fill positions instrumental in fulfilling the statute's purpose as well as the failure to develop government-to-government relationship between the state and New Mexico tribes.[208]

As to curriculum, the court took notice of the state's failure to provide programs to ELL students that would help them learn English.[209] The state constitution as well as state and federal statutes required such programming for students who were not

---

203. *See id.* at *59–60 (discussing how case law rejects education-related claims under the federal equal protection clause and that cases thereafter were based on the clauses in most state constitutions interpreted to be equivalent to the equal protection clause).

204. *See id.* at *25 (finding that New Mexico failed to meet the obligation to provide every student with the opportunity to obtain an education that allows them to become prepped for career or college).

205. *See id.* at *25–37 (analyzing both educational inputs and outputs to determine whether the education provided is constitutionally adequate).

206. *See id.* at *27–28 (referencing failure to comply with the Act as amounting to a violation of the constitution's adequacy clause).

207. *See id.* at *28 (noting the goal of the Act has not been realized in most of the districts with significant Native American student populations).

208. *See id.* at *28–29 (referencing the failure to fill three regional Indian Education Department positions and lack of development of relationships to achieve the statutory goals).

209. *See id.* at *31 (finding there is a lack of sufficient monitoring programs to determine if ELL students receive adequate assistance).

proficient in English.[210] In addition, the state department of education lacked sufficient monitoring to ensure that ELL students were receiving adequate assistance in learning English or to track the training provided to teachers of ELL students.[211] Finally, the department had failed to provide a framework that the district could use to provide multicultural education.[212] With respect to teaching, the court concluded that the quality of teaching for at-risk students was inadequate.[213] The state's high-poverty schools had a disproportionately high number of low-paid, entry-level teachers.[214] Furthermore, high poverty schools and high ELL schools had fewer teachers rated effective or better than their low poverty rate and low ELL counterparts.[215] Moreover, the state failed to provide funding that would lower student-teacher ratios for ELL students to fifteen-to-one, which was ideal for language attainment.[216]

The court also cited student outputs as evidence of the state's failure to provide a constitutionally adequate education.[217] While New Mexico's children ranked at the bottom of the country in terms of educational achievement, low-income Native American and ELL students performed much worse.[218] For instance, on state standardized tests, the majority of the state's fourth, eighth, and eleventh graders were not proficient in math or reading.[219] In

---

210. *See id.* (noting that such programs are required by legislation such as bilingual programs, required action to overcome language barriers that prevent equal participation, and by the state constitution).

211. *See id.* at *31–32 (finding that the Public Education Department did not track training given to teachers who educate ELL students).

212. *See id.* at *32 (finding no provided framework for districts to use in providing multicultural education).

213. *See id.* at *33 (concluding that the weight of the evidence shows the quality of teaching for at-risk students is inadequate).

214. *See id.* (noting that it is well-recognized that inexperienced teachers are systematically less effective than experienced teachers).

215. *See id.* (finding that teachers in those schools had lower average evaluation scores).

216. *See id.* at *37 (citing research that shows ELL students benefit from smaller class sizes and increased attention in the classroom).

217. *See id.* at *37–46 (classifying outputs as test results, graduation rates, and frequency of need for remedial courses in college).

218. *See id.* at *37–38 (citing study measuring proficiency levels of students in reading and math).

219. *See id.* at *37 (finding that, on average, these students were three years

contrast, low-income, Native American and ELL students ranged from four to fifteen percent proficiency on these tests.[220] High school graduation rates were another problematic educational output.[221] While New Mexico had the lowest graduation rate in the country (fifty-four to seventy percent),[222] the graduate rate for Native Americans was much lower (forty-five to sixty-five percent).[223]

The court found further evidence of failure in the college remediation rates.[224] About half of the state's high school graduates needed remediation and were, thus, not ready for college.[225] The need for remediation was even higher for Native American students (fifty-nine percent) and Latinx students (sixty-eight percent).[226] The court attributed the inadequacy of the educational system to insufficient funding.[227] For example, it found that parts of the school finance formula that were geared toward ELL students, such as the at-risk factor and below-the-line funding, were insufficient to meet the educational needs of ELL students.[228]

The court also found that the school finance formula violated the state equal protection clause with respect to ELL and educationally disadvantaged students.[229] The court concluded that

---

behind grade level).

220. *Id.* at *38.

221. *See id.* at *41 (discussing the consistently low high school graduation rate in New Mexico, with the 2013–14 school year being the lowest in the United States).

222. *Id.*

223. *Id.* at *42.

224. *See id.* (finding that many of the students who did go to college needed substantial remedial help).

225. *See id.* at *42–43 (providing evidence in the form of witnesses for both sides that testified students who have to take remedial coursework once arriving to college are not college-ready).

226. *See id.* at *43 (citing report conducted by the Legislative Finance Committee).

227. *See id.* at *45 (rejecting defendants' position that additional recourses cannot improve achievement by using evidence that money spent on classroom instruction programs, extended school year, and quality teachers can improve the performance of at-risk students).

228. *See id.* at *47–49 (discussing the complexity of the at-risk factor formula and the lack of availability of below-the-line funding grants to all districts).

229. *See id.* at *62 (discussing how many state constitutions have equality

Rodriguez was inapplicable because the state constitution guaranteed a right to a "uniform system of free public schools."[230] Instead of rational basis analysis, the court determined that intermediate scrutiny applied to the plaintiffs' claim, meaning that the classification had to be substantially related to an important governmental interest.[231] The current funding scheme failed this standard of review because singling out educational disadvantaged and ELL students for adverse treatment bore no substantial relationship to any legitimate purpose to be achieved by the educational funding system.[232]

The court issued an order requiring the defendants "to take immediate steps to ensure that New Mexico schools have the resources necessary to give at-risk students the opportunity to obtain a uniform and sufficient education that prepares them for college and career."[233] In June 2020, the trial court rejected a motion by the defendants to dismiss the case, meaning that the court would maintain jurisdiction of the case until the state implemented the reforms required by the order.[234]

E. North Carolina: Silver v. Halifax County Board of Commissioners

In *Silver v. Halifax County Board of Commissioners*,[235] plaintiffs alleged that a board of county commissioners failed to provide students in the county with a "sound basic education" guaranteed by North Carolina's education clause.[236] This lawsuit

---

clauses specific to schools, which may guarantee uniform or thorough and efficient public schools).

230. *See id.* at *61 (quoting the New Mexico Constitution).

231. *See id.* at *62 (ruling out rational basis because the review applies to general social and economic legislation, not that which affects a fundamental or important constitutional right or sensitive class).

232. *See id.* (elaborating on the substantially related to an important government interest test needed to pass intermediate scrutiny).

233. *Id.* at *74.

234. *See* Martinez v. New Mexico, No. D-101-CV-2014-00793 (N.M. Dist. Ct. Jul. 14, 2020) (retaining jurisdiction until New Mexico implements long-term, comprehensive reforms consistent with the final order).

235. Silver v. Halifax Cnty. Bd. of Comm'rs, 821 S.E.2d 755, 760 (N.C. 2018).

236. *See id.* at 756 (establishing that the state constitutional obligation to provide a sound, basic education belongs to the state, not a county board of

was similar to the North Carolina Supreme Court's decision in *Leandro v. North Carolina*.[237] In that case, the court ruled that its constitution imposed a duty on the state to provide every student with such a right.[238] The *Silver* plaintiffs, unlike those in the *Leandro* case, claimed that the board maintained a tripartite school district system in an efficient manner that resulted in the defendants' failure to provide the Black school districts in the county with a sound basic education.[239]

In support of this claim, the plaintiffs compared the inputs and outputs provided to the two overwhelmingly Black districts—Halifax County Public Schools (HCPS) and Weldon City Schools (WCS)—with those provided to the predominantly white district—Roanoke Rapids Graded School District (RRGSD).[240] With respect to inputs, the plaintiffs stated that school buildings were "woefully inadequate"; students in one high school had to "walk through sewage to move between classes because of defective plumbing"; and students frequently lacked textbooks and other curricular materials.[241] In contrast, the facilities of the white school district were "well kept and regularly renovated."[242] Students also had access to advanced placement classes and other curricular and extra-curricular programs not available to the Black districts.[243] Because of these disparities, the plaintiffs asserted that it was

---

commissioners).

237. *See id.* (determining the case is distinguishable from the landmark decision); *see also* Leandro v. North Carolina, 488 S.E.2d 249, 254 (N.C. 1997) (holding that the right to education provided in the state constitution is qualitative and encompasses the right to sound basic education).

238. *See Leandro*, 488 S.E.2d at 255 (concluding the North Carolina Constitution guarantees every child of the state the opportunity to sound basic education, including a qualitatively adequate education).

239. *See Silver*, 821 S.E.2d at 757–58 (alleging the continued support of the system and refusal to manage and distribute resources efficiently among the districts resulted in failure).

240. *See id.* (showing HCPS's student population as eighty-five percent Black and four percent white, WCS's student population as ninety-four percent Black and four percent white, and RRGSD as twenty-six percent Black and sixty-five percent white).

241. *Id.* at 758.

242. *Id.*

243. *See id.* (discussing availability of a wide variety of activities for RRGSD students while HCPS and WCS teachers often rely on donations from parents to purchase books and classroom materials).

difficult for HPCS and WCS to attract and retain "quality, or even fully licensed, teachers and administrators."[244] Indeed, they frequently had to resort to hiring teachers from the Teach for America program or very inexperienced teachers.[245]

According to the plaintiffs, these disparities were caused by the defendant's system of local sales tax distribution for education.[246] Legislation empowered county commissioners to choose between two methods of distributing local sales tax to provide additional funding to school districts.[247] The first was the per capita method, which called for local sales tax revenue to be distributed to all municipalities based on the resident population of each.[248] The second was the *ad valorem* method, in which local sales tax revenue is divided among all taxing entities.[249] The board always chose the ad valorem method, which the plaintiffs alleged caused the white school district to receive more educational funding than their Black counterparts.[250] As to outputs, the plaintiffs asserted that HCPS and WCS students scored substantially below RRGSD students on end-of-course tests and a majority of HCPS and WCS students scored below grade level on state standardized tests.[251] Moreover, students from HCPS and WCS schools consistently scored 150 to 250 points lower on the SAT exam.[252]

The Board moved to dismiss the lawsuit on the ground that the plaintiffs had failed to state a claim upon which relief could be

---

244. *Id.*

245. *See id.* (noting the percentage of fully licensed teachers in the two predominantly Black districts ranged from sixty-three to eighty-nine percent).

246. *See id.* (theorizing reasons for the discrepancy in the quality of education available).

247. *See id.* (discussing the General Assembly enacted legislation that gives the defendant the choice of two distribution options).

248. *See id.* (citing North Carolina General Statute § 105-472(b)(1)).

249. *See id.* (citing North Carolina General Statute § 105-472(b)(2)).

250. *See id.* (discussing how HCPS does not have supplemental property tax and is therefore not a taxing entity, receiving no money from the *ad valorem* method).

251. *See id.* (showing that students in HCPS and WCS schools score fifteen to thirty percent lower than RRGSD schools on tests).

