

**THE FORGOTTEN 40 ACRES:
HOW REAL PROPERTY, PROBATE & TAX LAWS CONTRIBUTED TO THE
RACIAL WEALTH GAP AND HOW TAX POLICY COULD REPAIR IT**

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I. INTRODUCTION

The story of America’s racial history is inextricably bound up with land and wealth. In the infancy of our country, land was limitless and inexpensive, but labor to turn that land into profit was in short supply. Expansion of our country to the Western territories and the question of whether slavery would follow suit ignited the sparks of the Civil War.¹ Confederates fought the Union in part out of fear that, not only would the institution of slavery be abolished, but that their land would be stripped from them and awarded to their slaves.²

After the war, the South remained short on cash but rich in land, so rather than paying fair wages, Black Codes and sharecropping were instituted to lock in a labor force.³ When the Black⁴ population spread west and north in the Great Migration, segregationist policies created barriers to land ownership.⁵ For people of color who managed to overcome the odds and acquire land or money, our probate laws have allowed it to slip away at death. After the progress of the civil rights movement, anti-tax policies implemented in the 1980s and continued today have created an economic segregation that threatens the continued success of our democracy.⁶

Reparations were expected and were attempted to be awarded after the conclusion of the Civil War, but a series of ill-fated and ill-willed efforts precluded it.⁷ Instead, many of the people and governments of this country, including the federal government, reverted to the same racial narrative used to dehumanize Black people and justify slavery. By dehumanizing Black Americans, federal, state, and local governments systematically deprived Black Americans of property and rights after the Civil War, until race discrimination was officially outlawed by the Civil Rights Act of 1964⁸ and the Fair Housing Act of 1968.⁹ Other civilized countries have made monetary awards and sacrifices to correct past wrongs, such as South Africa after apartheid and Germany after the Holocaust.¹⁰ Additionally, the United States has attempted reparations for other groups it has mistreated, such as Native Americans and Asian Americans after World War II.¹¹

Our failure as a nation to address the issue of reparations for Black Americans has contributed to a new form of racial segregation—economic segregation—in the form of income disparity and the racial wealth gap, which is taking us further away from the democratic ideals on which our country was founded. This Article proposes to use tax policy to repair the racial wealth gap, not just in the form of slave reparations,

¹ See *infra* note 23.

² See *infra* note 113.

³ See *infra* Parts III.A and B.

⁴ In accordance with the AP Stylebook, this Article will capitalize the terms “Black” and “White” when used as an adjective to describe Black and White people in the United States, except when the lowercase adjective is used in quoted sources. The term “African American” will be used when describing an American Black person of African descent. Immediately after slavery, most Black people in America were African Americans. The same cannot be said today. The term “Black American” can include persons of Caribbean descent or Europeans who do not trace their history back to Africa. The decision of whether to capitalize White is an issue that is currently up for debate, but the National Association of Black Journalists in June of 2020 issued a statement recommending that whenever a color is used to appropriately describe a race, it should be capitalized, including White and Brown. See Kanya Stewart, *NABJ Statement on Capitalizing Black and Other Racial Identifiers*, NAT’L ASSOC. OF BLACK JOURNALISTS (June 11, 2020), <https://www.nabj.org/news/512370/NABJ-Statement-on-Capitalizing-Black-and-Other-Racial-Identifiers.htm> [https://perma.cc/GH46-6ZBX].

⁵ See *infra* Parts III.C, D and E.

⁶ See *infra* Part III.G

⁷ See *infra* Part II.B

⁸ See Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964).

⁹ See Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73 (1968).

¹⁰ See *infra* Parts IV.A and B.

¹¹ See *infra* Parts IV.C and D.

but as “Black reparations.” These reparations can be achieved by using the estate tax and new charitable contribution rules to create a public and private partnership that makes both direct payments and community-based payments to Black Americans with a focus on the cornerstone of all American rights—property.

Part II begins by providing a historical background on slavery in America and post-Civil War attempts to provide slavery reparations. Part III explores the ways in which federal and state real property and tax laws have further discriminated against and continue to harm Black Americans. Part IV provides specific examples of reparations paid by other countries in connection to the Holocaust and Apartheid, as well as examples of reparations paid by the United States in connection to government seizure of Native American land and the internment of Japanese Americans. Part V discusses options for reparations to Black Americans through federal Estate Tax, as well as options available at the state and local level.

II. HISTORICAL BACKGROUND

A. History of Slavery in America

This Article begins in August 1619, when Jamestown colonists were the first in the New World to purchase enslaved Africans, marking what many believe was the beginning of slavery in America.¹² Other historians argue that slavery in America began much earlier, on September 8, 1565, when Spanish Admiral Pedro Menendez de Aviles founded St. Augustine, Florida, arriving on Florida’s shores in “ships filled with soldiers, wives, children and Africans, who were mostly slaves.”¹³

Over 400,000 Africans were stolen from their homes in Africa and sold into slavery in America before the abolishment of the international slave trade.¹⁴ From 1619 to 1865, almost 250 years, slave owners flourished under a cruel system of unpaid labor.¹⁵

1. *Origins of Servitude in America*

An unfortunate truth is that forms of involuntary servitude have been practiced throughout human history. Typically, such slavery occurred as a result of war or other armed conflict, but America was not at war with any tribe in Africa when slavery began in America.

When the Mayflower arrived at Plymouth in 1620, it carried indentured servants to the New World. Indentured servitude was the original model for growing a tobacco labor force in America. Investors would secure low wage citizens from England to migrate to America in exchange for a set number of years of labor.¹⁶ Failure of an indentured servant to be productive resulted in a court-imposed lengthening of their

¹² See Nikole Hannah-Jones, *Our Democracy’s Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-america-democracy.html> [https://perma.cc/5ENA-W67U]. As to the Jamestown location and 1619 as the year African slaves arrived in America, see also TIM HASHAW, *THE BIRTH OF BLACK AMERICA: THE FIRST AFRICAN AMERICAN AND THE PURSUIT OF FREEDOM AT JAMESTOWN* xvi (2007).

¹³ Nicquel Terry Ellis, *Forget What You Know About 1619, Historians Say. Slavery Began a Half-century Before Jamestown*, USA TODAY (Dec. 16, 2019), <https://www.usa-today.com/in-depth/news/nation/2019/12/16/american-slavery-traces-roots-st-augustine-florida-not-jamestown/4205417002/> [https://perma.cc/3M9N-UG5M].

¹⁴ See Hannah-Jones, *supra* note 12.

¹⁵ See *id.*

¹⁶ See WILLIAM A. DARITY, JR. & A. KRISTEN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* 314 n.89 (2020) (citing David Galenson, *The Rise and Fall of Indentured Servitude in the United States: An Economic Analysis*, J. ECON. HIST. 44, no. 1 (1984)).

indenture.¹⁷ There is some dispute as to exactly when and how the preferred source of labor became African slaves rather than indentured White servants. There is, however, no dispute that it happened.¹⁸

One theory for the origins of chattel slavery originates with Bacon's Rebellion in 1676.¹⁹ Nathaniel Bacon led a coalition of poor White farmers, African enslaved people, and White indentured servants frustrated with the inability to find farmland and disappointed that the Virginia governor (a relative of Bacon's) would not aid them in their vigilante killing and plunder of peaceful Native Americans to drive them off their lands.²⁰ Bacon and his supporters set fire to Jamestown in a rebellion against the Governor and other land-owning elites.²¹

After Bacon's Rebellion, White planters reacted with alarm to the anger they had seen among the Black Virginians who had joined Bacon. Worried about their inability to control this rowdy labor force of servants and slaves, laws were enacted making the Africans "hereditary slaves," and the system of White indentured servitude was slowly dismantled.²² This backlash from Bacon's Rebellion is said to have caused landowners to make a "racial bribe"²³ with poor Whites, elevating them to a preferred status by giving them the right to join in the legally permitted dehumanizing of African slaves to the status of non-person property-chattel.

Perhaps the idea of a racial bribe is a good description of the birth of racism, but historian Edmund Morgan provides a more practical insight as to why state governments codified white supremacy into a racist caste system. An indentured servant coming to Virginia in the first half of the seventeenth century cost about half as much as an African slave.²⁴ Then, the supply of indentured servants began to decline at about the same time as the need for more labor began to sharply increase.²⁵ As more African slaves were imported to meet the demand, an obvious problem began to manifest: indentured servants could not be controlled by physical coercion (English law prevented the maiming or killing of an English indentured servant), but they could be motivated by the threat of extending their term of service.²⁶ There was no similar way to motivate African slaves, who had a life sentence.

2. *Importation of the Racial Caste System*

In Barbados, the English enacted a law that permitted the beating, maiming, and death of Africans by libelously labeling Africans as a "brutish sort of people," and because they were viewed as such, it was

¹⁷ *Id.*

¹⁸ See DARITY, *supra* note 16, at 67 ("Black people overwhelmingly were the objects of enslavement. . . . Moreover, black enslavement had a unique severity that obviates any equivalence that might be drawn to white indentured servitude."). Digital History reports:

To meet planters' growing demand for slaves, the English government established the Royal African Company in 1672. After 1698, when Britain ended the Royal African Company's monopoly of the slave trade, the number of enslaved Africans brought into the colonies soared. Between 1700 and 1775, more than 350,000 African slaves entered the American colonies. By the mid-18th century, blacks made up almost 70 percent of the population of South Carolina, 40 percent in Virginia, 8 percent in Pennsylvania, and 4 percent in New England.

The Origins of New World Slavery, DIGITAL HIST., <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html> [https://perma.cc/YQ4E-AXJG].

¹⁹ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 24 (rev. ed. 1975).

²⁰ See, e.g., Erin Blakemore, *Why America's First Colonial Rebels Burned Jamestown to the Ground* (Aug. 2, 2019), <https://www.history.com/news/bacons-rebellion-james-town-colonial-america> [https://perma.cc/5CN3-7BY6].

²¹ *See id.*

²² *See id.*; see also Enactment of Hereditary Slavery Law Virginia 1662-ACT XII (explaining that under English law, a child received his or her status from the father. This Virginia colonial law of December 1662 made a child of an enslaved mother also a slave for life), <https://hsi.wm.edu/cases/anthony/documents.html> [https://perma.cc/EBP9-APTZ].

²³ See ALEXANDER, *supra* note 19, at 25.

²⁴ See EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* 297 n.4 (1975) ("A newly arrived English servant with 5 years or more to serve cost 1,000 pounds of tobacco more or less in the 1640s and early 1650s. The earliest surviving contract for importation of Negroes, in 1649, called for their sale on arrival at 2000 pounds apiece.").

²⁵ *Id.*

²⁶ *Id.*

necessary “or at least convenient” to kill or maim them in order to make them work.²⁷ Similarly, in 1705, Virginia passed a law that allowed the dismemberment of unruly slaves, but prohibited the whipping of a Christian, White servant without an order from the justice of the peace.²⁸ Slavery required new methods of labor discipline that became inextricably bound to contempt for African Americans. Government-sanctioned, judicially-enforced white supremacy had arrived in America as a necessary tool of American mercantilism. Historian Edmund Morgan boldly asserts that “to a large degree it may be said that Americans bought their independence with slave labor.”²⁹

Thus, to justify the inhumane institution of slavery, a false narrative became entrenched in the psyche of our nation—that people of northern European descent labeled as “White” were a superior race. John C. Calhoun, the senior Senator from South Carolina, was one of the most outspoken and formidable Congressional advocates for the lie that would undergird slavery and its ensuing African American dehumanization. He argued on the Senate floor in 1848 that “the two great divisions of society are not the rich and poor, but white and black, and all of the former, the poor as well as the rich, belong to the upper class and are respected and treated as equals.”³⁰

3. *Stolen Wealth Builds America*

Slavery was also the backbone of America’s financial success. By 1840, cotton produced by slave labor accounted for 59 percent of all U.S. exports and 66 percent of the world’s supply.³¹ The stolen wealth accumulated in America from slavery was not just in the crops farmed by uncompensated slave labor, but in the slaves themselves. Yale historian David W. Blight noted, “In 1860, slaves as an asset were worth more than all of America’s manufacturing, all of the railroads, all of the productive capacity of the United States put together.”³² In the Mississippi Delta, the richest cotton-farming land in the country, there were more millionaires per capita in the 1860s than anywhere else in the country.³³

America owes a great debt to the enslaved people that built it. As so eloquently written by Nikole Hannah-Jones, the creator of *The New York Times*’ 1619 Project:

They built the plantations of George Washington, Thomas Jefferson and James Madison, sprawling properties that today attract thousands of visitors from across the globe captivated by the history of the world’s greatest democracy. They laid the foundations of the White House and the Capitol, even placing with their unfree hands the Statue of Freedom atop the Capitol dome. They lugged the heavy wooden tracks of the railroads that crisscrossed the South and that helped take the cotton they picked to the Northern textile mills, fueling the Industrial Revolution. They built vast fortunes for white people North and South—at one time, the second-richest man in the nation was a Rhode Island “slave trader.” Profits from black people’s stolen labor helped the young nation pay off its war debts and financed some of our most prestigious universities. It was the relentless buying, selling, insuring and financing of their bodies and the products of their labor that made

²⁷ *Id.* at 314, 315, 325.

²⁸ See *An Act Concerning Servants & Slaves*, ENCYC. VA., <https://encyclopediavirginia.org/entries/an-act-concerning-servants-and-slaves-1705/> [https://perma.cc/ZCJ5-R9Q2] (last visited Oct. 26, 2021).

²⁹ MORGAN, *supra* note 24, at 5.

³⁰ John C. Calhoun, “*On the Oregon Bill*,” *June 27, 1848*, in 4 THE WORKS OF JOHN C. CALHOUN 503, 503–12 (Richard Kenner Cralle ed., D. Appleton & Co. 1888), <http://constitutionreader.com/reader/chapter.engz?doc=constitution&chapter=OEBPS/Text/ch76.xhtml> [https://perma.cc/2C7N-BJFU].

³¹ See *id.*; see also Hannah-Jones, *supra* note 12.

³² Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC MAG. (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [https://perma.cc/4VR5-72FB].

³³ See *id.*

Wall Street a thriving banking, insurance and trading sector and New York City the financial capital of the world.³⁴

Because the South was agrarian and the North was industrial, the North was able to gradually abolish slavery, although the North was by no means innocent of racist policies.³⁵ While some in the South cloaked their arguments for secession from the Union in the defense of states' rights and southern honor, the South's defense of its slave-based economy led to the first shots of the Civil War being fired on Fort Sumter in Charleston, South Carolina on April 12, 1861.³⁶ What follows in the rest of this Part is the story of our country's first attempts to repay its "great debt" created from stolen labor and stolen lives.

B. Civil War Era Attempts at Reparations

1. *Port Royal and the Sea Islands*

In November 1861, a fleet from the Union navy arrived at Port Royal, South Carolina to capture the harbor, which was ideally located between Charleston and Savannah.³⁷ Surrounding the harbor were several of the sea islands that stretch along the Atlantic coastline, including Edisto, St. Helena, Hunting, Parris, Hilton Head, and Daufuskie Islands.³⁸ Aside from harnessing the strategic military worth of Port Royal, the generals also planned to harvest the rich Sea Island cotton and rice fields there to finance the Northern war efforts.³⁹ The plantation owners were easily outnumbered by the Northern troops and were forced to flee, leaving over 10,000 Black men, women, and children behind.⁴⁰ They were not yet freed, as the Emancipation Proclamation was still two years away, but they were no longer slaves. Thus began the "Port Royal Experiment," as the abolitionists called it.⁴¹

There was no plan for what to do with the formerly enslaved people, called "freedmen," and there were competing interests, summarized by Katherine Franke as follows:⁴²

³⁴ Hannah-Jones, *supra* note 12.