252. *See id.* at 758–59 (discussing another statistic to show disparities within the school districts).

granted.[253] The trial court granted this motion and the state court of appeals affirmed.[254] The state supreme court upheld the lower courts' ruling on the ground that the state, not the county board of commissioners, had the obligation to provide a sound basic education.[255]

VI. Part V: Reparations Framework for State Legislation

Thus far, we explained how local property taxation, state aid policies, and stealth inequities have worked together to create Black-white disparities in school funding post-*Brown*.[256] We also observed that the Supreme Court further encouraged this gap by (1) upholding the constitutionality of local property taxation in *Rodriguez*; (2) prohibiting the court-mandated desegregation of metropolitan areas in *Milliken I*; and (3) authorizing limited reparations plans for Black urban communities in *Milliken II*.[257]

We have also observed that recent school finance litigation has begun to target policies that have caused racial funding disparities.[258] This race-conscious school finance litigation promises to put a stop to policies that have caused Black-white school funding disparities.[259] However, this litigation strategy does not provide a remedy for losses in school funding over the years and the funding gap experienced by predominantly Black schools and their communities.[260] Can reparations litigation provide relief for this latter injury?

---

253. *See id.* at 759 (moving to dismiss the plaintiffs' request of a declaratory judgement to order the implementation of a plan to cure alleged violations of fundamental rights to education).

254. *See id.* (noting that no provision of the North Carolina Constitution affirmatively requires a board of county commissioners to implement and maintain a public education system in the county in which it sits).

255. *See id.* at 760 (using the clear and unambiguous language of the state constitution to determine that no express provision requires boards of county commissioners to provide for or preserve any rights relating to education).

256. *See supra* Part II.

257. *See supra* Part III.

258. *See supra* Part IV.

259. *Id.*

260. *Id.*

Probably not. Plaintiffs have made several attempts to obtain reparations through litigation.[261] These attempts have been largely unsuccessful.[262] Indeed, "reparations litigation has been all but abandoned."[263] According to Kindaka Jamal Sanders, standing poses a particularly formidable barrier to reparations-based litigation:

> The standing problem produces several challenges to reparations-related litigation. The first problem relates to individual claims of current injuries stemming from slavery. The standing doctrine requires that the injury alleged by the plaintiff be his own and not that of another. Thus, African Americans are prevented from maintaining a suit based exclusively on the enslavement of their ancestors. The harm to the plaintiff has to be personal. The standing doctrine has also been interpreted to limit claims of group injury or injuries deriving from stigmatization.[264]

Because litigation provides an incomplete remedy for the damage caused to Black communities and the schools that serve them, reparations must be achieved through legislation, not litigation.[265] Robert Westley explains the advantages of legislative-based reparations in the following passage:

> Legislatures, it may be argued, provide a friendlier forum for racial redress for both formal and substantive reasons. Formally, although their actions may be subject to judicial review, they are not constrained by judicial doctrines of standing, deference, timing or res judicata. Each of these doctrines might impact negatively any lawsuit seeking Black

---

261. *See* Eric K. Yamamoto, Sandra Hye Yun Kim, & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 22—23 (2007) (discussing how the case for reparations fit within well-established legal principals such as traditional tort law framework and contract claims).

262. *See id.* at 24 (stating that the "staccato failure" of recent lawsuits lends a sense that the use of tort and contract law were misfits in the reparations context).

263. Kindaka Jamal Sanders, *Re-Assembling Osiris: Rule 23, the Black Farmers Case, and Reparations*, 118 PENN ST. L. REV. 339, 346 (2013).

264. *Id.* at 347.

265. *See* Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations*?, 19 B.C. THIRD WORLD L.J. 429, 434–35 (1998) (considering the recent revival of the reparations principle through legislation aimed towards Holocaust survivors whose assets were illegally confiscated by Swiss banks in the aftermath of World War II).

> reparations. The claim of reparations, although constructively taking the form of a traditional lawsuit, e.g., Victims of Racism v. The Government that Failed to Protect Them, inevitably presents issues, some of them political, that many courts would find difficult, if not impossible, to resolve. By contrast, legislatures may hold hearings, make findings, and pass resolutions or laws on any matter affecting the public interest and within the scope of constitutional power. Substantively, legislatures provide a friendlier forum than courts for racial remedies, even during periods of backlash, because of their ability to enact comprehensive solutions to diffuse social ills, such as racial discrimination, and the inherent susceptibility of legislators not only to constituent pressure but also to trading votes. Moreover, historically it has been legislatures, not courts, that have in fact initiated the most comprehensive remedies to racial subordination, *Brown v. Board of Education* and its progeny notwithstanding.[266]

One can find further support for the benefits of legislative-based reparations in Virginia's Brown v. Board of Education Scholarship Program (Brown Fund Act)[267]—which has been called the country's first civil rights reparations program in the country.[268] This legislation was enacted in response to the state's program of massive resistance in the wake of the *Brown* case.[269] At that time, the state passed several laws to circumvent desegregation including the creation of voucher programs that white students could use to attend segregated, private schools.[270] Pursuant to this authority, Prince Edward County closed its schools from 1959–1964 and provided vouchers for its white

---

266. *Id.* at 435–36.

267. VA. CODE ANN. §§ 30-231.1–10 (2020).

268. *See* Ken Woodley, *Virginia is Proof That Reparations for Slavery Can Work*, WASH. POST (Jul. 19, 2019, 11:24 AM), https://www.washingtonpost.com/opinions/virginia-is-proof-that-reparations-for-slavery-can-work/2019/07/19/11aceaaa-a25b-11e9-b732-41a79c2551bf_story.html (quoting "civil rights icon" Julian Bond remarking on the passing) [perma.cc/3ZCV-V7KU].

269. *See Committee Information*, BROWN V. BOARD OF EDUC. SCHOLARSHIP COMM., http://brownscholarship.virginia.gov/committee.asp (discussing how refusal of Virginia public schools to desegregate led to legislative action) [perma.cc/2Y7N-CDGH].

270. *See* Daniel Peter Kuehn, *Accommodation Within the Broad Structure of Voluntary Society: Buchanan and Nutter on School Segregation* (Jan. 14, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3308162 (discussing attempts to continue school segregation) [perma.cc/3QYQ-44UL].

students to use for segregation academies.[271] However, the county provided no educational opportunities for Black students during this period.[272] The Supreme Court eventually found this county's actions unconstitutional in *Griffin v. County School Board of Prince Edward County*,[273] but the five-year closing of schools affected Black residents in ways "that still haunt them as adults," such as the failure to obtain a high school diploma and the inability to pursue career goals.[274]

The Brown Fund Act seeks to remedy this wrong by providing financial support to present-day Virginia residents who were enrolled in the state's public schools between 1954 and 1964, in jurisdictions that closed their schools to avoid desegregation.[275] Specifically, eligible students could use the fund to help them obtain:

> [T]he adult high school diploma; a passing score on a high school equivalency examination approved by the Board of Education; College-Level Examination Program (CLEP) credit; career or technical education or training in an approved program at a comprehensive community college or at an accredited career and technical education postsecondary school in the Commonwealth; an undergraduate degree from an accredited associate-degree-granting or baccalaureate (i) private institution of higher education or (ii) public institution of higher education; a graduate degree at the masters or doctoral level; or a professional degree from an accredited baccalaureate

---

271. *See* Chris Ford, Stephenie Johnson, & Lisette Partelow, *The Racist Origins of Private School Vouchers*, CTR. FOR AM. PROGRESS (July 12, 2017, 11:59 PM), https://www.americanprogress.org/issues/education-k-12/reports/2017/07/12/435629/racist-origins-private-school-vouchers/ (discussing the history of the voucher program) [perma.cc/7X6B-2PE5].

272. *See* Leo Casey, *When Privatization Means Segregation: Setting the Record Straight on School Vouchers*, DISSENT (Aug 9, 2017), https://www.dissentmagazine.org/online_articles/private-school-vouchers-racist-history-milton-friedman-betsy-devos (examining the resistance of desegregating and lack of available educational opportunities for Black students) [perma.cc/L6KS-JSKY].

273. *See* Griffin v. Sch. Bd. of Prince Edward Cnty., 377 U.S. 218, 232 (1964) (holding that closing the public schools of the county while contributing to the support of private segregated white schools denied Black school children equal protection of the laws).

274. Verna L. Williams, *Reading, Writing, and Reparations: Systemic Reform of Public Schools as a Matter of Justice*, 11 MICH. J. RACE & L. 419, 441 (2006).

275. *See* VA. CODE ANN. § 30-231.1–10 (2020) (establishing financial support for those desegregation effected in the fifties and sixties).

> private institution of higher education in the Commonwealth or baccalaureate public institution of higher education in the Commonwealth.[276]

Since the statute's passage, nearly 250 persons have received financial support ranging "from a 65-year-old man, locked out of school after first grade, who wanted to learn phonics and cursive writing, to some who have gone on to earn college and graduate degrees."[277] While providing monetary reparations to those persons who have suffered from massive resistance should be part of the effort of a state to redress its wrongs, such funding alone is insufficient to address the educational harms suffered by Black students and communities.[278] Indeed, Verna Williams in her critique of the Brown Fund Act states: "[I]n light of the state's history of segregating tax dollars and funneling most public revenues to White schools, lawmakers should develop a system of school funding that ensures equitable funding for facilities and resources at all schools."[279] We would also add that Virginia and other states should include provisions designed to address the harm done to predominantly Black schools and the communities they serve.[280] The remainder of this part lays out a framework for school finance reparations that state legislators could adopt and provides specific examples using state data.[281] It concludes with a discussion of the constitutionality of the plan under the Equal Protection Clause.

A. Four-Part Reparations Framework

The persistent effects of Black-white racial segregation and housing discrimination affect education systems and school finance specifically in numerous ways.[282] Our reparations plan

---

276. *Id.*

277. Woodley, *supra* note 268.

278. *See id.* (discussing the ongoing need for the United States to address the harms of slavery).

279. Williams, *supra* note 274, at 472–73.

280. *See id.* at 472 (showing how reforming education would be difficult, but the right thing to do).

281. *See infra* A. Four-Part Reparations Framework.

282. *See* PHILLIP TEGELER & MICHAEL HILTON, DISRUPTING THE RECIPROCAL RELATIONSHIP BETWEEN HOUSING AND SCHOOL SEGREGATION 2 (2017) (showing

focuses on four specific effects of housing discrimination and financial remedies for those effects:

> 1. Lost property tax revenues due to depressed values;
>
> 2. Inequitable taxation in the form of higher tax rates adopted to offset revenue losses;
>
> 3. School finance policies which capitalize on and/or reinforce historical disparities;
>
> 4. Increased costs of achieving common outcome goals for children in the presence of racial isolation.

First, restrictive covenants in deeds, redlining, racial bias in mortgage lending, all interconnected with federal and state housing policies, as laid out in Richard Rothstein's *Color of Law*, have led to dramatic differences in accumulated real estate wealth and current residential property values of Black individuals and Black communities.[283] Local public-school district boundaries, which define taxing jurisdictions for funding public schools, often serve as dividing lines between high value residential properties owned by whites, immediately adjacent to low value residential properties owned for generations by Blacks.[284] These differences in the average values of residential properties between predominantly Black and predominantly white school districts lead to vastly different ability of those districts to raise revenues from property taxes.[285] These differences result directly from decades of government endorsed and enabled racial segregation.[286] Racial restrictions were introduced into and maintained in deeds specifically to preserve the value of homes in white neighborhoods.[287]

---

how housing discrimination and school policy are tied together).

283. *See generally* ROTHSTEIN, *supra* note 51 (documenting the history of racial disparity in the United States).

284. *See* Karin E. Kitchens, *Dividing Lines: The Role School District Boundaries Play in Spending Inequality for Public Education*, 102 SOC. SCI. Q. 468, 474 (2020) (highlighting the differences taxes cause in education).

285. *See id.* (explaining how higher priced property collects more revenue at a lower tax rate).

286. *See id.* at 488 (noting that districts are separated along racial lines).

287. *See* Colin Gordon, *St. Louis Blues: The Urban Crisis in the Gateway City*, 33 ST. LOUIS U. PUB. L. REV. 81, 85 (2013) (explaining how race restrictive deeds uphold segregation).

Other factors partially mitigate these disparities in local revenue raising capacity. One example occurs where affluent white neighborhoods and high value commercial shopping districts remain within the boundaries of the school district which serves a majority Black population.[288] For example, Kansas City was forced to pay for its own desegregation remedies through a significant increase in local tax levy.[289] Other major urban centers have similar advantages to the extent that significant tax abatements have not minimized the taxable values of commercial properties.[290] But more residential urban districts like Baltimore or Philadelphia and inner urban fringe neighborhoods relegated for Black homeowners lack these advantages.

Some states, primarily southern states, operate countywide school systems which leads to fewer sharply racially divided taxing jurisdictions.[291] But even then, in some of these states, Black cities and towns at the center of these counties are carved out as separate, segregated independent taxing jurisdictions.[292] One notable example is Baltimore City.[293] As such, the race gap in local property tax revenues varies widely from state to state and in some cases from region to region within states.

State school finance systems typically include a general formula aid component of which a primary goal is equalization of revenues based on differences in local wealth and income—many

---

288. *See* Green & Baker, *supra* note 134, at 64 (showing how predominantly white shopping centers and country clubs increased the value of the entire school district).

289. *See id*. at 73 (keeping in place the court ordered tax levy).

290. *See id*. at 64 (showing the effect of high value residential and commercial properties on taxes).

291. *See* ILL. STATE UNIV. CTR. FOR THE STUDY OF EDUC. POL'Y., COUNTY SCHOOL DISTRICTS: RESEARCH AND POLICY CONSIDERATIONS 9 (ILL. STATE UNIV. CTR. FOR THE STUDY OF EDUC. POL'Y, ed., 2009) (listing Florida, Georgia, Louisiana, and South Carolina as countywide school systems).

292. *See* Lionel Foster, *"The Black Butterfly" Racial Segregation and Investment Patterns in Baltimore*, URB. INST. (Feb. 5, 2019), https://apps.urban.org/features/baltimore-investment-flows/?fbclid=IwAR0uKWoIjA1JclJtceAQzGm6xl6-Mv5vROchWRWy_gcCfq9N0sFuIyNml7Y (attributing the racial divide in cities and neighborhoods to the Federal Housing Administration) [perma.cc/2T83-FYBP].

293. *See id*. (calling Baltimore City the "black butterfly" due to the rampant segregation).

exclusively focused on differences in taxable property wealth.[294] That is:

> [State General Formula Aid = Foundation Funding Target – Local Revenue Raised at Equitable Taxation]

The foundation funding target may either be a singular spending per pupil target, or may be adjusted to account for various need and cost factors.[295] These latter, additional adjustments may either work in favor of, or in opposition to, driving additional resources to Black communities and children.[296] Whether including additional factors or not, general formula aid programs often fail to mitigate entirely Black-white disparities in school district revenues.[297] Mitigating these disparities, now and henceforth (and perhaps retroactively) is part I of our reparations framework:

> Compensation for lost property tax revenues: Upon calculating the Black-white difference in local revenues which arise from historical forces of real estate segregation, then adding the difference in state general formula aid (existing compensation), we can identify the remaining gap in revenues for the Black child and for the white child in any state. States should be required to allocate this additional margin of funding per Black child based on Black enrollments across all districts.

As noted above, local tax revenues per Black child in many states are less than local tax revenues per white child because local property values are lower—even for otherwise similar structures—in predominantly Black neighborhoods than in white neighborhoods.[298] Often, however, the margin of difference in

---

294. *See* BRUCE D. BAKER. MATHEW DI CARLO, & MARK WEBER, THE ADEQUACY AND FAIRNESS OF STATE SCHOOL FINANCE SYSTEMS 2 (2019), https://www.shankerinstitute.org/resource/adequacy-and-fairness-state-school-finance-systems (introducing the generic school finance system formula) [perma.cc/FC8Q-STUK].

295. *See id*. at 4 (highlighting the different factors that weigh in to cost of education in schools).

296. *See id*. at 3 (comparing two similar school districts and showing how inequality can arise).

297. *See id*. at 2 (using three core principles to create a new and more equitable system of school finance).

298. *See* ANDRE PERRY, JONATHAN ROTHWELL, & DAVID HARSHBARGER, THE DEVALUATION OF ASSETS IN BLACK NEIGHBORHOODS 11 (2018), https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_Brookings-

revenue is less than it would be under equal taxation.[299] Black communities and homeowners in many cases are paying a higher effective tax rate on their properties to raise less revenue than their white neighbors in the next district over.[300] Save for another day the fact that Black homeowners are also likely paying significant additional fees and higher interest rates on their mortgages than even white homeowners in the same districts.[301] The assumption behind a general aid formula is that foundation spending levels should be attainable at equal taxation.

Our first component offsets only the remaining gap in revenues to school districts without considering the possible differences in unequal taxation between Black and white homeowners.[302] Our second component begins by calculating the average difference in effective tax rates paid by Black versus white homeowners and provides a rebate for the higher price in taxes paid by Black homeowners.

> Compensation for inequitable residential taxation: Rebates to Black property taxpayers covering Black-white differential in effective tax rate.

Structurally, this program is similar to state aid programs which have been used to buy down the tax rates for fixed or lower income households in affluent, high spending, high taxing school districts, like New York's STAR tax relief program.[303] The difference is that those programs in fact reinforce racial disparities

---

Metro_Devaluation-Assets-Black-Neighborhoods_final.pdf (valuing homes in Black neighborhoods at roughly half of homes with no Black residents) [perma.cc/J952-UDC5].

299. *See* BAKER, DI CARLO, & WEBER, *supra* note 294, at 16 (comparing the difference in revenue between two separate districts).

300. *See* Kitchens, *supra* note 284, at 6 (showing the difference in tax rates due to segregation).

301. *See* John Yinger, *Discrimination in Mortgage Lending: A Literature Review, in Mortgage Lending, Racial Discrimination and Federal Policy*, *in* MORTGAGE LENDING, RACIAL DISCRIMINATION, AND FEDERAL POLICY 29 (John Goering & Ron Wienk eds., 1997) (highlighting the higher interest rates Black homeowners regularly face).

302. *See* BAKER, DI CARLO, & WEBER, *supra* note 294, at 17 (listing the differences in revenue for school systems between states).

303. *See* Tae Ho Eom & Kiernan Killeen, *Reconciling State Aid for Property Tax Relief for Urban Schools: Birthing a New STAR in New York State*, 40 EDUC. & URB. SOC. 36, 43 (2007) (giving a brief overview of the STAR program).

and reward communities that have high property values due to past segregation.[304] States have a variety of features of their aid programs which specifically reward districts by driving more aid, or providing more local revenue raising authority to those districts that have benefited historically from racial residential segregation.[305] Perhaps the most obvious and egregious among these is Kansas's policy of raising local revenue caps for the districts with the highest priced houses—districts that primarily serve the white suburbs of Kansas City—a region that was a national model for the use of Homeowners Associations (HoAs) as method of enforcing racial restrictions.[306] That is, these districts are permitted to raise more revenue specifically because Black homeowners were (and still largely are) kept out.[307] This brings us to our third component:

> Reversal of school finance and aid distribution policies built explicitly on prior, systemic racism and commensurate repayment to affected school districts.

Revenues raised through these programs should be redistributed to neighboring districts serving large Black populations.

The final component of our reparations plan is more complicated, and addressed in our prior work. The creation of Black racial isolation through restrictive housing policies led to a unique form of concentrated Black urban poverty which has had intergenerational adverse influence on short-term achievement and long-term economic outcomes for children raised in these communities.[308] Bruce Baker and Preston Green have estimated in prior work the additional costs associated with achieving outcome equity in racially isolated Black communities.[309] States should be

---

304. *See id*. (outlining the issues with the STAR program).

305. Baker & Corcoran, *supra* note 78 (rewarding districts for having a history of racial segregation).

306. Gordon, *supra* note 287 (showing how race restrictive deeds uphold segregation).

307. *Id. (*explaining how race restrictive deeds keep Black property values down).

308. *See* Bruce D. Baker, *Exploring the Sensitivity of Education Costs to Racial Composition of Schools and Race-Neutral Alternative Measures*, 86 PEABODY J. EDUC. 58, 73 (2011) (displaying a table showing the adverse effect of poverty on achievement).

309. *See generally* Bruce D. Baker & Preston C. Green III, *Equal Educational*

obligated to include in their cost adjustments for funding formulas, a factor that compensates for the additional costs of remedying outcomes for students in racially isolated, Black school districts.

B. Examples

1. Lost Property Tax Revenues Due to Depressed Values

For the first component, the first step is to calculate the local revenue per white child in a state and local revenue per Black child in a state, to determine the magnitude of the gap, if any, between the two.

> [Local Revenue per White Child - Local Revenue per Black Child = Local Revenue Gap]

The second step is to calculate the extent to which state general formula aid compensates for this gap and whether a remaining racial gap is left after including state general formula aid. Table 1 provides a summary of the past decade for three states with persistent remaining racial gaps. In Maryland, the average local revenue per Black child is over $2,000 less per pupil in most years than the average local revenue per white child.[310] But the average state general formula aid is less than $1,000 more per Black child than per white child, covering less than half the gap and leaving a reparations margin of nearly $1,500 per pupil.[311] To a large extent, the Maryland gap is a function of the separation of Baltimore City from the county governance structure.[312] Gaps are also persistent in Virginia, a state where a number of majority Black "city" districts are carved out from county systems.

Connecticut remains one of the most segregated northeastern states, and a state that has put less effort into providing school

---

Opportunity and the Distribution of Educational Opportunity and the Distribution of State Aid to Schools: Can or Should School Racial Composition Be a Factor?, 34 J. EDUC. FIN 289 (2009).

310. *See infra* Table 1. *States with Large Persistent Black-White Revenue Gaps* (showing the local revenue gap to be $2,173).

311. *See id* (showing the margin to be $1,497).