³⁵ Between 1774 and 1817, all Northern states abolished slavery, even though emancipation was gradual. See J. Gordon Hylton, *Before There Were "Red States" and "Blue States," There Were "Free States" and "Slave States,"* MARQUETTE UNIV. L. SCH. FACULTY BLOG (Dec. 20, 2012), <https://law.marquette.edu/facultyblog/2012/12/before-there-were-red-and-blue-states-there-were-free-states-and-slave-states/> [https://perma.cc/EGW7-6UXK]. As evidence of racist policies among Northern states, Article 13 of Indiana's Constitution of 1851 stated, "No negro or mulatto shall come into or settle in the State, after the adoption of this Constitution." Anyone employing an African American would be fined between \$10 and \$500. See *Article 13 – Negroes and Mulattoes*, IND. HIST. BUREAU, <https://www.in.gov/history/about-indiana-history-and-trivia/explore-indiana-history-by-topic/indiana-documents-leading-to-statehood/constitution-of-1851/article-13-negroes-and-mulattoes/> [https://perma.cc/9CFS-GR3N]. This law may have been inspired by neighboring Illinois, which is said to have had "the harshest of all discriminatory Black Laws passed by Northern states before the Civil War." *100 Most Valuable Documents at the Illinois State Archives*, OFF. OF THE ILL. SEC'Y OF STATE, https://www.ilsos.gov/departments/archives/online_exhibits/100_documents/1853-black-law.html [https://perma.cc/X Y63-2EUK]. Illinois' 1853 Black Law charged any African American who entered the state with a misdemeanor and a heavy fine. See *id.* If the fine could not be paid, the sheriff was authorized to sell the African American's labor to the lowest bidder, essentially returning the freed person to slavery. See *id.*

³⁶ See *Slavery As A Cause of the Civil War*, NAT'L PARK SERV., <https://www.nps.gov/liho/learn/historyculture/slavery-cause-civil-war.htm> [https://perma.cc/9DN2-ZWGV] (last updated May 14, 2021) (quoting Alexander H. Stephens, Vice Pres. of the Confederate States of Am., in SAVANNAH REPUBLICAN, March 21, 1861, <https://www.nps.gov/liho/learn/historyculture/slavery-cause-civil-war.htm> [https://perma.cc/R4XD-AA9P]) ("The new [Confederate] constitution has put at rest, forever, all the agitating questions relating to our peculiar institution—African slavery as it exists amongst us—the proper status of the negro in our form of civilization. This was the immediate cause of the late rupture and present revolution.") (emphasis omitted).

³⁷ See KATHERINE FRANKE, REPAIR: REDEEMING THE PROMISE OF ABOLITION 19 (2019).

³⁸ Today, the sea islands are home to luxury resorts, state parks, and military training grounds. See "Sea Islands," BRITANNICA, <https://www.britannica.com/place/Sea-Islands> [https://perma.cc/BP8H-ABU3].

³⁹ See FRANKE, *supra* note 37, at 20–23.

⁴⁰ See *id.* at 22.

⁴¹ See William C. Lowe, *Battle of Port Royal, America's Civil War*, HISTORYNET, <https://www.historynet.com/battle-of-port-royal.htm> [https://perma.cc/3AJJ-X9QN].

⁴² See FRANKE, *supra* note 37, at 23.

The military was interested in the profits that could be generated from the agricultural work the freed people could undertake. Otherwise they wanted them out of the way. Northern missionaries were determined to save the souls and educate the minds of these people who had been subjected to a life of barbarism, and Northern land speculators were soon to arrive eager to turn a profit through the use of a cheap source of labor.

The person responsible for managing these competing interests and deciding what to do with the abandoned cotton plantations and former slaves who had worked them was Salmon P. Chase, head of the Department of the Treasury and one of the staunchest abolitionists in Lincoln's cabinet.⁴³ For Chase, the Sea Islands presented an opportunity to demonstrate the value and productivity of freed Black labor.⁴⁴

For a time, Chase and his team staved off the capitalists and turned to anti-slavery religious leaders from Northern cities to oversee the farming operations and teach the children.⁴⁵ In April 1862, Chase was joined by Brigadier-General Rufus Saxton, who assumed governorship of the Sea Islands when the responsibility for overseeing abandoned Confederate lands shifted from the Treasury to the War Department.⁴⁶ Along with Chase, Generals Saxton and William T. Sherman shared the view that "an essential part of their mission was the reallocation of confiscated land to the freed people so that they could fend for themselves."⁴⁷

To further this mission, Saxton embraced a land allocation plan that Chase's administration had recommended: "two acres of land were assigned to each working hand, plus an additional five-sixteenths of an acre for each child. In exchange for working the government's cotton fields, Black workers were permitted to raise corn and potatoes sufficient for their own use."⁴⁸

In time, the federal government was able to seize abandoned Confederate lands through a series of Confiscation Acts passed in the summer of 1862.⁴⁹ Under these laws, the federal government seized almost 77,000 acres of land in the Sea Islands.⁵⁰ Despite uncertain legal grounds,⁵¹ the land was to be sold in lots of about thirty-two acres to "loyal citizens" at an open auction.⁵²

Saxton wrote to Secretary of War Edwin Stanton in December 1862 to persuade him to alter the plan.⁵³ There was a widespread view throughout the Union that the seized Confederate lands should be allocated to the freed people as a kind of reparation for enslavement, and the prospect of the freed people being outbid

⁴³ See *id.* at 23; see also ALBERT BUSHNELL HART, SALMON PORTLAND CHASE 258 (Houghton, Mifflin, and Co. 1899) ("Chase had come forward as the leading anti-slavery spirit in the cabinet.")

⁴⁴ See HART, *supra* note 43, at 23.

⁴⁵ See FRANKE, *supra* note 37, at 25.

⁴⁶ See *id.* at 32–33.

⁴⁷ *Id.* at 33.

⁴⁸ *Id.* at 34.

⁴⁹ See Act of June 7, 1862, 37th Cong., Sess. II, Chapter 98, 12 Stat. 589 (June 7, 1862) (concerning collection of direct taxes in insurrectionary districts within the United States, and for other purposes); see also Act of July 17, 1862, 37th Cong., Sess. II, Chapter 195, 589–92 (concerning suppression of insurrection, to punishing treason and rebellion, to seizing and confiscating the property of rebels, and for other purposes). Section Five of the Confiscation Act of 1862 stated that

to insure [sic] the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same and the proceeds thereof for the support of the army of the United States.

⁵⁰ See FRANKE, *supra* note 37, at 35.

⁵¹ There was concern that the Confiscation Acts were unconstitutional and the Kentucky Supreme Court held them to be so in 1863. See *Norris v. Doniphan*, 61 Ky. (4 Met.) 385, 436–40 (1863). The U.S. Supreme Court upheld the Confiscation Acts after the close of the war as a legitimate exercise of the war power in seizing enemy property. See *Tyler v. Defrees*, 78 U.S. 268, 349 (1871).

⁵² FRANKE, *supra* note 37, at 35.

⁵³ See *id.* at 35–36.

by Northern speculators alarmed the friends of the freedmen.⁵⁴ Saxton, Stanton, Chase, and others desperately—and successfully—lobbied Congress to change the course of the impending auction.⁵⁵

Congress asked Abram Smith, one of the three tax commissioners sent by the federal government to inventory and administer the land auctions, to draft an amendment to the 1862 Direct Tax Act that would ensure the government “could reserve enough lands for all of the Sea Islands’ freedmen,” and the amendment became law on February 6, 1863⁵⁶—a mere five days before the auction was to take place. Of the 77,000 acres available, about 60,000 were reserved for the freed people.⁵⁷ Of the remaining 17,000 acres sold at public option, 2,595 acres were purchased by freed people, for about \$1 per acre, using pooled savings they had earned from selling pigs, chickens, and eggs, and from their meager wages from the government.⁵⁸

After much politicking, Secretary Chase and his friend Reverend Mansfield French persuaded Lincoln to make the full 60,000 or so acres of land that had been reserved from the first auction available to the freed people in a second auction.⁵⁹ Lincoln issued an order with the instructions that those who had resided on the land for the last six months or were currently cultivating the land had a preferred, preemptive right to purchase up to 40 acres of land at a price of \$1.25 per acre.⁶⁰ This is the first mention in history of the 40-acre reparations proposal.⁶¹

Within two weeks of Lincoln’s order, over a thousand freed people and their families filed applications for land.⁶² Based on various accounts of this time period, the freed people’s spirit of entrepreneurship was high, and their excitement was palpable.⁶³ Imagine the disappointment then, when, in February 1864, the Tax Commissioners reversed course and eliminated the preemptive right of the freed people to buy the land at a fixed \$1.25 per acre.⁶⁴ Saxton described the feeling of the freed people as follows: “The action of the commissioners proved a sad blow to their hopes, and the disappointment and grief of all were in proportion to their previous exaltation in the hope of soon becoming independent proprietors, free men upon their own free soil.”⁶⁵

In the aftermath of the tax auctions, freed people who were not able to purchase land were forced to choose between again working for a White overseer under labor contracts for poor wages or leaving the land on which they had spent their entire lives for an uncertain future.⁶⁶

⁵⁴ *Id.*

⁵⁵ *See id.* at 36–37.

⁵⁶ *Id.*; *see also* Act of February 6, 1863, ch. 21, 37 Stat. 640, 640–41 (amending collection of direct taxes in insurrectionary districts), [https://babel.hathitrust.org/cgi/pt?id=uc1.\\$b279462&view=1up&seq=43&skin=2021&q1=February%206.%201863](https://babel.hathitrust.org/cgi/pt?id=uc1.$b279462&view=1up&seq=43&skin=2021&q1=February%206.%201863) [<https://perma.cc/5CGV-N7XX>].

⁵⁷ *See* FRANKE, *supra* note 37, at 35 and 45.

⁵⁸ *See* FRANKE, *supra* note 37, at 38. Importantly, given that the Confiscation Act permitted the auction of land to “loyal citizens,” the fact that the freed people participated in this sale made them *de facto* citizens. “Indeed, their successful participation in the first Port Royal land auction should be understood as the first ‘acts of citizenship’ by freed people.” *Id.* at 42.

⁵⁹ *See* Abraham Lincoln, *Additional Instructions to the Direct Tax Commissioners for the District of South Carolina in Relation to the Disposition of Lands*, in 4 WAR OF THE REBELLION, OFFICIAL RECORDS, no. 3, 120 (Fred Ainsworth & Joseph King ed. 1900) (1863).

⁶⁰ *See id.*; *see also* Walter Lynwood Fleming, *Forty Acres and A Mule*, 182 N. AM. L. REV. 721, 724 (1906).

⁶¹ *See* Lincoln, *supra* note 59, at 120.

⁶² *See* FRANKE, *supra* note 37, at 46 (citing WILLIE LEE ROSE, *REHEARSAL FOR RECONSTRUCTION: THE PORT ROYAL EXPERIMENT 287* (Bobbs-Merrill ed., Athens: Univ. of Ga. Press 1999) (1964)).

⁶³ *Id.* at 49.

⁶⁴ *See* FRANKE, *supra* note 37, at 52.

⁶⁵ Rufus Saxton, *Report of Rufus Saxton to Edwin Stanton*, in 4 WAR OF THE REBELLION, no. 3, 1026 (Fred Ainsworth & Joseph King ed. 1900) (1863).

⁶⁶ *See* FRANKE, *supra* note 37, at 56.

Outside of the Sea Islands, the amount of land actually confiscated during or after the war was not great.⁶⁷ Aside from slaves, cotton was the primary property confiscated by the Union.⁶⁸

2. *Lincoln's Proclamation of Amnesty and Reconstruction*

At the same time as Secretary Chase and Reverend French were persuading Lincoln to allocate land to freed people in the second Port Royal auction,⁶⁹ Lincoln was considering plans for the post-war South. On December 8, 1863, Lincoln issued a Proclamation of Amnesty and Reconstruction.⁷⁰ Referred to as the "Ten Percent Plan," the proclamation addressed three main areas of concern.⁷¹

First, it allowed for a full pardon for and restoration of property to all engaged in the rebellion with the exception of the highest Confederate officials and military leaders. Second, it allowed for a new state government to be formed when 10 percent of the eligible voters had taken an oath of allegiance to the United States. Third, the Southern states admitted in this fashion were encouraged to enact plans to deal with the formerly enslaved people so long as their freedom was not compromised.⁷²

Lincoln's Proclamation of Amnesty and Reconstruction wrested control of reconstruction from Congress, put it in the hands of the Southern states, and minimized the chances that the former slaves would be granted their own land to farm.⁷³

3. *Sherman Refugees and Special Field Order No. 15*

As General Sherman and his troops marched from Atlanta to the sea, many enslaved deserters and newly freed people began caravanning behind the troops.⁷⁴ At the peak, estimates suggest nearly 17,000 formerly enslaved people were trailing the Union troops.⁷⁵ The refugees were a hindrance to the Union soldiers on their campaign, and Sherman sought some way to address both their destitution and his need to continue his military mission, unencumbered.⁷⁶

On January 12, 1865, Sherman and War Secretary Stanton gathered Black leaders to seek their opinion on a solution to the refugee problem.⁷⁷ Garrison Frazier, a former slave from North Carolina who bought his and his wife's freedom before joining Sherman's military operation, told Sherman, "[t]he way we can best take care of ourselves is to have land and turn it and till it by our own labor. . . . We want to be placed on land until we are able to buy it and make it our own."⁷⁸ When Sherman asked whether the freed people would rather live mixed with Whites or on their own, Frazier replied that his people preferred to live apart from White people, "for there is a prejudice against us in the South that it will take years to get over."⁷⁹

⁶⁷ See *id.* at 59.

⁶⁸ See Saxton, *supra* note 65, at 118–20.

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See Proclamation No. 11 (Dec. 8, 1863).

⁷² *President Lincoln Issues Proclamation of Amnesty and Reconstruction*, HIST. (Nov. 13, 2009), <https://www.history.com/this-day-in-history/lincoln-issues-proclamation-of-amnesty-and-reconstruction> [https://perma.cc/V5DC-LCC9].

⁷³ See *id.*

⁷⁴ See Ben Parten, "Somewhere Toward Freedom:" Sherman's March and Georgia's Refugee Slaves, at 23 (May 2017) (Masters of Arts dissertation, Clemson Univ.) (TigerPrints).

⁷⁵ See *id.* at 12.

⁷⁶ See FLEMING, *supra* note 60, at 725.

⁷⁷ See Edwin D. Hoffman, *From Slavery to Self-Reliance: The Record of Achievement of the Freedmen of the Sea Island Region*, 41 J. AFRICAN AM. HIST. 8, 20 (1956).

⁷⁸ *Id.* at 20.

⁷⁹ FRANKE, *supra* note 37, at 58.

Five days after this meeting, on January 16, 1865, General Sherman issued Special Field Order No. 15, which set aside for Black settlement the entire Sea Islands area, as well as a strip of land thirty miles wide from the coast inland that stretched from Charleston, South Carolina all the way to St. John's River in Florida.⁸⁰ Under the order, each “respectable” family was to be allotted forty acres of tillable land, which, along with a preceding promise by President Lincoln, provided the source of the demand that freed Blacks receive “forty acres and a mule.”⁸¹ The order also prohibited White people from living on the land, unless they were military officers or soldiers assigned to live there for duty.⁸² Furthermore, freed people were “left to their own control.” As Katherine Franke noted, “This is what most of the freed people imagined freedom would look like: land, tools, and complete independence from white people.”⁸³

The question remained whether the land reserved by Sherman's order was within the federal government's purview to give, and so the land was granted to the freed people with only possessory titles—it was theirs unless someone else made a claim to the land by presenting a valid deed.⁸⁴ Given that the possessory titles were likely to be revoked once the Confederate soldiers returned from the war,⁸⁵ General Saxton was reluctant to allocate the land to the refugees, fearing he would “be responsible for disappointing the freed people once again in their claims for land.”⁸⁶ Nevertheless, Saxton's men started to distribute thousands of possessory titles to male and married freed people (single women were excluded) in the lands that Sherman had set aside.⁸⁷ With their vulnerable possessory titles, the freed people began their spring planting as the Civil War drew to a close.⁸⁸

4. *Freedmen's Bureau*

On March 3, 1865, Congress established the Freedmen's Bureau, formally known as the Bureau of Refugees, Freedmen, and Abandoned Lands, with the purpose of providing “food, shelter, clothing, medical services, and land to displaced Southerners, including newly freed African Americans.”⁸⁹ The Freedmen's Bureau Act effectively authorized Sherman's Special Field Order No. 15; the Act authorized the Bureau to assign to male freedmen forty acres of abandoned or confiscated land, which freedmen could lease for three years.⁹⁰ After three years, the land's occupants could purchase the land from the government and receive “such title as is could convey.”⁹¹ By recognizing a potential limitation on the government's ability to convey title to this property, the Freedmen's Bureau Act acknowledged that title to the property was vulnerable to legal challenge.⁹²

⁸⁰ See *id.* For the text of Sherman's Special Field Order No. 15 and a map showing the 400,000 acres of land granted by Sherman to the freed people, see Gen. William T. Sherman, *Special Field Order No. 15*, BLACKPAST (Sept. 29, 2008), <https://www.blackpast.org/african-american-history/special-field-orders-no-15/> [https://perma.cc/YK7P-KUWY].

⁸¹ FRANKE, *supra* note 37, at 58.

⁸² See *id.*

⁸³ *Id.*

⁸⁴ See *id.* at 59.

⁸⁵ See *id.*

⁸⁶ *Id.*

⁸⁷ See *id.* at 59–60.

⁸⁸ See *id.* at 61.

⁸⁹ “Freedman's Bureau Acts of 1865 and 1866,” U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/FreedmensBureau.htm> [https://perma.cc/G8 GD-C3BW].

⁹⁰ FRANKE, *supra* note 37, at 60.

⁹¹ *Id.*

⁹² See *id.*

5. *Davis Bend*

At the same time as Sherman's Special Field Order No. 15 was being implemented on the Southern coast, another important area of land was set aside for freed people in Mississippi.⁹³ Even before the end of the Civil War, Ulysses S. Grant decided that the lands of Jefferson Davis and his family should be used as a "paradise" for the freed people.⁹⁴ Near what is today Vicksburg, Mississippi, three large plantations owned by Jefferson Davis and his brother, Joseph Davis, and known collectively as "Davis Bend" were confiscated by the Union and set aside for the "colonization, residence, and support of freedmen."⁹⁵ General Dana declared it to be "a suitable place to furnish means of support and security for the unfortunate race which [Jefferson Davis was] so instrumental in oppressing."⁹⁶ At Davis Bend, as with other colonies formed for freed people by Bureau agents throughout the South, no White people were permitted to reside on the property, and the colony was guarded by a regiment of freed people.⁹⁷

What made Davis Bend unique was that it had already been managed and run independently of White control, even before the Union troops arrived.⁹⁸ Joseph Davis "preferred persuasion to compulsion," and he implemented a capitalistic form of governance on the plantations that he referred to as a "community of cooperation," offering "incentives and rewards for exceptional cotton picking," allowing his servants to run and operate their own store, and even implementing a plantation trial court with a jury of peers.⁹⁹ Because of this background, Davis Bend was easily converted to a cooperative community after the Union leaders turned the land over to the freed people.¹⁰⁰

6. *Public Policy Debate*

There had been much debate in the Union about how to best transition the freed people from enslavement to paid labor.¹⁰¹ Many believed the government would run plantations and pay the freed people fair wages. Others argued the freed people should be granted their own land to farm and support themselves, free from White involvement.¹⁰² A third group, sympathetic to the Confederate cause, believed life should return to as close as pre-war normal as possible, with freed people working as contract laborers on White-owned plantations.¹⁰³ The third plan, arguably the worst, became the reality upon the assassination of President Lincoln and the installation of Andrew Johnson as President on April 15, 1865.¹⁰⁴

7. *Amnesty Proclamation*

Once in office, Johnson focused on quickly restoring the Southern states to the Union. On May 29, 1865, he issued an Amnesty Proclamation of his own that granted amnesty to most former Confederates and allowed "the restoration of all rights in property, except as to slaves."¹⁰⁵ The proclamation created

⁹³ See Stephen J. Ross, *Freed Soil, Freed Labor, Freed Men: John Eaton and the Davis Bend Experiment*, 44 J. S. HIST. 213, 214 (1978).

⁹⁴ See *id.* at 214.

⁹⁵ FRANKE, *supra* note 37, at 90–91.

⁹⁶ *Id.* (quoting FLEMING, *supra* note 60, at 724).

⁹⁷ See *id.* at 91.

⁹⁸ See *id.* at 85.

⁹⁹ *Id.* at 84–85; Neil R. McMillen, *The Life and Times of Isaiah T. Montgomery*, MISS. HIST. NOW (Feb. 2007), <https://www.mshistorynow.mdah.ms.gov/issue/isaiah-t-montgomery-1847-1924-part-1> [<https://perma.cc/KL4J-9WC8>].

¹⁰⁰ See FRANKE, *supra* note 37, at 93.

¹⁰¹ See FRANKE, *supra* note 37, at 60.

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.* at 60–61. For a timeline of Lincoln's assassination on April 14, 1865 and death on April 15, 1865, see *Abraham Lincoln's Assassination*, HIST. (Oct. 27, 2009, updated Jan. 28, 2022), <https://www.history.com/topics/american-civil-war/abraham-lincoln-assassination>.

¹⁰⁵ *Id.* at 61.

seemingly unanswerable questions related to land ownership. It was unclear whether the March 3, 1865 Freedmen’s Bureau Act or the May 29, 1865 Amnesty Proclamation controlled the disposition of lands falling under Sherman’s Special Field Order No. 15.¹⁰⁶

8. *Conflicting Orders Regarding Land*

The head of the Freedmen’s Bureau, General O.O. Howard (also the founder of Howard University), consulted with Stanton, Saxton, and the Attorney General. He issued an order “that the lands set apart for the freed people [under Sherman’s Field Order and the Freedmen’s Bureau] Act were not subject to [Johnson’s] Amnesty Proclamation, and that the Bureau should continue to convey the land to freed people in forty-acre lots.”¹⁰⁷ In September 1865, President Johnson fought back and issued an order “to all Bureau agents demanding that they restore all land except that which had already been sold under a court decree.”¹⁰⁸ General Howard traveled to South Carolina to personally “deliver the terrible news to the freed people” that not only would they lose the land they had farmed all year, but they would also be asked to remain on as contract laborers to the returning Confederates.¹⁰⁹ General Howard did all he could to slow the implementation of President Johnson’s Amnesty Proclamation.

9. *Attempted Assist from Congress*

In December 1865, the Thirteenth Amendment¹¹⁰ abolishing slavery became effective, and Congress later passed a new Freedmen’s Bureau bill¹¹¹ and a Civil Rights Act.¹¹² The Freedmen’s Bureau bill would have statutorily recognized the Sherman land grants and protected the possessory titles to that land for three years while Congress sought alternate land to offer to the freed people in the event title was reclaimed by the former Confederate owners.¹¹³ The bill would have reserved three million acres of public land in Florida, Mississippi, Alabama, Louisiana, and Arkansas for the freed people.¹¹⁴

President Johnson vetoed the bill, thus ending the hopes for reparations to formerly enslaved people in the form of property. It was this veto and others to follow that would lead to his impeachment. Johnson brought the Freedmen’s Bureau under the control of the military, which in turn seized control of the land restoration process.¹¹⁵

In stripping the freedmen of their possessory Sherman titles and granting “Johnson titles” back to the White planters, the economic dynamics of the Sea Islands were forever changed. Of the 190,000 or so people who live today in Beaufort County, South Carolina (which includes the towns of Beaufort and Hilton Head Island), 77 percent are White, and the rest are majority African American.¹¹⁶ “Much of the wealth held by residents of Beaufort County today is reflected in the value of property. And nearly all of the most

¹⁰⁶ See *id.* at 61–62.

¹⁰⁷ *Id.* at 62 (citing GEORGE R. BENTLEY, A HISTORY OF THE FREEDMEN’S BUREAU 93 (1955)).

¹⁰⁸ FRANKE, *supra* note 37, at 62.

¹⁰⁹ *Id.*; see also FLEMING, *supra* note 60, at 726.

¹¹⁰ See U.S. CONST. amend. XIII, §§ 1–2.

¹¹¹ See Freedmen’s Bureau Act, ch. 90, 13 Stat. 507 (1865).

¹¹² See Civil Rights Act of 1866, ch. 31, 14 Stat. 27–30 (1866) (current version at 42 U.S.C. §§ 1981–82).

¹¹³ Freedmen’s Bureau Act, *supra* note 111 at Sec. 4.

¹¹⁴ See generally Freedmen’s Bureau Act of 1866, ch. 90 xiii Stat. 507 (continuing in force and amending the Freedmen’s Bureau Act of 1865).

¹¹⁵ See *Impeachment Trial of President Andrew Johnson, 1868*, UNITED STATES SENATE, <https://www.senate.gov/about/powers-procedures/impeachment/impeachment-johnson.htm>; see also FRANKE, *supra* note 37, at 62–73.

¹¹⁶ See FRANKE, *supra* note 37, at 73; see also *QuickFacts: Beaufort County, South Carolina; United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/beaufortcountysouthcarolina,US/PST045219> [https://perma.cc/7CK8-S299] (providing that the percentage of people who live in Beaufort County, South Carolina that are White has increased to about 78 percent).

valuable property is owned by white people.”¹¹⁷ Land returned to the Confederates or purchased by Northern speculators in the Port Royal auctions ended up in the hands of stockbrokers, like E.F. Hutton; mining barons, like Solomon Guggenheim; and future governors and U.S. Senators, like Mark Sanford.¹¹⁸

At Davis Bend, a different story prevailed. After Joseph Davis reclaimed his property, he sold it to his favorite former slaves, Benjamin Montgomery and his son Isaiah Montgomery, “for \$300,000 at very liberal terms.”¹¹⁹ The Montgomery family “became the third largest cotton producers in Mississippi. They improved the land, diversified their crops, restored the buildings, and produced prize-winning long-staple cotton. . . . They established . . . [two] mercantile store[s]. White people sometimes remarked that they were ‘the best planter[s] in the county and perhaps in the state.’”¹²⁰ Davis Bend showed what the South could have looked like if Johnson did not veto the second Freedmen’s Bureau Bill and the Civil Rights Act passed by Congress in late 1865. Black farmers, free from White oversight and control, were able to be independently successful.

10. Southern Homestead Act

In June 1866, Congress tried again to assist the freed people by enacting the Southern Homestead Act.¹²¹ It was designed exclusively to give freed people and White Southern loyalists first choice of the remaining public lands from five Southern states (the same land attempted to be offered to ex-slaves under the second Freedmen’s Bureau Bill that was vetoed by President Johnson) until January 1, 1867.¹²²

But homesteading was problematic for several reasons. The short, six-month period allotted by Congress prevented freed people from taking action because most were under contract to work or had leased land, through the Bureau’s contract labor policy, until the end of the year.¹²³ Moreover, many Southern bureaucrats tasked with enforcing the law did not inform the freed people of their opportunity to acquire land.¹²⁴ In addition, the quality of the land was poor and, even though prices were reduced, the land was still too expensive for freed people to afford.¹²⁵ In the end, only about 1,000 freed people acquired title to land as part of the Southern Homestead Act.¹²⁶

Thaddeus Stevens of Pennsylvania, then Speaker of the U.S. House of Representatives and an ardent abolitionist,¹²⁷ introduced H.R. 29 on March 11, 1867, in an attempt to resuscitate the forty acres promise.¹²⁸ Section four of the bill stated:

Out of the lands thus seized and confiscated, the slaves who have been liberated . . . , who resided in said “confederate States” on the 4th day of March, A.D. 1861 or since, shall have

¹¹⁷ FRANKE, *supra* note 37, at 73 (footnote omitted).

¹¹⁸ *See id.* at 75–76.

¹¹⁹ McMillen, *supra* note 99.

¹²⁰ *Id.* (alteration in original) (quoting another source).

¹²¹ *See* Act for the Disposal of the Public Lands for Homestead Actual Settlement in the States of Alabama, Mississippi, Louisiana, Arkansas, & Florida, ch. 123, 14 Stat. 66–67 (1866).

¹²² *See generally id.*

¹²³ *See generally* FLEMING, *supra* note 60

¹²⁴ *See Id.*

¹²⁵ *See Id.*

¹²⁶ *See* CLAUDE F. OUBRE, *Forty Acres and a Mule: The Freedmen’s Bureau and Black Land Ownership* 86–87 (La. State Univ. Press ed. 1978). *But see* Keri Leigh Merritt, *Land and the Roots of African American Poverty*, AEON, (Mar. 11, 2016), <http://aeon.co/ideas/land-and-the-roots-of-african-american-poverty> [https://perma.cc/N7 YB-LLQM] (claiming 4,000 to 5,500 African Americans received land patents from the Southern Homestead Act, out of a total of 28,000 individuals who were granted land patents).

¹²⁷ *See* Steve Moyer, *Remarkable Radical: Thaddeus Stevens*, *Humanities*, Nov/Dec 2012, Vol. 33, No. 6, <https://www.neh.gov/humanities/2012/novemberdecember/feature/remarkable-radical-thaddeus-stevens> [https://perma.cc/PUV4-XX78].

¹²⁸ *See* Miranda Booker Perry, *No Pensions for Ex-Slaves*, 42 PROLOGUE MAG., no. 2, Summer 2010, <https://www.archives.gov/publications/prologue/2010/summer/slave-pension.html> [https://perma.cc/7VYJ-G4FR].

distributed to them as follows namely: to each male person who is the head of a family, forty acres; to each adult male, whether the head of the 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 At the end of ten years the absolute title to said homesteads shall be conveyed to said owners or to the heirs of such as are then dead.¹²⁹

In support of his bill, Stevens stated, “Withhold from them all their rights and leave them destitute of the means of earning a livelihood, [and they will become] the victims of the hatred or cupidity of the rebels whom they helped to conquer.”¹³⁰ Although Stevens’ bill failed to pass, Republicans campaigned on the promise of forty acres and a mule during the 1868 election season.¹³¹

C. Other Attempts at Reparations for Slavery

The history, laws, and policies reflected in Section B of this Part are enumerated to reveal that, although there were differences of opinion, there was a clear intent on the part of the federal government to allocate land to former slaves. The federal government’s plan to provide tillable land to freed people reflected the freed people’s idea of what it meant to be free (as opposed to simply “freed”)—living autonomous lives independent of White people.

The belief that former slaves would be granted land was widely held—by Northerners as morally just, by freed people as reason for hope, and by Confederates as fear-based motivation.¹³² Reparations was not a novel concept—there were cases of reparations for slavery dating all the way back to the colonial era.