312. FOSTER, *supra* note 292.

funding equity than others.[313] The local revenue gap for the average Black versus white child in Connecticut is huge.[314] While the state general formula aid margin is larger in Connecticut than in Virginia or Maryland, the remaining reparations margin in Connecticut in recent years is the largest.

Table 1. States with Large Persistent Black-White Revenue Gaps[315]

	State General Formula Aid DIF (BLACK – WHITE)	*Local Property Tax Revenue GAP (WHITE – BLACK)*	*Remaining Reparations Margin*
Maryland			
2008	$1,118	$2,809	$1,821
2009	$853	$2,609	$1,821
2010	$805	$2,471	$1,722
2011	$608	$2,293	$1,791
2012	$649	$1,970	$1,408
2013	$774	$1,700	$987
2014	$648	$2,034	$1,475
2015	$711	$2,373	$1,730
2016	$708	$1,907	$1,232
2017	$733	$2,022	$1,324
2018	$710	$2,173	$1,497
Virginia			
2008	$475	$1,442	$1,041
2009	$526	$1,348	$852
2010	$442	$1,387	$977
2011	$284	$1,210	$984
2012	$312	$1,187	$933
2013	$266	$1,261	$1,061
2014	$272	$1,281	$1,074
2015	$288	$1,268	$1,021
2016	$279	$1,255	$1,003
2017	$300	$1,257	$982

313. *See* GARY ORFIELD & JONGYEON EE, CONNECTICUT SCHOOL INTEGRATION MOVING FORWARD AS THE NORTHEAST RETREATS 31 (2015) (showing severe segregation in schools).

314. *See id*. at 13 (highlighting the extreme difference in communities' wealth).

315. Data Sources: Compiled by author using school district level panel, from: Bruce D. Baker, Matthew Di Carlo, Ajay Srikanth, & Mark Weber, SCHOOL FINANCE INDICATORS DATABASE (2020), http://schoolfinancedata.org/ [perma.cc/5HHX-MAAS].

2018	$300	$1,294	$1,016
Connecticut			
2008	$2,624	$3,168	$586
2009	$2,796	$3,034	$247
2010	$2,435	$3,071	$658
2011	$2,370	$3,365	$1,058
2012	$2,775	$3,390	$656
2013	$2,645	$3,732	$1,160
2014	$2,568	$3,941	$1,461
2015	$2,470	$4,108	$1,707
2016	$2,508	$4,015	$1,549
2017	$2,557	$4,319	$1,808
2018	$2,756	$4,295	$1,574

Revenue variables derived from U.S. Census Fiscal Survey of Local Governments, where local revenue includes revenue from school district local property taxes and local revenue from city, parent government property taxes. State aid includes only state general formula aid. Racial composition from National Center for Education Statistics Common Core of Data, Public Education Agency Universe Survey.

2. Inequitable Taxation in the Form of Higher Tax Rates Adopted to Offset Revenue Losses

Table 1 reveals the extent of local revenue gaps in Maryland, Virginia and Connecticut. These three states were found to have the largest persistent gaps among states with significant Black populations.[316] In Connecticut, for example, the average local revenue per Black child is over $4,000 per pupil less than the average local revenue per white child.[317] In many cases, Black homeowners are paying even higher effective tax rates on their homes than white homeowners just to get the gaps this small.[318] The revenue gaps would be larger at equitable taxation.[319] Blacks are paying a tax penalty in addition to facing a revenue deficit,

316. *See supra* Table 1. *States with Large Persistent Black-White Revenue Gaps*.

317. *See id.* (showing the average gap in revenue between white and Black children is $4,925).

318. *Id.*

319. *Id.*

because of housing segregation.[320] Black communities may also face other elevated costs related to maintenance of aging infrastructure and public safety, leading to higher cumulative property taxes.

Table 2 summarizes data on housing values and property taxes paid, calculated with individual household level data for Black and white households in the American Community Survey from 2005 to 2018.[321] Data are by metropolitan area, including metro areas within the states addressed in Table 1. In the Baltimore metro area Black homes are, on average, valued at about $150,000 less than white homes.[322] Property taxes paid on Black homes tend to be about $1,000 less, but this still leads to a higher effective tax rate.[323] One might calculate the average "reparations rebate" payment to Black households as the difference in the tax bill that would be paid on the Black home if the white effective tax rate was used.[324] For example, in Bridgeport for a home valued at $340,000:

Black Tax Rate – White Tax Rate = .53%

.53%	×	$340k	=	$1,802
Black Tax		*Black Home Value*		*Black Homeowner Rebate*

Similarly, in Baltimore on a $240,000 home, a $1,080 rebate (.45% rebate).

Table 2. Black Tax by Metropolitan Area[325]

		Housing Value	*Property Taxes*	*Effective Rate*

320. *Id.*

321. *See infra* Table 2. *Black Tax by Metropolitan Area* (displaying the property taxes paid in Black and white households).

322. *See id.* (showing the difference in home values to be $154,010).

323. *See id.* (showing the difference in property taxes to be $1,004).

324. *Id.*

325. Data Source: Calculated using American Community Survey annual samples from 2005–2018 from Steven Ruggles, Sarah Flood, Ronald Goeken, Josiah Grover, Erin Meyer, Jose Pacas, & Matthew Sobek, *IPUMS USA: Version 10.0,* IPUMS (2020), https://doi.org/10.18128/D010.V10.0 [perma.cc/K4WK-FH2K].

Baltimore-Columbia-Towson, MD	White	$391,996	$3,557	1.41%
	Black	$237,986	$2,553	1.86%
Bridgeport-Stamford-Norwalk, CT	White	$735,471	$7,310	2.00%
	Black	$339,384	$5,546	2.53%
Hartford-West Hartford-East Hartford, CT	White	$307,296	$5,395	2.30%
	Black	$224,367	$4,226	2.70%
New Haven-Milford, CT	White	$322,175	$5,515	2.35%
	Black	$221,543	$4,792	3.20%
Virginia Beach-Norfolk-Newport News, VA-NC	White	$317,542	$2,630	1.23%
	Black	$226,616	$1,965	1.37%
Richmond, VA	White	$303,926	$2,391	1.13%
	Black	$197,754	$1,631	1.23%
Washington-Arlington-Alexandria, DC-VA-MD-WV	White	$539,631	$4,603	1.29%
	Black	$400,178	$3,449	1.40%

Table 3 shows that even if we control for housing unit size, by number of bedrooms, year of data, and metropolitan area within state, housing values for Black families in Connecticut and Maryland are over $140k less than housing values for white families.[326] Total tax bills are lower, but effective tax rates still higher. These margins, however, are smaller than in Table 2 and would lead to smaller rebates. However, it is questionable as to whether such a policy should discount the rebate for the fact that whites in suburbs tend to live in larger homes (with more bedrooms).[327]

326. *See infra*

Table 3. *Conditional Analysis of Housing Value, Taxes and Tax Rate Differences* (compiling the housing value, property taxes and effective rate of several cities).

327. *Id.*

Table 3. Conditional Analysis of Housing Value, Taxes and Tax Rate Differences

2005–2018

	*Housing Value**		*Taxes*		*Effective Rate*	
	coef	se	coef	se	coef	se
Connecticut	-$173,247	$2,887	-$1,096	$15	0.449%	0.084%
Maryland	-$143,982	$938	-$737	$6	0.297%	0.033%
Virginia	-$93,721	$847	-$682	$6	0.076%	0.032%
*Controlling for year, no. of bedrooms and metro area						

3. School Finance Policies Which Capitalize on and/or Reinforce Historical Disparities

The third component of school finance reparations requires more detailed auditing of state aid programs. Bruce Baker and Preston Green wrote back in 2005 about how states have created features of their state school finance systems which reinforce racial disparities.[328] Specific examples included an Alabama provision which determined aid based on the degree levels held by teachers, which had been built on a previous program based on lower unit costs for Black versus white teachers.[329] The former largely reinforced the latter when the shift was made because Black teachers, generally in Black schools had not been provided opportunities to seek higher degrees at the same rate as white teachers.[330] Another example involved an adjustment to local revenue caps adopted in Kansas, called a "cost of living" adjustment, which increased the cap, by providing additional "weighted pupil" counts in the formula, for the seventeen districts with the highest housing prices.

---

328. *See generally* Bruce D. Baker & Preston C. Green III, *Tricks of the Trade: State Legislative Actions in School Finance Policy That Perpetuate Racial Disparities in the Post-Brown Era*, 111 AM. J. EDUC. 372 (2005).

329. *See id.* at 384 (summarizing the disparity in teachers' pay because of their education level).

330. *See id.* (indicating that black teachers are 59% less likely to hold master's degrees).

These programs capitalize on racial segregation, from de jure school segregation in Alabama, to carefully orchestrated racial residential segregation in Johnson and Wyandotte County Kansas.[331] Put bluntly, the reason why homes in some districts in Kansas are valued higher than homes in neighboring districts is because of racial restrictions enforced through HOAs.[332] Further, there is no justification that these policies represent any real needs or costs.[333] As the Kansas courts explained:

> We held that the new cost-of-living property tax provision was not based on any evidence that there was any link between high housing costs and higher education costs or that the 17 districts that would benefit from the provision pay higher teacher salaries. We noted that the evidence at trial demonstrated the opposite—that the districts with high-poverty, high at-risk student populations are the ones that need help attracting and retaining teachers.[334]

But because the adjustment was added while the case was already at the appellate court, it was allowed to remain as part of the funding formula and persists to this day.[335] Moving forward, and perhaps even retroactively, these revenues should be shared across districts that were inappropriately advantaged and those that were adversely affected.

Table 4 shows the effect of the Kansas "cost of living" adjustment across Johnson and Wyandotte County school districts. The policy adds "weighted pupils" to calculate a higher general funding level, and in turn raises the cap on additional (supplemental) local revenue raising.[336] For Johnson County districts like Blue Valley, Shawnee Mission and Olathe that amounts to a seven percent or more increase.[337] Kansas City, Kansas, where Blacks were relegated to homeownership, which remains twenty-seven percent Black (and majority Hispanic)

---

331. *See id*. at 388 (explaining the segregation practices in Kansas).

332. Gordon, *supra* note 287.

333. *See* Montoy v. Kansas, 138 P.3d 755, 758 (Kan. 2006) (noting high poverty students need help).

334. *Id.*

335. *See* Baker & Green, *supra* note 328, at 404 (outlining the court's reasoning).

336. *Infra* Table 4. *Effects of Kansas "Cost of Living" Adjustment*.

337. *See id*. (showing the percentage increases to be 7.07%, 7.79% and 6.71%).

receives no adjustment despite sharing a boundary with Shawnee Mission.

Table 4. Effects of Kansas "Cost of Living" Adjustment

County	*District Name*	*% Black*	*Adjusted Enrollment*	*Cost of Living WTD FTE*	*% Increase*	*$ Increase (per Adj. Enrollment)*
Johnson	Blue Valley	3%	22,329	1,579	7.07%	$314
Johnson	Spring Hill		3,073	-	0.00%	$0
Johnson	Gardner Edgerton	4%	5,889	134	2.28%	$101
Johnson	De Soto	3%	7,263	464	6.39%	$283
Johnson	Olathe	7%	29,177	2,274	7.79%	$346
Johnson	Shawnee Mission Pub Sch	9%	26,970	1,810	6.71%	$298
Wyandotte	Turner-Kansas City	11%	3,956	-	0.00%	$0
Wyandotte	Piper-Kansas City	17%	2,314	116	5.00%	$222
Wyandotte	Bonner Springs	11%	2,608	-	0.00%	$0
Wyandotte	Kansas City	27%	21,422	-	0.00%	$0
KSDE 2020 General Fund and Legal Max & NCES Common Core Public School Universe Survey						

4. Increased Costs of Achieving Common Outcome Goals for Children in the Presence of Racial Isolation

Finally, we have explained in prior work that the costs of achieving common outcome goals is influenced by racial isolation. Costs of achieving common outcome goals are influenced by a

variety of well understood factors including: child poverty concentrations, shares of children for whom English is a second language, shares of children with disabilities, regional differences in wages needed to recruit and retain teachers of comparable qualifications and other factors like district size and geographic location.[338] These factors are commonly accounted for in state school finance systems, toward the goal of providing more equal educational opportunity for children to achieve common outcomes.

We explored in a series of articles whether racial composition—specifically Black racial isolation—has independent effects on these costs that cannot be captured by race-neutral alternatives.[339] Table 5 shows select findings from a 2011 article on this topic, using data from the state of Missouri from 2006–2008. Table 4 focuses specifically on racially isolated inner urban fringe districts around Saint Louis and Kansas City. If we estimate costs of achieving equal opportunity using only the usual cost factors, for example, Wellston (a district since dissolved) which was 100 percent Black at the time, would have a cost index of 1.099.[340] That is, if the state average per pupil cost is assigned a 1.0, Wellston's costs are estimated to be about ten percent higher than state average. But, if we consider our race-neutral alternative measure which interacts child poverty with population density (a feature of racially isolated Black districts), we find that Wellston's costs of equal opportunity rise to 43.6% above state average.[341] That is, if the state of Missouri intends to give children across districts equal opportunity to succeed on the measured outcome metrics, the state would need to provide Wellston 43.6% more than average funding.[342] But, if we consider race directly in the equation, that margin increases to sixty-four percent above state

338. BRUCE D. BAKER, EDUCATIONAL INEQUALITY AND SCHOOL FINANCE: WHY MONEY MATTERS FOR AMERICA'S STUDENTS (2018).

339. Baker, *supra* note 308; Preston C. Green, Bruce D. Baker, & Joseph Oluwole, *Race-conscious Funding Strategies and School Finance Litigation*, 16 B.U. PUB. INT. L.J. 39, 61 (2006); Baker & Green, *supra* note 309.

340. *See infra* Table 5. *Select Missouri School District Cost Estimates from Baker, 2011 (based on modeled data from 2006–2008)* (displaying a 1.099 cost index).

341. *Id.*

342. *Id.*

average cost.[343] We argued then and reiterate now that states must be obligated to address these cost differences through their aid formulas. These corrections are past due and race neutral alternatives are insufficient.

Government endorsed and enabled policies of housing segregation, led to intergenerational economic deprivation of Black families in these metropolitan areas. As a result, we are now faced with the increased costs of mitigating outcome disparities in the presence of racial isolation.[344] Federal courts shrugged off outcome equity as a reasonable metric for evaluating desegregation remedies in the 1990s, specifically regarding Kansas City.[345] Here, as in our previous work, we provide the basis for allocating race-based differential funding to enable greater outcome equity.[346] Without taking this final step, the reparations framework laid out herein would be incomplete.

Table 5. Select Missouri School District Cost Estimates from Baker, 2011 (based on modeled data from 2006–2008)[347]

Metro Area	*District*	*% Black*	*Cost Index without Race or Race Neutral Alternative*	*Cost Index with Poverty × Density*	*Cost Index with Race (% Black)*
Saint Louis	Wellston*	100	1.099	1.436	1.640
	Normandy	98.8	1.016	1.307	1.460
	Jennings	98.7	1.054	1.525	1.501
	Riverview Gardens	96.7	1.018	1.293	1.453
	Ferguson-Florissant	77.2	1.003	1.099	1.312
Kansas City	Hickman Mills	79.2	.996	1.036	1.318
	Grandview	58.8	.977	.961	1.177
	Center	64.7	.998	.979	1.231

343. *Id.*

344. FOSTER, *supra* note 292.

345. *See generally* Missouri v. Jenkins, 515 U.S. 70 (1995).

346. Green, Baker & Oluwole, *supra* note 339.

347. *See* Bruce D. Baker, *Exploring the Sensitivity of Education Costs to Racial Composition of Schools and Race-Neutral Alternative Measures*, 86 PEABODY J. EDUC. 58, 73 (2011) (displaying a table showing the adverse effect of poverty on achievement); Data source: From Table 7, page 48.

*The Wellston district was merged with Normandy in 2010.

C. Equal Protection Clause Challenges

Plaintiffs from other racial and ethnic minority groups may challenge our proposed reparations plan on equal protection grounds because they were also harmed by the state government's racially discriminatory policies.[348] Carlton Waterhouse reasons that courts will reject these claims as long as states provide particularized findings of their acts of racial discrimination specifically against Blacks.[349] "Rather than random or particular instances," he continues, "findings should go to systematic exclusions or discrimination practices carried out, authorized, or sanctioned by . . . state governments."[350]

White plaintiffs may also challenge our proposed plan on equal protection grounds.[351] Such challenges pose a greater threat than the ones brought by other racial minority and ethnic groups because they go "to legislative authority to institute a reparations program rather than legislative discretion to choose which victims of past governmental discrimination will be its beneficiaries."[352] Because our reparations plan employs a racial classification, these components would be subject to strict scrutiny.[353] As such, they would have to be narrowly tailored to satisfy a compelling governmental interest.[354]

The Supreme Court has recognized that state governments have a compelling interest in eliminating the effects of past

348. *See* Carlton Waterhouse, *Follow the Yellow Brick Road: Perusing the Path to Constitutionally Permissible Reparations for Slavery and Jim Crow Era Governmental Discrimination*, 62 RUTGERS L. REV. 163, 170 (2009) (showing how equal protection is a grounds to challenge government policy).

349. *See id.* at 171 (dispensing claims so long as particular consideration is given to Blacks).

350. *Id.*

351. *See id.* (allowing for white plaintiffs to challenge under the reparations plan).

352. *Id.*

353. *See id.* at 172 (explaining the different levels of scrutiny appellate courts employ).

354. *Id.*

discrimination.[355] *City of Richmond v. J.A. Croson*[356] provides guidance for how state programs can satisfy this interest.[357] In this case, the Supreme Court invalidated Richmond, Virginia's set-aside program which required prime contractors to award thirty percent of the dollar amount of each contract to one or more minority business enterprises (MBEs).[358] Minority groups consisted of "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."[359] The Court rejected the claim that the set-aside program was designed to eliminate the present effects of past discrimination because:

> There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. . . . It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.[360]

Thus, *Croson* shows that states must provide particularized findings showing how its actions have led to the Black-white school funding disparities laid out in our reparations plan.

With respect to the narrow tailoring prong, courts will examine a variety of factors including, "the efficacy of alternative remedies; the flexibility and duration of the relief . . . ; and the impact of the relief on the rights of third parties."[361] Three components pose little problem for narrow analysis:

---

355. *See* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (allowing states to remedy past discrimination); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 720 (2007) (same); City of Richmond v. J.A. Croson. Co., 488 U.S. 469, 493 (1989) (same).

356. City of Richmond v. J.A. Croson 488 U.S. 469, 511 (1989) (holding that Richmond violated the Equal Protection Clause).

357. *See generally id.*

358. *See id.* at 469 (requiring contractors to award thirty percent of the contracts to minorities).

359. *Id.* at 487.

360. *Id.* at 506.

361. *See* U.S. v. Paradise, 480 U.S. 149, 171 (1987) (finding that the order of a one-for-one promotion of corporals was narrowly tailored to serve the states compelling purposes).

(a) Compensation to school districts for lost property revenues; (b) tax rebates to Black taxpayers; and (c) increased funding to racially isolated school districts.[362] Under the narrow-tailoring prong, there are no better ways to remedy these issues.[363] In fact, ostensibly race-neutral policies caused these problems in the first place.[364] Furthermore, these remedies do not impact the rights of residents and taxpayers living in other school districts.[365] These remedies merely place Black taxpayers and predominantly Black school districts on equal footing with their white counterparts.

Conversely, the component calling for redistribution of aid distribution policies built on systemic racism might pose a narrow-tailoring problem.[366] Residents from predominantly white school districts could assert that the loss of funding would have a negative impact on them.[367] A state could counter this assertion with education cost studies showing that this redistribution of funds would not affect these districts' ability to provide their students an adequate education as required by their state education clauses.[368]

---

362. *Cf. J.A. Croson Co.*, 488 U.S. at 507–08 (presenting two reasons why the plan in this case was not narrowly tailored to remedy prior discrimination: there was no consideration of the use of race-neutral means and the goal was not narrowly tailored to remedy the prior discrimination).

363. *See id.* at 507 (stating that the City in this case had not considered any alternative to their proposed plan which means it did not pass the narrow-tailoring analysis).

364. *See id.* at 505 (noting that nothing was presented that "clearly identified and unquestionably" legitimized the scope of injury to minority contractors in this case which called for necessary remedy).

365. *See id.* at 494 (explaining that classifications based on race must be strictly reserved for remedial settings).

366. *See* Joseph O. Oluwole & Preston C. Green III, *Harrowing Through Narrow Tailoring: Voluntary Race-Conscious Student-Assignment Plans, Parents Involved and Fisher*, 14 WYO. L. REV. 705, 710 (2014) (highlighting how narrow-tailoring analysis requires "evidence that the legislature observed and intended to remedy lingering discriminatory impacts within the particular institution affected by the remedial measure").

367. *See id.* at 715 (explaining how diversity passing constitutional muster is not "simple ethnic diversity," such as racial set asides or quotas).

368. *See* Hugh Baran, *In* Croson's *Wake: Affirmative Action, Local Hiring, and Struggle to Diversify America's Building & Construction Trades,* 39 BERKELEY J. EMP. & LAB. L. 299, 341 (2018) (noting how courts have consistently rejected programs without any statistical studies); *see also* Baker & Green, *supra* note 309 (discussing of the use of cost studies).

VII. Part VI: Federal Role

The federal government must also play a role in any reparations program that addresses Black-white school funding disparities. We take this stance in part because of the federal government's role in creating these enduring gaps, which we explained earlier in this Article.[369] It is also worth noting that Congress has provided reparations to other racial groups to atone for wrongdoing.[370] For instance, Congress authorized reparation payments to Native American tribes in 1946 for land taken from them.[371] Then, in 1971, through the Alaska Native Claims Settlement Act, Congress created a trust fund that distributed resource extraction profits.[372] Additionally, Congress allocated $462.5 million from the general treasury fund for Native Americans.[373] In 1948, Congress passed the American Japanese Evacuation Claims Act designed to partially pay Japanese Americans for loss of property during internment.[374] A mere total of $100,000 was allocated and claimants had to prove loss of

---

369. *See infra* Parts I and II.