1. *Reparations in the Colonial Era*

During the colonial era, it was customary (and even the law in the colony of Maryland) for masters to pay “freedom dues” to indentured servants at the expiration of their term of service.¹³³ Where freedom dues included land, it was usually fifty acres, but the payments more typically consisted of clothing, corn, and tools.¹³⁴ Freedom dues were “aimed at enabling ex-servants to start afresh, as free settlers.”¹³⁵ This history likely informed the abolitionists’ push for forty acres and a mule after the Civil War.

2. *Belinda Royall*

In his influential piece, “The Case for Reparations” published in *The Atlantic*, Ta-Nehisi Coates reports on two early examples of slave reparations. First was Belinda Royall, who “was kidnapped as a child [from what is now Ghana] and sold into slavery. She endured the Middle Passage and 50 years of enslavement at

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *See id.*

¹³² *See* FLEMING, *supra* note 60, at 723 (“I have been assured by old negroes that a general topic of conversation in some negro ‘quarters’ was the intention of the Federals to confiscate the lands and divide them among the blacks. They heard about this from the ‘big house’ and from ‘word that was saunt in.’ The Confiscation Acts of the Federal Congress were constantly referred to by the Confederates as showing what the policy of the North would be in case the South were conquered. Through fear of confiscation and division of lands, the Southerners were rallied to fresh exertion The last address of the Confederate[s] Congress, in March, 1865, reminded the people that the penalty for failure would probably be confiscation of estates, which would be given to their former bondsmen.” (alteration in original)).

¹³³ *See* Elodie Peyrol-Kleiber, “Starting Afresh: Freedom Dues vs. Reality in 17th Century Chesapeake,” *Mémoires, Identités, Marginalités dans le Monde Occidental Contemporain*, <https://journals.openedition.org/mimmoc/2777> (citing Maryland Archives Online, vol. 1, p. 40) [<https://perma.cc/P4UT-R4MJ>].

¹³⁴ *Id.*

¹³⁵ Manisha Sinha, *The Long History of American Slavery Reparations*, WALL ST. J. (Sept. 20, 2019) (alteration in original), <https://www.wsj.com/articles/the-long-history-of-american-slavery-reparations-11568991623> [<https://perma.cc/VQ8Y-NPYR>].

the hands of Isaac Royall and his son.”¹³⁶ Isaac Royall was famous not only as the benefactor of Harvard Law School, but also for having tortured and burned alive at the stake seventy-seven of his slaves in Antigua who were accused of planning a rebellion against their masters.¹³⁷

Isaac Royall fled the country during the Revolution and, in 1783, Belinda Royall asked the Massachusetts legislature for an allowance to be paid to her from Isaac’s estate, given that his wealth was accumulated in part on behalf of her uncompensated labor. The legislature granted her a pension of 15 pounds and 12 shillings from the estate, making her petition for reparations one of the earliest successful attempts.¹³⁸

3. Quakers

Coates’ second example of early reparations is that of the Quakers. Quaker John Woolman wrote in 1769, “A heavy account lies against us as a civil society for oppressions committed against people who did not injure us . . . and that if the particular case of many individuals were fairly stated, it would appear that there was considerable due to them.”¹³⁹ Indeed, in New York, New England, and Baltimore, Quakers made “membership contingent upon compensating one’s former slaves.”¹⁴⁰ Following this ideology, Quaker Robert Pleasants, in 1782, emancipated his seventy-eight slaves and granted them 350 acres.¹⁴¹ He also built a school on their property and provided for their education.¹⁴² As Pleasants explained, “The doing of this justice to the injured Africans . . . would be an acceptable offering to him who ‘Rules the kingdom of men.’”¹⁴³

The forty acres promised at the end of the Civil War was not a novel concept—there was an established pattern already existing in the country for giving those who had been freed a fresh start. After 1868, however, the reparations rhetoric went silent. Public sentiment in favor of aiding the freed people faded with people’s memories of the war. The prominent publication *The Nation* published editorials warning that the allocation of land to formerly enslaved people violated the American ideals of hard work, contending that “[n]o man in America has any right to anything which he [had] not honestly earned, or which the lawful owner[s] [have] not thought proper to give him.”¹⁴⁴ Apparently, lifetimes of unpaid labor did not count as “honest work” to the editors of *The Nation*. Eventually, former slaves and their descendants picked up the mantle of the quest for reparations.

4. First Ex-Slave Pension Bill

After the Civil War, military service pensions were granted to both White and Black veterans.¹⁴⁵ However, many Black veterans had no birth certificates, military papers, or hospital records, and, thus, they

¹³⁶ Coates, *supra* note 32; see also Isaac Royall Jr.: Slave Master, Harvard L. Sch. Benefactor, HARVARD UNIV. PRESS BLOG (Nov. 20, 2015), https://harvardpress.typepad.com/hup_publicity/2015/11/isaac-royall-jr-slave-master-harvard-law-school-benefactor.html [https://perma.cc/M9U5-426R].

¹³⁷ See HARVARD UNIV. PRESS BLOG, *supra* note 136.

¹³⁸ Coates, *supra* note 32.

¹³⁹ *Id.*; see also Manisha Sinha, *The Slave’s Cause: A History of Abolition* 12 (Yale Univ. Press, 2016). For a discussion on the Quaker manumission movement, see, e.g., Michael J. Crawford, *The Pace of Manumission among Quakers in Revolutionary-Era North Carolina*, 102 QUAKER HIST. 1, 1–16 (2013).

¹⁴⁰ Coates, *supra* note 32.

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ *Id.*

¹⁴⁴ *Land for the Landless*, THE NATION, May 16, 1867, at 394, 394–95.

¹⁴⁵ See “Racial Discrimination in Union Army Pensions Detailed by New Study,” Brigham Young Univ. Commc’ns Press Released, Feb. 9, 2010, <https://news.byu.edu/news/racial-discrimination-union-army-pensions-detailed-new-study> [https://perma.cc/7SWS-MNUH]; see also SARAH GOLDY-BROWN, REPARATIONS FOR SLAVERY: THE FIGHT FOR COMPENSATION 36 (2018).

could not complete the paperwork needed to qualify.¹⁴⁶ Partly for this reason, “the first ex-slave pension bill (H.R. 11119) was introduced by Rep. William Connell of Nebraska in 1890 . . . at the request of [his constituent,] Walter R. Vaughan.”¹⁴⁷ The plan called for one-time payments as well as monthly benefits that were based on a person’s age and would increase in time. The older a former slave, the higher the one-time payment (called a “bounty”) and the higher the monthly pension.¹⁴⁸

Vaughan, a White Democrat, politician, and newspaper editor, “did not believe that [H.R. 11119] . . . should be identified as a pension bill but instead as ‘a Southern-tax relief bill.’”¹⁴⁹ Although “Vaughan recognized that pensions would financially benefit former slaves and would be a semblance of justice for their years of forced labor,” his motivation for the pension program was also to increase spending among the recipients of the pension in order to stimulate the devastated Southern economy.¹⁵⁰

5. *Callie House*

Callie House was a former slave, born near the end of the Civil War, who demanded reparations for ex-slaves a full seventy years before the Civil Rights Movement. A widowed mother of five, working as a laundress in Nashville, Callie House fought for African American pensions based on those offered to Union soldiers, the logic being that if men who had served in the Union army were entitled to a pension to recognize their service, so too were the former slaves entitled to compensation for their years of involuntary labor.¹⁵¹ The National Ex-Slave Mutual Relief, Bounty and Pension Association (“MRB&PA”), created and led by Ms. House alongside Isaiah H. Dickerson, grew so influential, with a membership of around 300,000 by 1900, that it became the target of government interference.¹⁵²

The Department of Justice investigated the organization’s leaders, hoping to find actionable offenses, and the United States Post Office used its extensive anti-fraud powers to block MRB&PA’s mailings to its members, claiming the Association was spreading false hope to freed people and thus committing mail fraud.¹⁵³ In 1917, Callie House was charged and sentenced to a year in jail for mail fraud, accused of sending misleading circulars through the mail that guaranteed pensions to association members, even though the Post Office offered no definitive evidence to that effect.¹⁵⁴

6. *Johnson v. McAdoo*

In 1915, the National Ex-Slave Mutual Relief, Bounty and Pension Association filed a class action lawsuit against the U.S. Treasury in federal court for around \$68 million.¹⁵⁵ The lawsuit asserted that the plaintiffs were owed this sum, which the Secretary of Treasury collected between 1862 and 1868 as a tax on cotton, because they and their ancestors had produced the cotton as a result of their “involuntary

¹⁴⁶ *See id.*

¹⁴⁷ Perry, *supra* note 128; *see generally* H.R. 11119, 51st Cong. (1890); S. 1389, 53rd Cong. (1894); S. 1978, 54th Cong. (1896); S. 1176, 56th Cong. (1899); H.R. 11404, 57th Cong. (1902) (showing that all the bills contained the same provisions); *see also* Mary F. Berry, *Reparations for Freedmen, 1890-1916: Fraudulent Practices or Justice Deferred?*, 57 J. OF NEGRO HIST. 219, 220–21 (1972) (“Vaughn drafted his own bill and asked his Congressman, William J. Connell . . . to introduce it.”).

¹⁴⁸ *See* H.R. 11119, *supra* note 147.

¹⁴⁹ Perry, *supra* note 128.

¹⁵⁰ *Id.*; GOLDY-BROWN, *supra* note 145, at 36.

¹⁵¹ *See* MARY FRANCES BERRY, *MY FACE IS BLACK IS TRUE: CALLIE HOUSE AND THE STRUGGLE FOR EX-SLAVE REPARATIONS* 4, 6, 34, 54, 189 (Vintage Books 2005); *see also* Quint Qualls, *Black History Month: Callie House Led Early Push for Reparations*, TENNESSEAN (Feb. 19, 2014), <https://www.tennessean.com/story/news/local/2014/02/19/black-history-month-callie-house-led-early-push-for-reparations/5601227/> [https://perma.cc/8PY4-WMTQ].

¹⁵² *See* BERRY, *supra* note 151, at 7, 50–51, 87.

¹⁵³ *See id.* at 142, 148, 156.

¹⁵⁴ *See id.* at 156, 189, 192; *see also* Qualls, *supra* note 151.

¹⁵⁵ *See* *Johnson v. McAdoo*, 45 App. D.C. 440 (1916), *aff’d* 244 U.S. 643 (1917); *see also* Perry, *supra* note 128; Arica L. Coleman, *The House Hearing on Slavery Reparations is Part of a Long History*, TIME (June 18, 2019), <https://time.com/5609044/reparations-hearing-history/> [https://perma.cc/Y62G-JU3F].

servitude.”¹⁵⁶ The *Johnson v. McAdoo* cotton tax lawsuit is the first documented African American reparations litigation in the United States at the federal level.¹⁵⁷

On appeal, the U.S. Supreme Court in 1916 sided with Court of Appeals for the District of Columbia in denying the claim based on governmental immunity.¹⁵⁸ Callie House’s arrest and imprisonment in 1917 is thought to be in response to her “audacity” to bring the *Johnson v. McAdoo* suit.¹⁵⁹ At the close of the 1910s, the reparations movement went dormant for decades.¹⁶⁰

7. House Resolution 40

Former Michigan Congressman John Conyers first introduced H.R. 40 in 1989, and he doggedly re-introduced the Bill in every session of Congress thereafter until he retired in 2017. HR 40 would establish “a commission to examine slavery and discrimination in the United States from 1619 to the present and recommend appropriate remedies.”¹⁶¹ After Conyers retired, his colleagues continue to introduce H.R. 40 each year.¹⁶² “Conyers contended that raising the topic was not meant to be divisive or controversial but rather that it was necessary.”¹⁶³ In Conyers’ words, “Slavery is a blemish on this nation’s history, and until it is addressed, our country’s story will remain marked.”¹⁶⁴

The House of Representatives held hearings on the Bill in 2007 and 2019.¹⁶⁵ On April 14, 2021, the House Judiciary Committee voted 25-17 to send H.R. 40 out of committee and to the floor of the House for mark-up and vote.¹⁶⁶ This was the first time H.R. 40 left committee and made it to the House floor.¹⁶⁷

Officially cited as the “Commission to Study and Develop Reparation Proposals for African Americans Act,” H.R. 40 recites as its purpose:

To address the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to study and consider a national apology and proposal for reparations for the institution of slavery, its subsequent de jure and de facto racial and economic discrimination against African-Americans, and the impact of these forces on living

¹⁵⁶ *Johnson*, 45 App. D.C. 440; Perry, *supra* note 128.

¹⁵⁷ Perry, *supra* note 128; *see also* Coleman, *supra* note 155.

¹⁵⁸ *See Johnson*, 244 U.S. at 649–50; Perry, *supra* note 128.

¹⁵⁹ Coleman, *supra* note 155.

¹⁶⁰ The authors could not find examples of advocates for Black reparations from the jailing of Callie House until the start of the civil rights movement. Audley “Queen Mother” Moore is thought to be the founder of the modern reparations movement, beginning in 1955. Ashley D. Farmer, *The Black Woman Who Launched the Modern Fight for Reparations*, THE WASHINGTON POST (Jun. 24, 2019), <https://www.washingtonpost.com/outlook/2019/06/24/black-woman-who-launched-modern-fight-reparations/>

¹⁶¹ “*House Judiciary to Hold Historic Markup of H.R. 40, Legislation to Study and Develop Slavery Reparations Proposals*”, Press Release from House Committee on the Judiciary, April 9, 2021, <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4499> [https://perma.cc/63M6-6NR4]; *see also* Coleman, *supra* note 155.

¹⁶² *See, e.g.*, Commission to Study and Develop Reparation Proposals for African Americans Act, H.R. 40, 117th Cong. (2021).

¹⁶³ Coleman, *supra* note 155.

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

¹⁶⁶ *See Historic Progress on US Slavery Reparations Bill*, HUMAN RIGHTS WATCH, <https://www.hrw.org/news/2021/04/15/historic-progress-us-slavery-reparations-bill> [https://perma.cc/HD5N-HML9].

¹⁶⁷ *Id.* H.R. 40 specifically asks that the empowered commission determine “how Federal laws and policies that continue to disproportionately and negatively affect African Americans as a group, and those that perpetuate the lingering effects, materially and psycho-social, can be eliminated.” H.R. 40.

African-Americans, to make recommendations to the Congress on appropriate remedies, and for other purposes.¹⁶⁸

H.R. 40 has often been characterized as a Bill that would only study reparations. However, the Bill has been altered to clearly indicate that the appointed Commission of thirteen individuals suggested by the Bill are to make concrete proposals for actual reparations.¹⁶⁹

III. HOW REAL PROPERTY, PROBATE & TAX LAWS CODIFIED WHITE SUPREMACY

As the purpose of H.R. 40 reveals, the issue of reparations now goes beyond slavery, to our country's "subsequent de jure and de facto racial and economic discrimination against African-Americans."¹⁷⁰ This Part explores the ways in which federal and state real property and tax laws have further discriminated against and harmed Black Americans. In addition, this Part will briefly address how probate laws have also had an indirect but decidedly negative effect on wealth transmission within the African-American community. Although many other laws, from labor laws to voting laws to the criminal justice system in general, have implemented discriminatory policies that have harmed Black Americans,¹⁷¹ we limit the scope of this Article to the laws that fall within the realm of the real property, trust, and estate practice areas.

A. Black Codes, Radical Reconstruction, and Jim Crow Laws

While Black Codes and Jim Crow laws were not real property laws, *per se*, they used labor laws and segregation to lock in an economic system in which Whites were landowners and Blacks were tenants, helping Whites to gain wealth through property, and suppressing Blacks from doing the same.¹⁷²

1. Black Codes

In May 1865, President Andrew Johnson laid out his plans for Reconstruction, which imposed three essential requirements on the Southern states: (1) uphold the abolition of slavery in compliance with the 13th Amendment to the Constitution, (2) "swear loyalty to the Union," and (3) "pay off their war debt."¹⁷³ In return, Southern state governments were given free rein to govern and rebuild themselves.¹⁷⁴

In part due to the freed people's widely held belief, supported by Congressional bills and campaign rhetoric, that they were imminently to receive allotments of forty acres, some refused to work for the White planters.¹⁷⁵ In response, in late 1865, Mississippi and South Carolina were the first Southern states to enact Black Codes that were designed to restrict the freed people's activities, ensure their availability for labor, and fix their compensation, thereby legalizing a new form of indentured servitude.¹⁷⁶ Freed people who

¹⁶⁸ H.R. 40.

¹⁶⁹ *See id.*

¹⁷⁰ *Id.*

¹⁷¹ See, e.g., Meilan Solly, *158 Resources to Understand Racism in America*, SMITHSONIAN MAGAZINE (June 4, 2020), <https://www.smithsonianmag.com/history/158-resources-understanding-systemic-racism-america-180975029/>

¹⁷² See *Housing Discrimination in the Jim Crow US and The Case for Reparations*, AAIHS, <https://www.aaihs.org/housing-discrimination-in-the-jim-crow-us/> [https://perma.cc/KD6U-SV55].

¹⁷³ *Andrew Johnson and Reconstruction*, NAT'L PARK SERV., <https://www.nps.gov/anj/andrew-johnson-and-reconstruction.htm> [https://perma.cc/E3BT-6VEW].

¹⁷⁴ *See id.*

¹⁷⁵ See Dan Bryan, "Forty Acres and A Mule"—*The Elusive Promise*, AM. HIST. USA, <https://www.americanhistoryusa.com/forty-acres-and-a-mule-elusive-promise/> [https://perma.cc/U4CU-EZGS].

¹⁷⁶ See *Black Codes*, HIST. (June 1, 2010), <https://history.com/topics/black-history/black-codes> [https://perma.cc/PXJ4-LMW9] (last updated Jan. 21, 2021).

refused to enter into labor contracts with the White landowners were subject to arrest under the Black Codes for violating vagrancy laws, which prohibited freed people from being “idle” or unemployed.¹⁷⁷

Mississippi’s law subjected to arrest any freedman who had not entered into an employment contract by January 2, 1866, and any person who broke or deserted an employment contract was also subject to arrest and surrender of their wages for the year.¹⁷⁸ Any orphaned minor was to be returned to his or her former master or mistress as their apprentice, allowing for their unpaid labor and corporal punishment until the age of majority was reached.¹⁷⁹

In South Carolina, a Black person could only work as a farmer or servant; anyone seeking a different job was required to pay an annual tax of \$10 to \$100.¹⁸⁰ This provision hit especially hard for the blacksmiths and other artisans living in Charleston who had specialized expertise and no experience in farming.¹⁸¹ By the end of 1866, nearly all the Southern states had enacted Black Codes that not only forced freed people into contract labor, but also forbade interracial marriage and imposed segregation of schools, hospitals, and other public institutions.¹⁸² Black Codes did grant freed people the right to own property and pass property to their heirs in the same manner as White people, but forbade them from serving as landlords.¹⁸³

It is worth noting that, while the 13th Amendment to the Constitution abolishes slavery, it expressly permits involuntary servitude “as a punishment for crime whereof the party shall have been duly convicted.”¹⁸⁴ This exception to the 13th Amendment incentivized Southern Whites to arrest and convict freed people under the Black Codes and, later, under Jim Crow laws, which are discussed below.

2. Radical Reconstruction

After growing concern in the North over Black Codes, the Reconstruction Act of 1867¹⁸⁵ was passed by Congress over President Johnson’s veto, placing the South under martial law. The Reconstruction Act required Southern states to (1) ratify the 14th Amendment, which broadened the definition of citizenship and granted “equal protection of the laws”¹⁸⁶ to people who had been enslaved, and (2) enact universal male suffrage before those states could rejoin the Union.¹⁸⁷

During this period of “Radical Reconstruction” from 1867 to 1877, federal troops were sent South “to oversee the establishment of state governments that were more democratic,” and the Black Codes were reformed.¹⁸⁸ The Republican Party controlled the governments of nearly every Southern state, overwhelming the votes of the native-born White Democrats with the infusion of Freedmen’s Bureau

¹⁷⁷ See Brent Tarter, *Vagrancy Act of 1866*, ENCYC. VA. (Apr. 2, 2021), <https://encycl.opediavirginia.org/entries/vagrancy-act-of-1866/> [https://perma.cc/D85T-C4GA].

¹⁷⁸ See (1866) *Mississippi Black Codes*, BLACKPAST (Dec. 15, 2010), §§ 1.6, 3.2, <https://www.blackpast.org/african-american-history/1866-mississippi-black-codes/> [https://perma.cc/PXL5-RW78].

¹⁷⁹ See *id.* § 2.1.

¹⁸⁰ See HIST., *supra* note 176.

¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ See BLACKPAST, *supra* note 178, § 1.1.

¹⁸⁴ U.S. CONST. amend. XIII, § 1.

¹⁸⁵ See Reconstruction Act of 1867, ch. 153, 14 Stat. 428–30 (1867).

¹⁸⁶ U.S. CONST. amend. XIV, § 1.

¹⁸⁷ See Reconstruction Act of 1867, *supra* note 185, §§ 5–6.

¹⁸⁸ Jeff Wallenfeldt, *Radical Reconstruction*, BRITANNICA (Jun. 23, 2020) (“Reconstruction-era legislatures introduced public funding for schooling and the goal of access to schooling for all, authorized the use of public funds for infrastructure development, established fairer systems of taxation, and promoted the general rebuilding of the devastated landscape in the south. Their mission, effectively, was to create a public sector in the southern states. Nevertheless, the story of Reconstruction has been reduced to a story of exceptional corruption and black ‘misrule’ by proponents of the ‘Lost Cause.’”), <https://www.britannica.com/topic/Radical-Reconstruction> [https://perma.cc/3DE8-UX8K].

agents, former Union soldiers, businessmen and teachers, so-called “scalawags” (native born White Republicans who had been loyal to the Union during the war), and freed people.¹⁸⁹ Black men won election to Southern state governments and sixteen were elected to the U.S. Congress.¹⁹⁰ “Throughout the South, more than 600 African Americans served in state legislatures, and hundreds more held local offices from sheriff to justice of the peace.”¹⁹¹

Reconstruction governments “establish[ed] the South’s first state-funded public school systems, . . . ma[de] taxation more equitable, and outlaw[ed] racial discrimination in public transportation and accommodations.”¹⁹² Economic programs provided funding for railroads and other development, but also produced corruption.¹⁹³

White Southerners’ violent opposition to Reconstruction led to the rise of white supremacist organizations, such as the Ku Klux Klan, which “targeted local Republican leaders for beatings or assassination.”¹⁹⁴ Violence and lynchings on the eve of elections was one way the white supremacist organizations suppressed the Black vote.¹⁹⁵

Under Republican President Ulysses S. Grant, the 15th Amendment was ratified in 1870, guaranteeing a citizen’s right to vote would not be denied because of race, color, or previous servitude.¹⁹⁶ The 15th Amendment was adopted in direct response to the rising violence in the South. Congress also enacted a series of Force Acts authorizing national action to suppress political violence.¹⁹⁷

3. *Jim Crow Laws*

Reconstruction drew to a close as the older Radical Republicans such as Thaddeus Stevens began to retire or die.¹⁹⁸ A disputed presidential election in 1876 was resolved by a compromise that elected Rutherford B. Hayes as President in exchange for the withdrawal of federal troops who had been protecting African Americans in the defeated Confederate states.¹⁹⁹ The last federal soldiers left the South in 1877. Southern Whites, alarmed at the progress of Blacks during Reconstruction, regained control of their states and the Jim Crow²⁰⁰ era began.

Rooted in the Black Codes, Jim Crow laws legalized racial segregation at the state and local levels.²⁰¹ The laws marginalized African Americans by creating segregated water fountains, restrooms, building entrances, and even entire towns.²⁰² They also restricted Black progress by denying African Americans the

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *See id.*

¹⁹⁴ *Id.*

¹⁹⁵ *See* Coates, *supra* note 32, (referring to Mississippi’s dark history of lynching Black people, Coates quotes Theodore Bilbo, a Mississippi senator and a proud Klansman: “‘You and I know what’s the best way to keep the n—from voting,’ he blustered, ‘You do it the night before the election.’”).

¹⁹⁶ *See* U.S. CONST. amend. XV, §§ 1–2.

¹⁹⁷ The Force Acts were: (1) Act of May 31, 1870, ch. 114, 16 Stat. 140 (enforcing voting rights of U.S. citizens); (2) Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (amending Act of May 31, 1870); and (3) Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (enforcing provisions of the Fourteenth Amendment).

¹⁹⁸ *See* *Radical Reconstruction*, BRITANNICA, <https://www.britannica.com/topic/Radical-Reconstruction>.

¹⁹⁹ *See* RICHARD ROTHSTEIN, *THE COLOR OF LAW* 39 (Liveright Publ’g 2017).

²⁰⁰ The term “Jim Crow” was a pejorative epithet for African Americans, based on a Black minstrel show character portrayed as a buffoon. *See, e.g.*, Dr. David Pilgrim, *Thomas Rice*, Ferris State University Jim Crow Museum (Sept. 2000, edited 2012), <https://www.ferris.edu/HTMLS/news/jimcrow/who/index.htm>.

²⁰¹ *See, e.g.*, *Jim Crow Laws*, HISTORY (Feb. 28, 2018, updated Jan. 11, 2022), <https://www.history.com/topics/early-20th-century-us/jim-crow-laws>.

²⁰² *Id.*

right to vote, seek certain jobs or attend the same schools as Whites.²⁰³ Violators of Jim Crow laws often faced arrest, fines, jail sentences, violence, and death.²⁰⁴ Jim Crow laws spawned the “Great Migration” of Black Americans fleeing to the North beginning in 1916.²⁰⁵

B. Sharecropping, Tenant Farming, and Convict Leasing

1. Sharecropping

Immediately after the Civil War, the Freedmen’s Bureau attempted to implement a contract labor system.²⁰⁶ The Bureau’s goal was to negotiate deals between White landowners and freed people, but the freed people were resentful of the system and often refused to participate (leading to the Black Codes, discussed above).²⁰⁷

Without land of their own, freed people had no choice but to work for White landowners.²⁰⁸ However, the destruction of the Civil War and loss of revenue from free slave labor left southern landowners without the cash needed to pay a labor force.²⁰⁹ Sharecropping developed as “a system that theoretically benefited both parties.”²¹⁰ Landowners could have access to the large labor force necessary to grow cash crops such as tobacco, cotton and rice, but they did not need to pay these laborers in cash.²¹¹ “The workers, in turn, were free to negotiate a place to work and had the possibility of clearing enough profit at the end of the year to buy farm equipment or even land” of their own.²¹²

Freed people saw sharecropping as preferable to labor contracts, as they could move their families out from direct supervision of White employers.²¹³ However, sharecroppers needed more than just land from their landlords. “[T]he landlords or nearby merchants would lease equipment to the renters, and offer seed, fertilizer, food, and other items on credit until the harvest season. At that time, the tenant and landlord or merchant would settle up, figuring out who owed whom and how much.”²¹⁴

The sharecropping system was rife with trickery and thievery. Instead of splitting profits with the farmers, landowners would undercount the bales of cotton delivered to them by the sharecroppers or change the price per pound on a whim.²¹⁵ Inevitably, the tenant would have little to no profit at the end of a season and was more likely to have found his debt to the landlord to have increased, forcing year after year of servitude to the landlord.²¹⁶

The southern states passed laws that solidified the White landowners’ advantage. For example, North Carolina formally established a crop lien system in March 1867, with the General Assembly’s passage of

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ See Isabel Wilkerson, *The Long-Lasting Legacy of the Great Migration*, SMITHSONIAN MAG. (Sept. 2016); see also ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS* 10 (2010) (“The Great Migration would not end until the 1970s, when the South began finally to change—the whites-only signs came down, the all-white schools opened up, and everyone could vote. By then nearly half of all black Americans—some forty-seven percent—would be living outside the South, compared to ten percent when the Migration began.”).

²⁰⁶ See James C. Giesen, *Sharecropping*, NEW GA. ENCYC. (Jan. 26, 2007), <https://www.georgiaencyclopedia.org/articles/history-archaeology/sharecropping> [https://UY55-GKC4].

²⁰⁷ *See id.*

²⁰⁸ *See id.*

²⁰⁹ *See id.*

²¹⁰ *Id.*

²¹¹ *See id.*

²¹² *Id.*

²¹³ Karin Lorene Zipf, *Sharecropping*, ENCYC. OF N.C. (Jan. 1, 2006), <https://www.ncpedia.org/sharecropping> [https://perma.cc/5TSG-5MXJ].

²¹⁴ *Sharecropping*, PBS, <https://www.pbs.org/tpt/slavery-by-another-name/themes/sharecropping/> [https://perma.cc/T9YG-CJ2B].

²¹⁵ See Coates, *supra* note 32.

²¹⁶ *See id.*

an “Act to Secure Advances for Agricultural Purposes.”²¹⁷ The law allowed landowners to seize crops from their tenants if the tenant attempted to sell the crops to anyone other than the landlord in an attempt to get a better price.²¹⁸ North Carolina laws reinforced White landowners’ dominance over Black farmers by “defin[ing] sharecropping as wage labor.”²¹⁹ This allowed the landlord to exert more managerial supervision over sharecroppers than they could over “tenants who merely rented land from planters and provided their own supplies.”²²⁰

2. *Tenant Farming*

Tenant farming is the other agricultural system that emerged in the South after the Civil War. Sharecroppers “aspired to be tenant farmers,” as the tenant farming system was slightly more favorable.²²¹ A tenant farmer typically had enough money to buy (or already owned) the implements he needed to cultivate crops, all he needed was access to land. “The farmer rented the land, paying the landlord in cash or crops At the end of the harvest, the landowner would typically be paid one-third the value of the crops or would receive one-third of the crop directly from the farmer.”²²² While some tenant farmers were successful, many more found themselves in debt to the landlord, again due to store credit being extended based on a crop’s expected yield: “If conditions were poor or market prices for a crop decreased, the farmer became indebted to the . . . landowner.”²²³ As with sharecroppers, a tenant’s debts to the landowner would keep him locked in servitude.

3. *Convict Leasing*

As noted above, the 13th Amendment expressly permits involuntary servitude as punishment for crime, and Southern Whites used Black Codes and Jim Crow laws to liberally arrest and convict African Americans. According to a manuscript titled “Convict Lease System” by Frederick Douglas, Southern states leased prisoners

in bulk . . . to railroads and other corporations, and to plantations. The state throws off the entire responsibility of caring for her convicts, and turns them over into the hands of the lessee, whose only interest in them is, to secure for himself, what profit he can for their labor.²²⁴

Convict laborers were forced to work in “inhumane, dangerous, and often deadly work conditions” with no pay.²²⁵ Author Douglas A. Blackmon calls convict leasing “slavery by another name” and has said in an interview that “at least 200,000 African Americans were subjected to the convict leasing system in Alabama.”²²⁶ He estimates that “over the 80-year period before the [convict leasing] system was formally

²¹⁷ Public Laws of the State of North Carolina, C345.1, N87 (1866 to 67 Session).