370. *See* Adeel Hassan & Jack Healy, *America has Tried Reparations Before. Here is How it Went.*, N.Y. TIMES (June 19, 2019), https://www.nytimes.com/2019/06/19/us/reparations-slavery.html (explaining Acts where the United States paid reparations to Native Americans and Japanese-American survivors of internment) [perma.cc/U6Q2-EPJY].

371. *See* Michael Conklin, *An Uphill Battle for Reparationists: A Quantitative Analysis of the Effectiveness of Slavery Reparations Rhetoric*, 10 COLUM. J. RACE & L. 33, 39 (2020) (noting that in the past 100 years the payment of reparations has diversified from the past when payments were largely limited to instances of the losing state in a war agreeing to make payments to the victor and now it is a form of remedy for mistreatment).

372. *See* Ryan Fortson, *Models of Reparations for Slavery: Correcting the Harms of Slavery: Collective Liability, The Limited Prospects of Success for a Class Action Suit for Slavery Reparations, and the Reconceptualization of White Racial Identity*, 6 AFR. AM. L. & POL'Y REP. 71, 107 (2004) (highlighting that there are many times in history that Congress has provided some sort of restitution to Native Americans).

373. *See id.* at 107 (explaining that this was specifically meant to be distributed amongst Native Alaskan tribes).

374. Westley, *supra* note 266, at 450–51 (listing indignities and losses suffered by the Japanese Americans due to internment); For a great discussion of the Japanese-American reparations, *see generally* Dale Minami, *Lessons from Other Reparations Movements: Japanese-American Redress*, 6 AFR. AM. L. & POL'Y REP 27 (2004); Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 83–84 (2008).

property and that the loss happened as a natural result of the evacuation for internment.[375] Additionally, it required claimants to give up their rights to any future evacuation-related claims against the federal government.[376] In 1988, Congress, in partnership with President Reagan, passed the Civil Liberties Act of 1988 which appropriated $20,000 per person reparation payments to Japanese-Americans for internment during World War II.[377] Ryan Fortson points out that "the reparations awarded to those interned was not the result of a lawsuit but rather occurred by Congress directly appropriating funds for that purpose."[378] As Robert Westley notes, "the importance of the legislation lies in the precedent established for compensation of wronged groups within the American system."[379] However, Dale Minami notes that the Civil Liberties Act of 1988 "limited redress to those Americans of Japanese ancestry who were alive on the date of the signing, a requirement inserted for a reason—to avoid a 'precedent' for African Americans."[380] Blacks advocated for the

375. Westley, *supra* note 266, at 450 (noting that this piece of legislation is the "only official attempt by Congress to compensate Japanese American property losses for over forty years").

376. *Id.* at 450–51 (highlighting another flaw in the legislation was that compensation was only provided once loss of property could be proved by records).

377. Fortson, *supra* note 372, at 92 (noting that the reparations were paid to roughly 60,000 survivors). The reparations payments amounted to anywhere between $1.2 billion and $1.6 billion. *Id.* at 92; Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 499–500 (2003). For more on the Japanese-American reparations and the Civil Liberties Act of 1988, *see* Chad W. Bryan, *Precedent for Reparations? A Look at Historical Movement for Redress and Where Awarding Reparations for Slavery Might Fit*, 54 ALA. L. REV. 599, 601–03 (2003); Mishael A. Danielson & Alexis Pimentel, *Give Them Their Due: An African-American Reparations Program Based on the Native American Federal Aid Model*, 10 WASH. & LEE RACE & ETHNIC ANC. L. J. 89, 103–05 (2004).

378. Fortson, *supra* note 372, at 108; *see* Abigail M. Holden, Sandra Hye Yun Kim, & Erik K. Yamamoto*, American Reparations Theory and Practice at the Crossroads*, 44 CAL. W.L. REV. 1, 75–76 (2007) (showcasing an example of reparations was the Public Health Services payments to 399 Black men who were experimented on like laboratory rats in study of late-stage syphilis. These men were allowed to die a slow death rather than getting penicillin to treat the disease. Twenty-eight of the men died from syphilis and 100 from complications).

379. Westley, *supra* note 266, at 451.

380. Dale Minami, *Lessons from Other Reparations Movements: Japanese-American Redress*, 6 AFR. AM. L. & POL'Y REP 27, 33 (2004).

Japanese-American reparations.[381] In fact, "we saw solidarity among members of Congress.[382] The Japanese-American contingent, and all of the Latino and Black caucuses supported Japanese-American redress, giving the issue weight and moral authority."[383]

In contrast, Congress has taken limited actions to address the harm that slavery, Jim Crow, and other forms of discrimination has inflicted upon the Black community.[384] In 1865, during the Civil War, General Sherman's Field Order No. 15 called for redistribution of forty acres of land and a mule to each freedman.[385]

---

381. *See id.* at 33 (highlighting how "other Asian Americans, Jewish Americans, other people of color, and white Americans all came together and lobbied on behalf of Japanese Americans").

382. *Id.* at 34.

383. *See id.* at 33 ("Other Asian Americans, Jewish Americans, African Americans, other people of color, and white Americans all came together and lobbied on behalf of Japanese Americans."). Japanese-American civil rights attorney Dale Minami calls for unity with African-American reparations efforts:

> Many in our community never thought this Redress Bill would ever pass. Many of us were skeptical, but thought we should take this journey anyway because the journey was as important as the destination. We needed to attempt to make America live up to its own rhetoric of equal liberty, equal rights, and stand the test of truth and time. We felt that it was important, whether we won redress or not, to take the journey. Whether we won redress or not, we believed our efforts would educate the American public. And for that victory alone, it is incumbent on all of us to continue these efforts to educate—for all of us to take this journey for African-American redress. *Id.* at 34.

384. *See* Holden, *supra* note 378, at 85 (explaining that the Senate, as well as Virginia, did put forth an apology for inaction in the face of widespread Jim Crow lynching).

385. *See* Adjoa Aiyetoro, *Achieving Reparations While Respecting Our Differences: A Model for Black Reparations*, 63 HOW. L.J. 329, 336 (2020) (noting how this land was not a gift, and that the receivers had to pay rent for the first three years, then required payment of the value of the land to purchase); Emma Coleman Jordan, *The Importance of Slavery Reparations: The Non-Monetary Value of Reparations Rhetoric*, 6 AFR.-AM. L. & POL'Y REP. 21, 24 (2004) ("The forty acres and a mule that General Sherman promised to the slaves was the beginning of the idea of reparations in America, but not the end."); Danielson & Pimentel, *supra* note 377, at 103 (noting that, as with all the reprehensible injustices against slaves, the mules for this reparation were "animals too weak for military service"); David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043, 1049 (2010) (explaining how in the end, the promise ended up being a mere

Congress then worked with President Abraham Lincoln to enact the Freedmen's Bureau Act.[386] The Freedmen's Bureau Act established the Bureau of Refugees, Freedmen, and Abandoned Lands (Freedmen's Bureau) to rent out the forty acres to freedmen for three years with a possibility of purchase.[387] Sadly, the distribution was not equitable but rather based on whom the federal government considered loyal and deserving.[388] Moreover, the Bureau's funding was cut and the lands reverted to slaveowners as President Andrew Johnson pardoned ex-Confederates and returned land to them.[389] The Freedmen's Bureau Act had a relatively nominal impact on education compared to the need:

> Under the Freedmen's Bureau Act of 1866, Congress provided

---

nominal empty promise as the reparations were not justly paid); Patricia M. Muhammad, *The Trans-Atlantic Slave Trade: A Legacy Establishing a Case for International Reparations*, 3 COLUM. J. RACE & L. 147, 199 (2013) (highlighting how the empty promises impacted more than the generation which they were denied to because it also "deprived historic victims of lawful property" who should have inherited such estates).

386. *See* Aiyetoro, *supra* note 385, at 336 (explaining that the first bill was vetoed by President Johnson, but after modifying the bill, it passed in 1866); Tuneen E. Chisolm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 685–86 (1999) (stating that the final bill authorized Congress's appropriation of funds to purchase school buildings for refugees and freedmen, and to empower the President to "reserve up to three million acres of "good" public land . . . .").

387. *See* Aiyetoro, *supra* note 385, at 336 (noting that the land was not a gift, and that the government charged rent for the land for the first three years with the option to purchase).

388. *See* Tuneen E. Chisolm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 686 (1999) (indicating that the act was only authorized for two years).

389. *See* Westley, *supra* note 266, at 460 (highlighting that the freedmen and refugee's hope of buying this land from the federal government also evaporated with this action); Zachary F. Bookman, *A Role for Courts in Reparations*, 20 NAT'L BLACK L.J. 75, 101 n.148 (2007) (explaining that President Johnson revoked General Sherman's order to distribute 40 acres to free black families); Maxine Burkett, *Reconciliation and Nonrepetition: A New Paradigm for African-American Reparations*, 86 OR. L. REV. 99, 107–08 (2007) (noting how Sherman's order was in alignment with President Lincoln's belief that emancipated slaves needed land as an economic base for their advancement); Danielson & Pimentel, *supra* note 377, at 100 (expounding on the fact that General Sherman had the support of the War Department when he made the original land grants).

> $ 500,000 for rent and repair of school and asylum buildings, and decided that the Bureau might "seize, hold, lease or sell for school purposes" any property of the ex-Confederate States. To meet the need for permanent schools, the Bureau in most states paid for completion of buildings that the freedmen themselves began constructing. Often these structures were located on land that the freedmen had purchased for themselves. Additionally, in order to obtain financial assistance from the Bureau, school organizations were required to ensure that the buildings would always be used for educational purposes and that no pupil would ever be excluded because of race, color, or previous condition of servitude. By March, 1869, the Bureau had either built or had helped to build 630 schoolhouses. It had spent $1,771,132.25. In the next three years, its appropriation for educational expenses amounted to another $2,000,000.[390]

Then in 1867, Representative Thaddeus Stevens introduced the Reparations Bill in Congress, but it failed to pass.[391] This bill stated:

> And be it further enacted. That out of the lands thus seized and confiscated the slaves who have been liberated by the operations of the war and the amendment to the constitution or otherwise, who resided in said "confederate States" on the 4th day of March, A.D. 1861, or since, shall have distributed to them as follows, namely: [T]o each male person who is the head of a family, forty acres; to each adult male, whether the head of a family or not, forty acres, to each widow who is the head of a family, forty acres—to be held by them in fee-simple, but to be inalienable for the next ten years after they become seized thereof.[392]

---

390. Westley, *supra* note 266, at 461; *see* Williams, *supra* note 274, at 445–46 ("After the Civil War and the abolition of slavery, doors to educational opportunities slowly opened for Blacks throughout the South. The Freedmen's Bureau, which Congress established in 1866 to help the newly freed slaves, provided the first public schooling for Blacks, as well as for Whites in the South.").