²¹⁸ *See id.* § 2.

²¹⁹ Zipf, *supra* note 213.

²²⁰ *Id.*

²²¹ *Tenant Farming*, GALE ENCYC. OF U.S. ECON. HIST. <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/tenant-farming> [https://perma.cc/558N-BV47].

²²² *Id.*

²²³ *Id.*; *see, e.g.*, Frederick A. Bode, *Tenant Farming*, NEW GA. ENCYC. (Sept. 25, 2020), <https://www.georgiaencyclopedia.org/articles/history-archaeology/tenant-farming> [https://perma.cc/8SBC-QVPT].

²²⁴ Frederick Douglas, “*Convict Lease System*,” Library of Congress, at 5 (1893) <https://www.loc.gov/resource/mfd.01008/?sp=5> [https://perma.cc/8VDB-5885].

²²⁵ *Convict Leasing*, EQUAL JUSTICE INITIATIVE (Nov. 1, 2013), <https://ej.org/news/history-racial-injustice-convict-leasing/> [https://perma.cc/9TDF-53XS].

²²⁶ Ashley Mott, *Fact Check: Southern States Used Convict Leasing to Force Black People into Unpaid Labor*, USA TODAY (Jul. 7, 2020), <https://www.usatoday.com/story/news/factcheck/2020/07/07/fact-check-convict-leasing-forced-black-people-into-unpaid-labor/5368307002/> [https://perma.cc/U7U9-NMVP].

ended in 1941, . . . tens of millions were either forced to live on a farm, in a lumber camp or forced into convict leasing by the justice system.”²²⁷

C. Racial and Exclusionary Zoning

In the late 1890s and early 1900s, Blacks outside of the South were enjoying a degree of freedom and integration. In his book, *The Color of Law*, Richard Rothstein cites Montana as an example: “By 1890, Black settlers were living in every Montana county.”²²⁸ In Helena in 1910, 420 residents were Black, making up 3.4 percent of the population.²²⁹ Black Americans during this time enjoyed middle class status from their work as laborers on the railroads and in Montana’s mines.²³⁰ “The city had black newspapers, black-owned businesses, and a black literary society.”²³¹ But in 1909, Helena banned marriages between Blacks and Whites, and nearby towns “adopted policies forbidding African Americans from residing or even from being within town borders after dark.”²³² Mob violence forced the African American community to flee.²³³ By 1970, only 45 Blacks remained in Helena.²³⁴ Throughout the country at the turn of the century, African Americans were systematically driven out of communities that had once been peacefully integrated through segregation ordinances and violence.

1. Early Racial Segregation Ordinances

While smaller towns relied on mob violence and ordinances like that of Helena, Montana to expel their Black population, cities with large numbers of Black residents turned to different tactics, such as zoning rules, to create separate living areas for Black and White families.²³⁵

In 1910, Baltimore adopted an ordinance that prohibited African Americans from buying homes on White majority blocks and vice versa.²³⁶ Cities like Atlanta, Birmingham, Charleston, Dallas, Louisville, New Orleans, Oklahoma City, and St. Louis followed suit.²³⁷

2. *Buchanan v. Warley*

In 1917, the Supreme Court overturned the racial zoning ordinance of Louisville, Kentucky with its holding in *Buchanan v. Warley*.²³⁸ In *Buchanan*, the seller of the property, who was White, sought to enforce a contract for the purchase of a home entered into by a Black man on an integrated block where there were already two Black and eight White households.²³⁹ The purchaser claimed that he could not complete the purchase because of Louisville’s 1914 ordinance, which prohibited Black persons from occupying houses in blocks where the greater number of houses are occupied by White persons.²⁴⁰ Because the practical effect of the ordinance was to prevent the sale of lots in such blocks to persons of color, the city ordinance was found to be an unconstitutional violation of the Fourteenth Amendment, which prevents state interference with property rights except by due process of law.²⁴¹ Rather than denouncing segregation,

²²⁷ *Id.*

²²⁸ ROTHSTEIN, *supra* note 199, at 41–42.

²²⁹ *See id.* at 42.

²³⁰ *See id.*

²³¹ *Id.*

²³² *Id.*

²³³ *See id.*

²³⁴ *See id.*

²³⁵ *See id.* at 44.

²³⁶ *See id.*

²³⁷ *See id.* at 45.

²³⁸ *See* 245 U.S. 60 (1917).

²³⁹ *See id.* at 70.

²⁴⁰ *See id.* at 69–70.

²⁴¹ *See id.* at 82.

the Court focused its arguments on the freedom of contract, arguing that individuals should be free to sell their property to whomever they wished.²⁴²

The *Buchanan* decision was largely ignored by city planners throughout the country. In Atlanta, Indianapolis, and New Orleans, racial zoning ordinances were adopted after *Buchanan* on the grounds that because these cities' policies differed slightly from the Louisville ordinance, their ordinances would withstand challenge.²⁴³ Atlanta designated entire separate neighborhoods for Black people and White people, and Indianapolis and New Orleans permitted Black residents to move into a White area only if a majority of the White residents gave their consent.²⁴⁴ The ordinances were justified as being needed to preserve the peace, welfare, and prosperity of both races.²⁴⁵ Georgia's Supreme court rejected the Atlanta City Planning Commission's race zoning in 1924,²⁴⁶ but the city continued to use its racial zoning map for decades to come. In 1927, the Supreme Court overturned the New Orleans law.²⁴⁷ Similar laws and reversals occurred in Richmond, Virginia, and Birmingham, Alabama.²⁴⁸

3. Exclusionary Zoning

Given that residential ordinances based on race were technically unconstitutional after the *Buchanan* decision, municipalities turned to economic or exclusionary zoning to segregate their White and Black residents without mentioning race in the statute. Zoning is believed to have originally developed in Los Angeles, California in 1908 with the purpose of separating residential uses from industrial uses.²⁴⁹ Zoning as a practice was upheld by the Supreme Court in *Euclid v. Ambler* as a reasonable use of police power.²⁵⁰ Structures were categorized as single-family residential, multifamily residential, commercial, or industrial, and then maps were laid out to direct where new structures of the various categories could be built.²⁵¹ St. Louis adopted such a zoning ordinance in 1919, two years after the *Buchanan* decision.²⁵²

Even though the St. Louis ordinance made no mention of race, race became the primary driver of variance requests and administration of the zoning plan.²⁵³ Richard Rothstein cites occasions where “the commission changed an area’s zoning from residential to industrial if [Black] families had begun to move into it.”²⁵⁴ The change in zoning allowed “polluting industry, . . . taverns, liquor stores, nightclubs, and houses of prostitution to open in [Black] neighborhoods” but prohibited such activities in the single-family residential White neighborhoods.²⁵⁵ Because there were so few places where people of color could live, “rooming houses sprang up [in industrial-zoned areas] to accommodate the overcrowded [Black] population.”²⁵⁶

²⁴² See *id.* at 81 (“The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.”).

²⁴³ See ROTHSTEIN, *supra* note 199, at 46.

²⁴⁴ See *id.* at 46–47.

²⁴⁵ See *Buchanan*, 245 U.S. at 81 (“It is urged that this proposed segregation will promote the public peace by preventing race conflicts.”); see also ROTHSTEIN, *supra* note 199, at 46 (citing the Atlanta City Planning Commission).

²⁴⁶ See generally *Bowen v. City of Atlanta*, 125 S.E. 199 (Ga. 1924).

²⁴⁷ See *Harmon v. Tyler*, 23 U.S. 668 (1927).

²⁴⁸ See ROTHSTEIN, *supra* note 199 at 47.

²⁴⁹ See Jeremy Rosenberg, *The Roots of Sprawl: Why We Don't Live Where We Work*, KCET (Mar. 19, 2012), <https://www.kcet.org/history-society/the-roots-of-sprawl-why-we-dont-live-where-we-work> [https://perma.cc/DEE3-HN6M].

²⁵⁰ See *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

²⁵¹ See generally, ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 100-107 (2000).

²⁵² See ROTHSTEIN, *supra* note 199, at 49.

²⁵³ See *id.*

²⁵⁴ *Id.* at 50.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

4. Federal Government Involvement

In 1921, Herbert Hoover as Secretary of Commerce “organized an Advisory Committee on Zoning to develop a manual explaining why every municipality should develop a zoning ordinance.”²⁵⁷ The Advisory Committee was populated by “outspoken segregationists whose speeches and writings demonstrated that race was one basis of their zoning advocacy.”²⁵⁸ One famous member, Frederick Law Olmsted Jr. (whose father was the renowned city park designer), told the National Conference on City Planning in 1918 that “in any housing developments which are to succeed, . . . racial divisions . . . have to be taken into account.”²⁵⁹ Another member of the Advisory Committee was Irving B. Hiatt, who in his role as President of the National Association of Real Estate Boards oversaw adoption of a code of ethics in 1924 that warned, “a realtor should never be instrumental in introducing into a neighborhood . . . members of any race or nationality . . . whose presence will clearly be detrimental to property values in that neighborhood.”²⁶⁰

The Advisory Committee on Zoning drafted and issued the Standard State Zoning Enabling Act of 1922.²⁶¹ This model law “grant[ed] states the power to regulate land use for the ‘health, safety, morals, or the general welfare of the community’” and was adopted by numerous states to enable zoning regulations in their jurisdiction.²⁶² As was the case in St. Louis, zoning laws modeled on the 1922 Act restricted industrial use in pre-existing White residential neighborhoods and allowed industrial and commercial uses in existing Black communities.²⁶³

During the Clinton administration, the Environmental Protection Agency issued a report confirming that a disproportionate number of toxic waste facilities were found in Black communities nationwide. President Clinton issued an executive order requiring that such disparate impact be avoided in future decisions, but that order has seen little enforcement.²⁶⁴

Thus, while zoning began as a tool to protect the property values of White homeowners by keeping away people of color, industrial, or environmentally unsafe businesses, it also led to overcrowding in urban areas and purposefully located undesirable and environmentally dangerous businesses in areas where people of color lived.

D. The New Deal and Redlining

While the New Deal was celebrated as a model for progressive government policies, its home ownership component rested on the foundation of segregationist zoning policies.²⁶⁵ When Franklin D.

²⁵⁷ *Id.* at 51.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 52.

²⁶¹ See U.S. Dep’t of Com., Standard State Zoning Enabling Act, under which municipalities may adopt zoning regulations., <https://www.govinfo.gov/content/pkg/GOV-PUB-C13-18b3b6e632119b6d94779f558b9d3873/pdf/GOVPUB-C13-18b3b6e632119b6d94779f558b9d3873.pdf> [https://perma.cc/Q2AP-NE8Q].

²⁶² Julia Mizutani, *In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana*, 31 GEO. ENVTL. L. REV. 363, 366 (2019) (citing a standard state zoning enabling act).

²⁶³ See NAT’L ACAD. OF PUB. ADMIN., ADDRESSING COMMUNITY CONCERNS: HOW ENVIRONMENTAL JUSTICE RELATES TO LAND USE PLANNING AND ZONING (2003), <https://www.epa.gov/sites/production/files/2015-02/documents/napa-land-use-zoning-63003.pdf> [https://perma.cc/2DK7-V4LT].

²⁶⁴ See Mizutani, *supra* note 262, at 380.

²⁶⁵ See Derrick Johnson, *Viewing Social Security Through the Civil Rights Lens*, NAACP: THE CRISIS (Aug. 14, 2020), <https://naacp.org/articles/viewing-social-security-through-civil-rights-lens> [https://perma.cc/E89W-5ZHE]. The employment component of the New Deal carried forward the Jim Crow-era belief system. See *id.* The New Deal’s Social Security retirement benefits and unemployment insurance provided a safety net for the White working-class. See *id.* Farmworkers and domestic employees, overwhelmingly people of color, were specifically excluded. See *id.* When President Roosevelt signed Social Security into law in 1935, 65 percent of African Americans nationally, and an even higher percentage in the South, were ineligible for its protections. See *id.* “The exemptions were finally repealed in the 1950s, but they had significantly worsened the economic gap between Blacks and Whites.” *Id.*

Roosevelt became President in 1933, “[h]omeownership remained prohibitively expensive for working-class and middle-class families: bank mortgages typically required 50 percent down, interest-only payments, and repayment in full after five to seven years.”²⁶⁶ As a result of the Depression, many families were unable to pay their mortgages and faced foreclosure.²⁶⁷ Additionally, most others could not afford to buy a home, and the construction industry stalled.²⁶⁸

The New Deal took a two-pronged approach, implementing one program for existing homeowners who could not afford their mortgages, and another to enable the middle class to become first-time home buyers.²⁶⁹

1. Home Owners’ Loan Corporation

As part of the New Deal’s rescue plan, the Home Owners’ Loan Corporation (“HOLC”) was created in 1933, and it pioneered “redlining” to mark Black neighborhoods.²⁷⁰ The HOLC purchased existing mortgages that were faced imminent foreclosure, and it then refinanced the mortgages, providing new mortgages with repayment schedules of up to fifteen years, which it later extended to twenty-five years.²⁷¹ In addition, so the borrower could build up equity in their home as the loan was repaid, HOLC amortized the new mortgages so that each month’s payment included some principal and some interest.²⁷²

As the issuer of these refinanced mortgages, the government sought ways to protect itself from the risk of default. HOLC devised a strategy to know which homes would likely retain their value.²⁷³ It hired local real estate agents, who were trained to believe that racial diversity would be detrimental to property values, as noted above, to create “color-coded maps of every metropolitan area in the nation, with the safest neighborhoods colored green and the riskiest colored red. A neighborhood earned a red color if African Americans lived in it, even if it was a solid middle-class neighborhood of single-family homes.”²⁷⁴ A home in a redlined neighborhood typically did not qualify for HOLC refinancing.²⁷⁵

HOLC, a public institution funded by federal tax dollars, “pioneered the practice of redlining” such that White families received government-backed loans, but Black families did not.²⁷⁶ As a result of this New Deal policy, “[m]illions of dollars flowed from [federal] tax coffers into segregated white neighborhoods.”²⁷⁷

The racist attitudes, language, and underpinnings of the HOLC Residential Security Maps gave federal support to racist real-estate practices that helped segregate America throughout the twentieth century. A study released in 2018 found that “74 percent [of the neighborhoods] that HOLC graded as high-risk or ‘Hazardous’ eight decades ago are low-to-moderate income today.”²⁷⁸ Another study, published in 2017,

²⁶⁶ ROTHSTEIN, *supra* note 199, at 63.

²⁶⁷ *See id.*

²⁶⁸ *See id.*

²⁶⁹ *See id.*

²⁷⁰ ROTHSTEIN, *supra* note 199, at 63.

²⁷¹ *See id.* at 63–64.

²⁷² *See id.*

²⁷³ *See id.* at 64.

²⁷⁴ *Id.*

²⁷⁵ *See id.*

²⁷⁶ Coates, *supra* note 32.