391. *See* Muhammad, *supra* note 385, at 155 (noting that even though this effort failed, it is considered one of the earliest landmark legal decisions to initiate the grant of reparations for past slavery); *see also* Jeremy Levitt, *Black African Reparations: Making a Claim for Enslavement and Systematic De Jure Segregation and Racial Discrimination Under American and International Law*, 25 S.U. L. REV. 1, 7–9 (1997) (expanding on Stevens' search for fundamental change aimed at dismantling the "Southern plantation system and redistributing land to formerly enslaved Blacks").

392. Muhammad, *supra* note 385, at 155.

Congress subsequently rejected calls to enact pension legislation for freedmen.[393] Adjoa Aiyetoro, co-chair of the Reparations Coordinating Committee of the National Coalition of Blacks for Reparations in America (N'COBRA), observes that Congress's failure to pass the "Ex-Slave Pension legislation . . . supports the conclusion that Congress maintained its disdain for and insensitivity to formerly enslaved African descendants by denying it owed them a debt due to its support of enslavement."[394] Additionally, as Alfred Brophy points out, "as the United States struggled with extricating itself from the tragedy of slavery in the years of the Civil War and Reconstruction, some members of Congress proposed transferring land to former slaves.[395] The proposals, if followed, would have resulted in huge redistribution of property."[396]

Congressman John Conyers introduced H.R. 40 for African-American reparations in 1989 but it has not made it to the House floor.[397] The bill calls for creation of a commission that

---

393. *See* Aiyetoro, *supra* note 385, at 337 (listing three reasons redress failed as the (1) whites in power's reluctance to acknowledge a debt, (2) whites' refusal to share leadership, and (3) class and perspective divisions within the black community).

394. *See id*. at 338 (noting how many previously enslaved individuals failed to benefit from pension plans meant for those who served in the Civil War because they couldn't provide documentation of their service).

395. *See* Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 498 (2003) (explaining the plans were forward thinking and focused on economic independence and virtue).

396. *See id.* ("it is doubtful that anyone would be talking about reparations now, for there would be no need for them. African Americans would have educational opportunities and wealth equivalent to (or approaching) that of the white population.").

397. *See* Aiyetoro, *supra* note 385, at 343 (explaining that this bill was filed every year that Congressman John Conyers was in office); Zachary F. Bookman, *A Role for Courts In Reparations*, 20 NAT'L BLACK L.J. 75, 84 n.54 (2007) (noting how shrewd it was for the bill to be named H.R. 40 after the failed attempt by General Sherman to provide freed slaves with 40 acres of land.); Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 116th Cong. (2019) (highlighting the three goals of the commission to identify "(1) the role of the federal and state governments in supporting the institution of slavery, (2) forms of discrimination in the public and private sectors against freed slaves and their descendants, and (3) lingering negative effects of slavery on living African-Americans and society"); Danielson & Pimentel, *supra* note 377, at 105–06 (stating the purpose of the Conyers Bill presented to the Judiciary Committee in 2001); Maxine Burkett, *Reconciliation and Nonrepetition: A New Paradigm for*

would study the impact of slavery and ongoing discrimination; and make recommendations on reparations through apology and monetary payments.[398] It also calls for educating the public about the damage of slavery.[399] In 2000, Congressman Tony Hall unsuccessfully introduced his bill in 2000—a bill designed to acknowledge the federal government's contributions to slavery as well as issue a formal apology for these contributions.[400] Congressman Conyers persisted by reintroducing his bill every year thereafter until he left Congress at which point Congresswoman Sheila Jackson Lee took up the mantle starting in 2019 with 125 co-sponsors and a Senate version S.1083 spearheaded by Senator Cory Booker.[401] Under the leadership of

---

African-American Reparations, 86 OR. L. REV. 99, 127–29 (2007) (noting his status as a twenty-five-year veteran of Capitol Hill at the time he first introduced the bill).

398. *See* Fortson, *supra* note 372, at 115 (highlighting a reason that Congress has not moved on Congressman Conyers' repeated attempts to pass this bill because the government is only exposed to liability once it has given consent); *see also* Brophy, *supra* note 395, at 499 (proposing ways to educate Americans about the history of slavery on top of making recommendations for reparations).

399. *See* Fortson, *supra* note 372, at 115 (mentioning other goals of the bill such as a formal apology, but at the same time stating these goals as the reason the bill won't go very far).

400. *See id.* (noting the closest the bill comes to reparations was a call for "an attempt at real restitution); Yomamata et al., *supra* note 378, at 72–73 ("[T]he United States dramatically pulled out of the widely publicized 2001 United Nations Conference on Contemporary Racism in Durban, South Africa, in fear of a resolution naming slavery a crime against humanity."); Danielson & Pimentel, *supra* note 377, at 109 (stating that the United States government has to approve reparations in order to claim credible moral authority internationally).

> Just as America implores the world community to recognize human rights abuses by ostracizing, punishing and even invading sovereign states that refuse to meet America's standards regarding human rights, America should consider its own history on these issues and assume the 'highest responsibility' in ensuring that those who were denied these same rights are justly compensated. Otherwise, just as some authors theorize, America may appear as a hypocrite in the international community.

For a discussion of the United States' claims to international moral authority in advocacy for reparations, see Joe R. Feagin, *Documenting the Costs of Slavery, Segregation, and Contemporary Racism: Why Reparations Are in Order for African Americans*, 20 HARV. BLACKLETTER J. 49, 64–65 (2004).

401. *See* Aiyetoro, *supra* note 385, at 348 (highlighting how we should stop

Chairman Jerrod Nadler, the Judiciary Committee in the House of Representatives held a hearing on reparations for slavery on June 19, 2019.[402] The hearing included compelling discussions of slavery and its lingering impact on African Americans.[403] "To date, more than ten cities, including Chicago, Detroit, Cleveland, Dallas, and Washington, D.C., have passed resolutions calling on the federal government to inquire into the effects of slavery."[404] Additionally eighty percent of the 2020 Democratic presidential frontrunners expressed support for reparations signaling the possibility of federal action on reparations.[405] We agree with Vincent Verdun

---

believing the process needs to be controlled by the fear of proposal rejections as it will only halt the efforts to obtain reparations); *see also* Valorie E. Douglas, *Reparations 4.0: Trading in Older Models for a New Vehicle*, 62 ARIZ. L. REV. 839, 874 (2020) (noting that Congressman Conyers Jr. introduced the bill for 25 years); *see* Fortson, *supra* note 372, at 115 (adding that ten cities have already called on the federal government to inquire into the effects of slavery); *see* Fortson, *supra* note 372, at 116 ("On the other hand, Representative Conyers wrote legislation calling for a national holiday honoring Martin Luther King, Jr. only four days after Dr. King was assassinated and the holiday was not established for more than fifteen years, so perhaps with persistence Conyers' reparations efforts will also succeed.").

402. *H.R. 40 and the Path to Restorative Justice Before the H. Comm. on the Judiciary*, 116th Cong. (2019), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2261 [perma.cc/SB5V-6GEV].

403. *See id.* (including one story told by Katrina Browne which is now a documentary titled *Traces of the Trade: A Story from the Deep North* and follows a family retracing the steps of their ancestors' triangle trade).

404. *See* Fortson, *supra* note 372, at 115 (noting that if states were ensured they would not be presented with legal liability after an apology, more states may take similar action).

405. *See* Natsu Taylor Saito, *Redressing Foundational Wrongs*, 51 U. TOL. L. REV. 13, 33 (2004).

> In reparations discussions, America must remember that African Americans "are not 'victims' begging for relief from the injustices inflicted upon them, but human beings who, individually and in community, are insisting that their rights be respected and that the perpetrator state comply with the rule of law. They must have the final say in what constitutes meaningful and appropriate redress. If this process works as it should, they will be empowered by it.

See also Conklin, *supra* note 371, at 41 (comparing this statistic to the 2016 Democratic Primary where all three candidates on the ballot expressly rejected reparations).

that "[g]ranting reparations to Japanese Americans [and other groups] without granting similar compensation to African Americans sends the latter yet another message declaring that they are on the bottom of society's ladder, and this exclusion confirms their sense of futility in the quest for justice in the United States.[406] Amelioration of one ill has made a previously tolerable condition seem degrading."[407] While a broad reparations plan for Black Americans is beyond the scope of this article, we outline below new legislation and regulatory actions that the federal government can take to bring about reparations approaches to school finance reform.

A. Legislation to Remediate Black-White School Funding Gaps

Congress could provide states with funding to eradicate Black-white school funding disparities pursuant to the Spending Clause, which provides, "The Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common defense and General Welfare of the United States."[408] Congress has enacted several statutes impacting

---

406. Vincent Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 659 (1993) (explaining that the latter message referred to is that "African Americans cannot distinguish their suffering from that of Japanese Americans, except to conclude that the injuries suffered by African Americans were more severe.").

407. *Id.* at 659.

> The indubitable truth is "[n]o nation can enslave a race of people for hundreds of years, set them free bedraggled and penniless, put them, without assistance in a hostile environment, against privileged victimizers, and then reasonably expect the gap between the heirs of the two groups to narrow. Lines, begun parallel and left alone, can never touch."

See President Lyndon B. Johnson, To Fulfill These Rights, Speech at Howard University Commencement (June 4, 1965), *reprinted in* Lee Rainwater & William L. Yancey, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 125 (1967) (affirming this point through his explanations of racial prejudice); *see also* Charles J. Ogletree, Jr., *The Significance of Brown*, 20 HARV. BLACKLETTER J. 1, 10–12 (2004) (explaining the resistance to integrate schools after Brown v. Board of Education, 347 U.S. 483 (1954)).

408. U.S. CONST. art. 1, § 8.

education through this constitutional provision including the No Child Left Behind Act (NCLBA) and the Every Student Succeeds Act (ESSA).[409] In *South Dakota v. Dole*,[410] the Supreme Court laid out a four-part test for determining the limits of the federal government's spending power: (1) The program was in pursuit of the general welfare; (2) any condition for accepting the funds is unambiguously stated so that states can knowingly choose whether to accept the funding; (3) there is a relation between the federal interest and the purpose of the federal funding; and (4) the spending condition does not violate another constitutional provision.[411]

In addition to the four-part test, the Court recognized that Congress might unconstitutionally coerce states into accepting federal funding.[412] In *Dole*, the Court ruled that the Minimum Drinking Age Act, which withheld five percent of state funding if states failed to raise the drinking age to twenty-one was not coercive because states would lose only a small percentage of federal funding.[413] However, in *National Federation of Independent Business v Sebelius*, (*NFIB*)[414] the Court found that the expansion of Medicaid under the Affordable Care Act constituted illegal coercion.[415] Instead of providing states with "relatively mild encouragement," as was the case in *Dole*, the Court

409. *See* Anna Williams Shavers, *Using International Human Rights Law in School Finance to Establish Education as a Fundamental Right*, 27 KAN. J.L. & PUB. POL'Y 457, 473 (2018) (discussing how Congress uses the General Welfare Clause to influence educational policy).

410. *See* South Dakota v. Dole, 483 U.S. 203, 212 (1987) (holding that a federal statute that withheld federal funds from states whose legal drinking age did not conform to federal policy).