²⁷⁷ *Id.*

²⁷⁸ Bruce Mitchell, PhD, *HOLC “Redlining” Maps: The Persistent Structure of Segregation and Economic Inequality*, NCRC (Mar. 20, 2018), <https://ncrc.org/holc/> [https://perma.cc/Z5NZ-8AQF].

found that areas deemed high-risk by HOLC maps saw an increase in racial segregation over the next thirty to thirty-five years, as well as a long-run decline in home ownership, house values, and credit scores.²⁷⁹

2. Federal Housing Administration

The second prong of the New Deal's housing plan was enacted to allow more middle-class families to purchase single-family homes for the first time.²⁸⁰ Congress and President Roosevelt created the Federal Housing Administration in 1934.²⁸¹ The FHA insured bank mortgages that, like the HOLC refinancing loans, covered up to 80 percent of the appraised value, had terms of up to twenty years, and were fully amortized.²⁸²

Thomas J. Sugrue, a historian at the University of Pennsylvania, wrote, "Without federal intervention in the housing market, massive suburbanization would have been impossible."²⁸³ He further wrote, "In 1930, only about 30 percent of Americans owned their own homes; by 1960, more than 60 percent were home owners. Home ownership became an emblem of American citizenship."²⁸⁴ But, as Ta-Nehisi Coates notes, "that emblem was not to be awarded to Blacks."²⁸⁵

During this explosion in home ownership from the 1930s through the 1960s, Black Americans "were largely cut out of the legitimate home-mortgage market" by both legal and nefarious methods.²⁸⁶ The FHA adopted the same system of maps as the one used by the HOLC that rated neighborhoods based on the expected stability of property values. "On the maps, green areas, rated 'A,' indicated 'in-demand' neighborhoods" that were predominantly White.²⁸⁷ "Neighborhoods where Black people lived were rated 'D' [colored red on maps,] and were usually considered ineligible for FHA backing."²⁸⁸

Racially mixed neighborhoods and even White neighborhoods that bordered predominantly Black neighborhoods were deemed too risky for FHA backing.²⁸⁹ To guide its appraisers, the FHA issued an *Underwriting Manual* that defined a stable neighborhood eligible for a mortgage as one that "shall continue to be occupied by the same social and racial classes."²⁹⁰ Further, the FHA discouraged banks from making loans in urban neighborhoods, preferring newly built suburbs where boulevards or highways separated White families from Black families.²⁹¹

Redlining was not contained to FHA-backed loans; it spread to the entire mortgage industry, where racism was already prevalent.²⁹² Thus, redlining prevented Black people "from most legitimate means of obtaining a mortgage."²⁹³ Not being able to buy homes through the mortgage lending process, Black

²⁷⁹ See Daniel Aaronson et al., *The Effects of the 1930s HOLC "Redlining" Maps*, (FRB of Chi. Working Paper No. WP2017-12, 2020), at 2–4, <https://poseidon01.ssrn.com/delivery.php?ID=721006122086127027002112102100099025089057026076017028009115033036037108108013102045023014066024040087062032036074084067099096004126073099088079072082071009071065015115114091077079110011021071028065079069118120077066122000080112117&EXT=pdf&INDEX=TRUE> [https://perma.cc/85E8-FC32].

²⁸⁰ ROTHSTEIN, *supra* note 199, at 64.

²⁸¹ See Coates, *supra* note 32.

²⁸² See Aaronson et al., *supra* note 279, at 5, 52.

²⁸³ Coates, *supra* note 32.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ ROTHSTEIN, *supra* note 199, at 65.

²⁹⁰ FED. HOUS. ADMIN., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT para. 937 (1938).

²⁹¹ See *id.* at para. 908–31, 957.

²⁹² See Coates, *supra* note 32.

²⁹³ *Id.*

families bought “on contract,” which meant that they purchased a property from a prospecting middleman, who would hold legal title until all of the loan payments were made.²⁹⁴ The purchasing family was not able to build equity as one normally would with mortgage payments.²⁹⁵ If the purchasing family defaulted on the loan by not being able to make a payment or pay for a repair (not having access to a line of credit), they would be evicted.²⁹⁶ The prospector would keep the family’s down payment and all prior monthly payments, then turn around and enter into a similar contract with another family.²⁹⁷

The government could have required a nondiscrimination policy, but it chose not to do so until the 1964 Housing Act.²⁹⁸ Urban studies expert Charles Adams said in 1955, “Instead, the FHA adopted a racial policy that could well have been culled from the Nuremberg laws.”²⁹⁹

Following the passage of the Fair Housing Act in 1968,³⁰⁰ there was little decrease in housing segregation, and violence arose from Black efforts to seek housing in White neighborhoods.³⁰¹ Moreover, in just thirty years, the Black population in urban areas increased significantly, from 6.1 million in 1950 to 15.3 million in 1980.³⁰²

E. GI Bill and Restrictive Covenants

The celebrated GI Bill³⁰³ also failed Black Americans by accepting and strengthening the nation’s racist housing policies initiated by the New Deal. Title III of the Bill created a low-interest home loan program for returning veterans.³⁰⁴ The Veterans Administration (“VA”) adopted FHA housing policies, and VA appraisers relied on the FHA Underwriting Manual, which continued to include racially discriminatory language through its 1952 version.³⁰⁵ Black veterans seeking VA loans were at the mercy of their local, White-controlled VA offices and the same banks “that had, for years, refused to grant mortgages to [B]lacks.”³⁰⁶

By 1950, about half of all new mortgages nationwide were insured by either the FHA or the VA.³⁰⁷ Together, the agencies shaped discriminatory housing practices by “financing entire subdivisions, and in many cases entire suburbs, as racially exclusive White enclaves.”³⁰⁸ In thousands of locales, “mass-production builders created entire suburbs with the FHA- or VA-imposed condition that these suburbs be all White.”³⁰⁹ This popularized the use of restrictive covenants in suburban communities. Homes built in

²⁹⁴ See *id.*

²⁹⁵ See *id.*

²⁹⁶ See *id.*

²⁹⁷ See *id.*

²⁹⁸ See Housing Act of 1964, S. Res. 3049, 88th Cong., 78 Stat. 769 (1964).

²⁹⁹ Coates, *supra* note 32.

³⁰⁰ See Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601–19.

³⁰¹ See, e.g., Michelle Adams, *The Unfulfilled Promise of the Fair Housing Act*, THE NEW YORKER (April 11, 2018) (“... in 1968 residential segregation was stratospherically high. Whites were deeply committed to it. They used all legal and illegal means, including cross burnings, arson, and physical attacks, to keep blacks out of their neighborhoods.”)

³⁰² See *Fair Housing Act*, HIST. (Jan. 28, 2021), <https://www.history.com/topics/black-history/fair-housing-act> [https://perma.cc/9WY6-U442].

³⁰³ See S. Res. 767, 78th Cong. (1994) (enacted).

³⁰⁴ See Coates, *supra* note 32.

³⁰⁵ See ROTHSTEIN, *supra* note 199, at 70; see also Richard Rothstein, *The Intentional Segregation of America’s Cities*, AMERICAN EDUCATOR (Spring 2021) (“The 1952 Underwriting Manual continued to base property valuations, in part, on whether properties were located in neighborhoods where there was ‘compatibility among the neighborhood occupants.’”), <https://www.aft.org/ae/spring2021/rothstein>.

³⁰⁶ *Id.*

³⁰⁷ See ROTHSTEIN, *supra* note 199, at 70.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

new suburban neighborhoods that contained restrictive covenants against ownership by Blacks and other minorities automatically qualified for FHA-backed loans.³¹⁰

Restrictive covenants pre-dated the FHA. In the 1920s, communities used restrictive covenants to avoid the Supreme Court's 1917 racial zoning decision in *Buchanan*; for example, in Brookline, Massachusetts a provision in a restrictive covenant "forbade resale of property to 'any negro or native of Ireland'"³¹¹ Almost all restrictive covenants created exceptions for live-in household or childcare workers.³¹² A restrictive covenant in the deed to author Sarah Moore Johnson's home in a Maryland suburb just over the border from the District of Columbia stated (prior to being stricken by said author upon her acquisition of the property):

No part of the land hereby conveyed shall ever be used or occupied by, or sold, demised, transferred, conveyed unto, or in trust for, leased, or rented, or given, to negroes, or any person or persons of negro blood or extraction, or to any person of the Semitic Race, blood, or origin, which racial description shall be deemed to include Armenians, Jews, Hebrews, Persians and Syrians except that this paragraph shall not be held to exclude partial occupancy of the premises by domestic servants of the said [homeowners].³¹³

Restrictive covenants are enforceable as a contract among all homeowners in a neighborhood.³¹⁴ Therefore, if a Black family purchased a home in the neighborhood, a neighbor could sue.³¹⁵ Alternatively, many subdivision developers restricted the sale of homes within a neighborhood to Black families by requiring membership in a community association as a condition of purchase.³¹⁶ The community association's bylaws usually restricted membership to Whites.³¹⁷

All levels of government helped to promote and enforce restrictive covenants.³¹⁸ Courts throughout the nation evicted Black families from homes they had purchased by upholding the covenants.³¹⁹ Judges in Alabama, California, Colorado, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, New York, North Carolina, West Virginia, and Wisconsin "endorsed the view that restrictive covenants did not violate the Constitution because they were private agreements."³²⁰

Racially restrictive covenants were ruled unconstitutional in 1948 by the Supreme Court in *Shelley v. Kraemer*.³²¹ However, much like the *Buchanan* decision in 1917, the *Shelley* decision was largely ignored—this time not by state and local governments, but by federal agencies. Just two weeks after the Court's decision in *Shelley*, FHA Commissioner Franklin D. Richards pronounced that *Shelley* would "in no way affect the programs of this agency" [and] would make "no change in our basic concepts or

³¹⁰ See *id.* at 71.

³¹¹ *Id.* at 78.

³¹² See *id.* at 78–79.

³¹³ See, e.g., David Rotenstein, "The Ghosts of Covenants Past" (Feb. 21, 2018), <https://blog.historian4hire.net/2018/02/21/the-ghosts-of-covenants-past/> [<https://perma.cc/D8ST-BQNX>] (for a screen shot of the relevant paragraph in the author's deed).

³¹⁴ See ROTHSTEIN, *supra* note 199, at 79.

³¹⁵ See *id.*

³¹⁶ See *id.*

³¹⁷ See *id.*

³¹⁸ See *id.* at 81.

³¹⁹ See *id.*

³²⁰ *Id.* at 81–82.

³²¹ See 334 U.S. 1 (1948). In a majority opinion that was joined by the other five participating justices, Chief Justice Vinson struck down a restrictive covenant on a house in St. Louis, Missouri, holding that the Fourteenth Amendment's Equal Protection Clause prohibits racially restrictive housing covenants from being enforced. Vinson held that private parties could voluntarily abide by the terms of a racially restrictive covenant, but that judicial enforcement of the covenant qualified as a state action and was thus prohibited by the Equal Protection Clause. See *id.* at 13–23; see also ROTHSTEIN, *supra* note 199, at 91 ("Three of the nine justices excused themselves from participating because . . . there were racial restrictions covering the homes in which they lived.")

procedures.”³²² It was not until 1962, when President John F. Kennedy issued an executive order prohibiting the use of federal funds to support racial discrimination in housing,³²³ that the FHA ceased “financing subdivision developments whose builders openly refused to sell to [B]lack buyers.”³²⁴

F. State Intestacy Laws

The laws, policies, and practices described in the preceding Subsections of this Part all contributed to the racial wealth gap in America. The Federal Reserve’s 2019 Survey of Consumer Finances documented a staggering difference between the median family wealth level of White and Black families. Specifically, with a median family wealth level of \$188,200 for White families and \$24,100 for Black families—White Americans had almost 8 times the wealth of Black Americans.³²⁵

Sociologists Fabian Pfeffer and Alexandra Killewald have established that intergenerational downward mobility is much greater and upward mobility is much lower for Blacks than Whites.³²⁶ Federal data from 2019 shows that about one of every five Black families has a negative median net worth compared to less than one out of every ten White families.³²⁷ When Black families do accumulate wealth, state probate and intestacy laws often impede the ability of these families to preserve and pass on the wealth to their heirs.³²⁸

1. Hardship Created by Probate Process

Unless bond is waived by a decedent’s Will or by the consent of all interested parties in the estate, most states require that an individual serving as personal representative of an estate with a gross value over a certain nominal threshold secure bond.³²⁹ In fact, even if the personal representative is excused from giving bond, an interested person or creditor of the estate may still request that bond be provided in an amount deemed sufficient by the court to secure the payment of the estate’s debts and any state tax due.³³⁰ If the appointed personal representative does not meet certain credit requirements, he or she may be unable to secure bond.³³¹

This is particularly detrimental to the Black community because bonding companies usually perform a credit check as part of the bonding process.³³² Due to the legacy of discriminatory lending practices, such as redlining, and predatory lending practices that prey on the poor, such as payday loans, only about 20 percent of Black Americans (compared with 51 percent of White Americans) have a credit score of 700 or higher, which is considered a good, credit-worthy score.³³³ Meanwhile, 54 percent of Black Americans have

³²² ROTHSTEIN, *supra* note 199, at 86.

³²³ See Exec. Order 11,063, 3 C.F.R., 1958-1963 Comp., at 652.

³²⁴ ROTHSTEIN, *supra* note 199, at 88.

³²⁵ See Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FEDS NOTES, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Sept. 28, 2020), <https://doi.org/10.17016/2380-7172.2797> [<https://perma.cc/XE2F-3MUS>]; see also *infra* Part V.3 (discussing racial wealth gap).

³²⁶ See Fabian Pfeffer & Alexandra Killewald, *Intergenerational Wealth Mobility and Racial Inequality*, SOCIUS: SOCIOLOGICAL RESEARCH FOR A DYNAMIC WORLD 5, Mar. 2019, at 1–2, <https://journals.sagepub.com/doi/pdf/10.1177/2378023119831799> [<https://perma.cc/E25J-YBTD>].

³²⁷ See Shelley Stewart, III et al., *The Economic State of Black America: What Is and What Could Be*, MCKINSEY GLOBAL INST., Ex. 6 (Sept. 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/the-economic-state-of-black-america-what-is-and-what-could-be#> [<https://perma.cc/53N2-U2TC>].

³²⁸ See Jennifer Birchfield Goode, Esq., *Combating Racial Wealth Gap in Maryland through Changes to Probate and Intestacy Laws*, 27, no. 2 MSBA ESTATES & TRUSTS NEWSL. 16–20 (2021).

³²⁹ See, e.g., MD. CODE ANN., EST. & TRUSTS §§ 5-604, 6-102.

³³⁰ See, e.g., UNIF. PROB. CODE §§ 3-603 through 3-605.

³³¹ See, e.g., James Long, *Your Definitive Probate Bond Guide*, <https://regnumlegacy.com/definitive-probate-bond-guide/>

³³² See *id.*

³³³ See Jung Hyun Choi et al., *Explaining the Black-White Homeownership Gap: A Closer Look at Disparities Across Local Markets*, URB. INST. (Nov. 2019), <https://www.urban.org/research/publication/explaining-black-white-homeownership-gap-closer>

either a fair to poor credit score or do not even qualify for a credit score, compared to only 33 percent of White Americans.³³⁴ In other words, half of all Black Americans appointed to serve as personal representative of a family member's estate may be disqualified from serving due to the bond requirement.

If no individual appointed under the will is able to secure bond, the interested parties must consent to the appointment of another individual, which may delay the opening of the estate and cause intrafamily strife.