411. *See id.* at 207–08 (finding that the fourth limitation occurs when Congress is inducing the states to engage "in activities that would themselves be unconstitutional").

412. *See id.* at 211 (stating that the point which would be too far is when "pressure turns into compulsion").

413. *See id*. (noting that states would only lose 5% of funds otherwise obtainable under specified highway grant programs).

414. *See* Nat'l Fed. Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012) (holding that the Medicaid expansion portion of the Affordable Care Act violates the Constitution).

415. *See id.* at 585 (stating Congress is attempting to "conscript state [agencies] into the national bureaucratic army").

likened the choice presented to states in *NFIB* to "a gun to the head."[416]

A federal spending program for states to close Black-white school funding gaps caused by state and federal housing policies would satisfy the first prong of the *Dole* test.[417] Clearly, such a program would be in the interest of the general welfare. Congress could satisfy the second prong of the *Dole* test by clearly indicating to states that they must use this funding to eliminate funding disparities between Black and white school districts.[418] With respect to the third prong, Congress could provide findings showing how state policies have helped to create the conditions leading to Black-white school funding disparities.

With respect to the final prong, this statute would probably be subject to an equal protection challenge.[419] As the Supreme Court made clear in *Adarand Constructors, Inc. v. Peña*,[420] federal spending programs that offer financial incentives are subject to strict scrutiny if they employ racial classifications.[421] To satisfy the compelling interest of eliminating past discrimination, Congress would have to provide particularized findings of state practices that have created Black-white school funding disparities.[422] This statute could withstand narrow-tailoring analysis because: (1) There are no better ways to correct Black-white school funding disparities than to provide additional funding to predominantly Black school districts; and (2) predominantly white school districts

---

416. *See id.* at 582 (noting that states would lose 10% of their overall budget if they do not comply, leaving them with no real option but to acquiesce).

417. *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987) (highlighting that in considering whether the expenditure is intended to "serve general public purposes, courts should defer substantially to the judgment of Congress").

418. *See id.* (meaning Congress must ensure that states exercise their choice "knowingly, cognizant of the consequences of their participation").

419. *See id.* at 207–08 (explaining that conditions on "federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.").

420. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (holding that all racial classifications must be analyzed under strict scrutiny).

421. *See id.* at 237 (restating that race-based action may be necessary to further a compelling interest, but it must satisfy the compelling interest test and the "narrow-tailoring" test).

422. *See id.* at 230 (enacting "racial classifications only when doing so is necessary to further a 'compelling interest' does not contravene any principle of appropriate respect for a coequal branch of the Government").

do not suffer any harm by placing their Black counterparts on an equal footing.[423] To avoid challenges of coercion, Congress can make sure that the program is not so large as to constitute an offer that states cannot refuse.[424] Also, this proposed program would not be connected with any other spending program, so it does not pose the danger to which the Court objected in the *NFIB* case.[425]

B. Legislation Providing Additional Funding for School Districts Experiencing Black Racial Isolation

Similarly, we propose that Congress enact legislation providing states with additional funding for school districts experiencing Black racial isolation.[426] Funding pursuant to this spending program would be used to mitigate disparities in educational outcomes.[427] This spending program could also satisfy the *Dole* test.[428] It would satisfy the first prong because it would combat the outcome inequities experienced by these districts caused by state and federal government endorsed and enabled housing segregation.[429] Congress could satisfy the second prong by

---

423. *See* United States v. Paradise, 480 U.S. 149, 171 (1987) (listing factors which are to be considered in determining whether race-conscious remedies are appropriate such as necessity, alternative remedies, the flexibility and duration of the relief, and the impact of the relief on third parties).

424. *See* South Dakota v. Dole, 483 U.S. 203, 211 (1987) (stating that the point which would be too far is when "pressure turns into compulsion.").

425. *See* Nat'l Fed. Indep. Bus. v. Sebelius, 567 U.S. 519, 558 (2012) (noting that the "individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity").

426. *See* Lauren Camera, *Segregation Reinforced by School Districts*, U.S. NEWS (July 25, 2019, 4:19 P.M.), https://www.usnews.com/news/education-news/articles/2019-07-25/racial-and-economic-segregation-reinforced-by-school-district-boundaries (explaining that of the 13 school districts surrounding Philadelphia, two-thirds are at least 25% more white and have at "least 10% more funding for their schools than the city schools—equating to an average of $5,000 or more in per-pupil funding") [perma.cc/Y7E4-FK7B].

427. *See* Baker & Green, *supra* note 309 at 316 (finding that "just as racial achievement gaps persist in education, the cost of closing achievement gaps varies across school districts – in part associated with the racial composition of those school districts").

428. *See supra* Part VI, A. Legislation to Remediate Black-White School Funding Gaps.

429. *Id.*

clearly laying out the conditions for state participation.[430] Congress could satisfy the third prong by providing particularized findings showing how state and federal housing policies have helped to create racially isolated Black school districts that need increased funding to attain state and federally mandated educational outcomes.[431] This program could withstand an equal protection challenge for the same reasons as the funding program to eliminate Black-white school funding disparities.[432] Finally, Congress must be mindful to design the program so as to not constitute coercion.

C. Department of Education Enforcement Action Pursuant to Title VI's Implementing Regulations

Finally, the U.S. Department of Education could work with states to eliminate Black-white school funding disparities through Title VI of the Civil Rights Act of 1964.[433] Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[434] The Supreme Court has held that this provision prohibits only intentional discrimination.[435] However, the Department of Education has promulgated a regulatory provision that prohibits recipients of federal funding from engaging in policies that have a disparate impact on protected groups:

> A recipient [of federal funds] . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as

430. *Id.*

431. *Id.*

432. *Id.*

433. *See supra* Part VI.A. Legislation to Remediate Black-White School Funding Gaps.

434. 42 U.S.C. § 2000d (2018).

435. *See* Alexander v. Sandoval, 532 U.S. 275, 281 (2001) ("Title VI itself directly reach[es] only instances of intentional discrimination.").

> respect individuals of a particular race, color, or national origin.[436]

Title VI has authorized the DOE to initiate an investigation of a recipient of federal funding "whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part."[437] If the investigation reveals a failure to comply, the regulation provides that "the matter will be resolved by informal means whenever possible."[438] If the noncompliance cannot be resolved by informal means, the regulations authorize the DOE to obtain compliance by suspending or terminating federal funding or "by any other means authorized by law."[439] Such other means include referring the matter to the Department of Justice (DOJ) for enforcement.[440]

Thus far, the Office for Civil Rights (OCR), the enforcement wing of the Department, has not used the power granted under the Title VI regulations to address state racial funding disparities.[441] However, in two Dear Colleague letters, OCR did recognize this problem.[442] The first letter, issued in 2001, noted that school districts with high concentrations of minority students: (1) "[W]ere less likely to have experienced certified teachers who are teaching in their area of expertise"; (2) "were significantly more likely . . . to have less adequate environmental conditions across several measures, including lighting, heating, ventilation, air quality, noise control, energy efficiency, and physical security"; (3) were

---

436. 34 C.F.R. § 100.3(b)(2) (2020).

437. 34 C.F.R. §§ 107(a), (c) (2020).

438. *Id.* § 107(d)(1).

439. 34 C.F.R. § 100.8(a)(8).

440. *See id.* ("No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person.").

441. *See* S. Hsin, CONG. RSCH. SERV., R45665, CIVIL RIGHTS AT SCHOOL: AGENCY ENFORCEMENT OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, 17 (2019) (explaining how the Office of Civil Rights enforces Title VI regulations).

442. *See* U.S. Dep't of Educ., Office for Civil Rights, "Dear Colleague" Letter, at 2 (Oct. 1, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf (recognizing the department's Title VI power) [perma.cc/NJB4-XRRR].

"less likely to have access to . . . computers"; and (4) received less funding per pupil than their low-minority counterparts.[443] The letter concluded by "strongly encourag[ing] all states to examine their provision of educational resources."[444]

The second letter, issued in 2014, addressed the problem of unequal access to educational resources experienced by school districts serving students of color.[445] Specifically, the letter pointed out that districts serving such students were at a disadvantage to their predominantly white districts with respect to: (1) Advanced courses and gifted and talented programs; (2) experienced teachers; (3) facilities; and (4) access to instructional materials and technology.[446] The letter observed that districts needed adequate funding to provide the resources to provide the resources listed above, but districts serving students of color often lacked such funding because of "funding systems that allocate less State and local funds to high-poverty schools that frequently have more students of color."[447] The letter asserted that school districts could violate Title VI by adopting facially neutral funding policies that had a racially disparate impact.[448] OCR laid out a three-step process for making this determination: (1) Whether the school district had a facially neutral policy that created an adverse racial impact; (2) whether the school district could demonstrate an important educational goal for the policy; and (3) whether there are alternative policies that could accomplish the district's goal with less discriminatory effect on an affected racial group.[449] Although the letter focused on the resource allocations of school districts, the OCR observed that states also had to "comply with Title VI's nondiscrimination requirements, including nondiscrimination in their provision and allocation of education resources."[450] Therefore, OCR:

> [S]trongly encourages State education officials and school

443. *Id.*
444. *Id.* at 4.
445. *Id.*
446. *Id.* at 3–5.
447. *Id.* at 5.
448. *Id.* at 7.
449. *Id.* at 8.
450. *Id.* at 1 n.†.

> administrators to closely review this letter and to take proactive steps to ensure that the educational resources they provide are distributed in a manner that does not discriminate against students on the basis of race, color, or national origin. In particular, State education officials should examine policies and practices for resource allocation among districts to ensure that differences among districts do not have the unjustified effect of discriminating on the basis of race.[451]

In turn, we strongly urge OCR to investigate racial funding disparities at the state level, using the investigatory mechanism laid out in the Dear Colleague Letter to help states redress the policies that are creating Black-white school funding disparities.

VIII. Conclusion

This article has addressed why and how school finance reform should be a part of a reparations program for Black Americans. Black-white school funding disparities have endured from the separate-but-equal era to the present day despite more than sixty-five years of school desegregation and school finance litigation. State and federal governmental housing policies, state school funding formulas, and Supreme Court decisions have helped to create these Black-white school funding gaps. Consequently, many predominantly Black school districts are racially isolated, thus needing more resources than predominantly white schools to attain the same educational outcomes. Furthermore, Black taxpayers suffer harm because they have to pay more taxes than their white counterparts to fund education.

Because litigation has proven inadequate to achieve reparations for school finance reform, we have set out a legislative plan that state and federal governments could adopt. Our four-part plan for state legislation calls for: (1) Compensation to school districts caused by unequal taxation; (2) rebates to Black property taxpayers covering Black-white differentials in residential taxation; (3) redistribution of school finance and aid distributions based on systemic racism; and (4) increased funding to Black school districts that are experiencing racial isolation. Our plan for federal action calls for legislation providing funding to remediate

---

451. *Id.*

Black-white school funding gaps and additional funding to school districts experiencing Black racial isolation. In addition, the U.S. Department of Education's Office for Civil Rights (OCR) should work with states pursuant to Title VI's implementing regulations to remedy the effects of funding policies that have an adverse disparate impact on predominantly Black school districts.