2. *Liquidity Problems During Estate Administration*

Lack of access to liquid funds during the estate administration period can compound financial difficulties. In addition to the time it takes to find a will, identify a personal representative, secure bond, and open an estate, a personal representative generally cannot distribute the decedent's assets without the risk of personal liability during the creditor claims period, which usually ends four months to a year after the decedent's death with respect to any unknown creditor.³³⁵

If the decedent was providing financial support for all or any portion of his or her family, this lack of access to funds can drain the family's wealth through late fees, forced sales of assets at less than fair market value, and repossession or foreclosure. While this may pose a hardship for a low-net-worth family of any background, families of color are more likely to be negatively impacted by such restricted access, as they are likely to have considerably less in liquid savings than the average White family.³³⁶

States that have enacted the Uniform Probate Code, and many that have not, attempt to deal with the access-to-liquidity problem by creating homestead and family allowance exceptions.³³⁷ These allowances permit up to a certain amount to be paid to a surviving spouse or minor children of a decedent. The homestead allowance ranges from \$5,000 to \$22,500, with only a few states including a cost-of-living adjustment to these thresholds.³³⁸ The family allowance attempts to match the support actually provided by the decedent to his or her spouse and minor children for up to a year from date of death.³³⁹ However, homestead and allowance exceptions may not provide enough financial support to see a family through the creditor period if the family lacks a monetary safety net.³⁴⁰ For families with nontraditional structures that lack a spouse or minor child, there is no allowance at all.³⁴¹

3. *Heirs' Property*

State intestacy laws may lead to the unnecessary division of real estate and subsequent loss of real estate wealth among families of color.³⁴² If a person dies without a will, the decedent's estate may be divided among the decedent's spouse and children, with more remote descendants inheriting the shares of any predeceased children.³⁴³ Additionally, in the absence of both a surviving spouse and children, the decedent's

[look-disparities-across-local-markets](https://perma.cc/BW6T-KLVB) [https://perma.cc/BW6T-KLVB]; Megan Leonhardt, *Black and Hispanic Americans Often Have Lower Credit Scores—Here's Why They're Hit Harder*, CNBC (Jan. 28, 2021), <https://www.cnbc.com/2021/01/28/black-and-hispanic-americans-often-have-lower-credit-scores.html> [https://perma.cc/HA6P-Q77D].

³³⁴ See *id.*

³³⁵ See, e.g., 20 PA. CONS. STAT. § 3383 (Pennsylvania has a one year creditor claims period); UNIF. PROB. CODE § 3-109 (UPC states have a four month creditor claims period).

³³⁶ The Federal Reserve found that the typical Black or Hispanic family had \$2,000 or less in liquid savings in 2019, while the typical White family had more than \$8,000 of liquid assets. See Bhutta et al., *supra* note 325, at 10.

³³⁷ See, e.g., UNIF. PROB. CODE §§ 2-402 and 2-404.

³³⁸ See, e.g., UNIF. PROB. CODE § 2-402 & cmt. (amended 2008).

³³⁹ See *id.* § 2-404.

³⁴⁰ See Goode, *supra* note 328.

³⁴¹ See *id.*

³⁴² See *id.*

³⁴³ See, e.g., UNIF. PROB. CODE §§ 2-102, 2-106 (setting forth laws of intestate succession adopted by nearly half the states).

property may be further divided among the decedent's parents, siblings, and siblings' descendants.³⁴⁴ This intestate succession can and does result in what is commonly referred to as "heirs' property," with multiple family members owning undivided interests in the property as tenants in common.³⁴⁵

If property passes by intestate succession upon successive deaths within a family, property ownership can become unstable due to the tangled web of owners. Commentators have noted that it is not uncommon for thirty or more individuals to own fractional shares in property as tenants in common because of intestate succession.³⁴⁶ The prefatory note to the Uniform Partition of Heirs' Property Act explains that tenancy in common ownership has many undesirable effects, the most relevant to this discussion being

the universal right of any cotenant to file a lawsuit petitioning a court to partition the property, even if that cotenant only recently acquired its interest in property that the other cotenants had owned within their family for a long time and even if that interest is very small (e.g., a five percent or even smaller interest).

In resolving a partition action, the two principal remedies that a court may order are partition in kind of the property into separate subparcels, . . . or partition by sale . . . Despite a preference for partition-in-kind, courts in a large number of states typically resolve partition actions by ordering partition by sale which usually results in forcing property owners off of their land without their consent.³⁴⁷

Partitions by sale can lead to homelessness and loss of ancestral homes at below-market sales prices. Partition by sale is usually done through court-ordered auctions, which yield below-market sales prices.³⁴⁸ These forced sales at auctions deprive the tenants in common from receiving a fair price for their property and also gives the buyers "unjustified windfall[s]."³⁴⁹

A common occurrence with heirs' property, particularly in gentrifying neighborhoods, is that an unscrupulous real estate speculator will purchase a very small interest in family-owned, tenancy-in-common property just so they can ask a court to order a partition by sale.³⁵⁰ In the subsequent auction of the property, the speculator often submits the winning bid, which may represent just a fraction of the property's market value.³⁵¹

Adding insult to injury, many states' laws require a co-tenant who has unsuccessfully resisted a partition to pay a portion of the attorney's fees and costs of the real estate speculator who bought the small fractional interest and petitioned the court for the partition by sale, thus "forcing them in effect to pay for the deprivation of their property rights and their resulting loss of wealth."³⁵² Moreover, the unsuccessful cotenant must pay their own attorney's fees that they incurred in their attempt to resist the sale of their property and maintain ownership of their property.³⁵³

The loss of heirs' property through partition impacts communities of color more frequently than White communities. As the Preamble to the Uniform Partition of Heirs Property Act provides:

[A]lthough African Americans acquired between sixteen and nineteen million acres of agricultural land between the end of the Civil War and 1920, African Americans retain

³⁴⁴ See, e.g., *id.* § 2-103.

³⁴⁵ UNIF. PARTITION OF HEIRS PROP. ACT prefatory note, p. 4 (UNIF. LAW COMM'N 2010).

³⁴⁶ Thomas W. Mitchell, *Historic Partition Law Reform: A Game Changer for Heirs' Property Owners*, 65, 69–70 (2019), <https://scholarship.law.tamu.edu/facscholar/1327> [https://perma.cc/9VXW-79FW].

³⁴⁷ UNIF. PARTITION OF HEIRS PROP. ACT prefatory note (UNIF. LAW COMM'N 2010).

³⁴⁸ See Thomas W. Mitchell, Stephen Malpezzi & Richard K. Green, *Forced Sale Risk: Class, Race, and the "Double Discount"*, 37 Fla. St. U.L. Rev. 589, 610-19 (2010).

³⁴⁹ UNIF. PARTITION OF HEIRS PROP. ACT prefatory note (UNIF. LAW COMM'N 2010)..

³⁵⁰ See *id.*

³⁵¹ See *id.*

³⁵² *Id.*

³⁵³ See *id.*

ownership of approximately just seven million acres of agricultural land today. Scholars and advocates who have analyzed patterns of landownership within the African American community agree that partition sales of heirs property have been one of the leading causes of involuntary land loss within the African-American community.³⁵⁴

This loss is in part due to the larger percentage of decedents of color who die intestate. For example, economists in a working paper issued by the National Bureau of Economic Research found that, of respondents with a college education and above, 72 percent of Whites had a will, as compared to only 32.3 percent of Blacks.³⁵⁵ Additionally, as mentioned above, families of color are less likely to have the necessary credit history or liquid assets to be able to purchase a problematic co-tenant's interest. This leaves families whose wealth is concentrated in a family home without recourse to preserve such wealth for their benefit.

4. *Fictive Kin Deprived of Inheritance*

The dispositive scheme of state intestate succession laws can be traced back to English common law. Thus, as a country, we began from a culturally narrow place in deciding how and to whom an intestate decedent's property should be distributed. While most states have made changes made to their intestacy laws over the years, those changes have focused almost exclusively on adjusting the share of property allocated to a surviving spouse, adding stepchildren as takers of last resort, and tinkering with the definition of a child in light of advances in reproductive technology.³⁵⁶

Social science research has shown that race may be correlated to different desired testamentary dispositions. For example, researchers who reviewed five-hundred wills probated in Florida noted that Black decedents were far more likely than White decedents to leave their property to their children rather than their surviving spouse.³⁵⁷

Families of color are also more likely to incorporate into a single family unit certain extended family members or "fictive kin" (i.e., unrelated individuals who are assigned a familial role) whose interests may not be addressed by intestacy laws.³⁵⁸ For example, researchers have documented the prevalence of informal adoption of children by relatives and neighbors within Black families, with the number of Black children living in extended-family households rising from 13 to 16 percent from 1970 to 1990 and 41 percent of those children being raised in the home of a relative without the presence of a biological or formally adoptive parent.³⁵⁹

If the intestate succession laws prioritize support of a decedent's family members in a manner that is out of step with the way in which the decedent has structured his or her family, the family members or

³⁵⁴ *Id.* at 4; see also Phyliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L.Q. 737 (2000); Chris Kelley, *Stemming the Loss of Black Owned Farmland Through Partition Action: A Partial Solution*, 1985 ARK. L. NOTES 35; Harold A. McDougall, *Black Landowners Beware: A Proposal for Statutory Reform*, 9 N.Y.U. REV. L. & SOC. CHANGE 127 (1979–1980); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 N. U. L. REV. 505 (2001); Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 58 (2007).

³⁵⁵ See April Simpson, *Racial Justice Push Creates Momentum to Protect Black-Owned Land*, PEW CHARITABLE TRUSTS STATELINE (Sept. 21, 2020), <https://www.pew-trusts.org/en/research-and-analysis/blogs/stateline/2020/09/21/racial-justice-push-creates-momentum-to-protect-black-owned-land> [https://perma.cc/E83J-WHF2].

³⁵⁶ See Goode, *supra* note 328, at 18.

³⁵⁷ See Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341, 367–68 (2017).

³⁵⁸ See, e.g., ANDREW BILLINGSLEY, *CLIMBING JACOB'S LADDER* (1992); ROBERT B. HILL, *THE STRENGTH OF AFRICAN-AMERICAN FAMILIES: TWENTY-FIVE YEARS LATER* 40 (1999); Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223, 228 (2008).

³⁵⁹ See HILL, *supra* note 358.

others who are financially reliant on a decedent may be left without financial support or in an otherwise unstable financial situation following the decedent's death.

For example, if a grandmother is informally raising her grandchild due to an absence, but not death, of the child's parent and this grandmother dies intestate, the grandmother's estate will be left to such grandchild's living parent under state intestate succession laws, despite the grandchild's financial dependency on the grandmother as established during her lifetime. This would likely result in financial hardship for the grandchild, which would then negatively impact the grandchild's ability to generate wealth in future years. As research indicates that this scenario is more likely to occur in a family of color than in a White family, this disconnect between a statutorily-defined family and actual family and the financial fallout that results therefrom is likely to have a disproportionate impact on the Black community.

G. "Anti-Tax" Movement Entrenches White Supremacy

On the heels of civil rights victories in the 1960s, America's tax policies began to shift from progressive to regressive, or "anti-tax," which some now recognize as the newest form of racism³⁶⁰ perpetuated by the United States. Anti-tax systems create and enforce economic segregation, solidifying and boosting White advantage, while further inhibiting the creation of Black wealth. As will be explained below, this economic segregation occurs at every level of government and with most types of tax systems.

1. Property Tax

In the 1970s, the country was swept by a wave of tax protests, often called the Tax Revolt.³⁶¹ States were pressured into placing limits on property taxes, the most widely publicized being California's Proposition 13,³⁶² a constitutional amendment approved by California voters in 1978 that protected landowners from any increase in property taxes that were greater than 2 percent year over year.³⁶³ Almost every state enacted a form of a homestead exemption to shield primary residences from aggressive property taxes.

Limits on property taxes for primary residences protect those who have the fortune to own a home. U.S. Census Bureau data for 2019 shows that 73.3 percent of White Americans own their own home, as compared with only 42.1 percent of Black Americans.³⁶⁴ "This 31.2 percentage point difference was the largest gap since the Census . . . began" collecting the data in 1994.³⁶⁵

For Black families who are homeowners, the implementation of the property tax system works against them. Economists Troup Howard of the University of California, Berkeley and Carlos Avenancio-León of Indiana University looked at more than a decade of tax assessment and sales data for 118 million homes around the country in their new working paper, and they found that "[s]tate by state, neighborhood by neighborhood, [B]lack families pay 13 percent more in property taxes each year than a White family would

³⁶⁰ Many people use the terms prejudice and racism interchangeably. In his book, *Portraits of White Racism*, David Wellman argues that limiting our understanding of racism to prejudice does not offer a sufficient explanation for the persistence of racism. He defines racism as a "system from which advantage is derived on the basis of race," which is what the federal and state tax systems have promoted. David Wellman, *PORTRAITS OF WHITE RACISM* 210 (Cambridge Univ. Press 2d ed. 1993). Another related definition of racism, commonly used by antiracist educators and consultants, is "prejudice plus power." Beverly Daniel Tatum, *WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?* 87–88 (Twentieth Anniversary ed. 2017) ("While I think this definition also captures the idea that racism is more than individual beliefs and attitudes, I prefer Wellman's definition because the idea of systematic advantage and disadvantage is critical to an understanding of how racism operates in American society.")

³⁶¹ See, e.g., Lee Sigelman, David Lowery, and Roland Smith, *The Tax Revolt: A Comparative State Analysis*, *THE WESTERN POLITICAL QUARTERLY* 36, no. 1 (1983): 30–51. <https://doi.org/10.2307/447843>.

³⁶² See CAL. CONST. art. XIII A §§ 1–7.

³⁶³ See, e.g., Glenn W. Fisher, *History of Property Taxes in the United States*, *ECON. HIST. ASS'N*, <https://eh.net/encyclopedia/history-of-property-taxes-in-the-united-states/> [<https://perma.cc/DX6R-FF66>].

³⁶⁴ See *Homeownership Rates Show That Black Americans Are Currently the Least Likely Group to Own Homes*, USA FACTS (July 20, 2020), <https://usafacts.org/articles/homeownership-rates-by-race/> [<https://perma.cc/4ZGP-ZQR6>].

³⁶⁵ *Id.*

in the same situation.”³⁶⁶ Property tax assessments in virtually every state increased in areas with greater numbers of Black and Hispanic residents.³⁶⁷

2. Income Tax

The Reagan-era tax cuts of the 1980s shifted the tax burden away from wealthy taxpayers. The highest top income tax rate in our country’s history was in 1944, when the top rate of 94 percent was imposed on taxable income over \$200,000 (which is the equivalent of about \$2.5 million in today’s dollars).³⁶⁸ From the 1950s through the 1970s, the top income tax rate never dipped below 70 percent.³⁶⁹ The Tax Reform Act of 1986 ended progressive taxation, implementing a top rate of 28 percent. Since then, the top rate has fluctuated in a narrow range of 28 percent to 39.6 percent (or 43.4 percent if the Obama administration’s net investment income tax is included).³⁷⁰

Since the Reagan-era tax cuts were implemented, the racial wealth gap has increased. Statistics maintained by the Federal Reserve show that “the racial wealth gap between Black and White families grew from about \$100,000 in 1992 to \$154,000 in 2016, in part because White families gained significantly more wealth (with the median increasing by \$54,000), while median wealth for Black families did not grow at all [in real terms] over that period.”³⁷¹

The Reagan-era promise of trickle-down economics did not come to fruition. A study by David Hope of the London School of Economics and Julian Limberg of King’s College London “examines 18 developed countries—from Australia to the United States—over a 50-year period from 1965 to 2015. The study compared countries that passed tax cuts in a specific year, such as the U.S. in 1982 when President Ronald Reagan slashed taxes on the wealthy, with those that [did not], and then examined their economic outcomes.”³⁷² The study found that while macroeconomic data such as per capita gross domestic product and unemployment rates were nearly identical after five years in countries that cut taxes on the rich and in those that did not, “the incomes of the rich grew much faster in countries where tax rates were lowered.”³⁷³

The researchers argue that the economic rationale for lowering the tax rates of the rich is weak. The period through history with highest economic growth and lowest unemployment was also the period with the highest taxes on the rich—the postwar period.³⁷⁴

³⁶⁶ Andrew Van Dam, *Black Families Pay Significantly Higher Property Taxes Than White Families, New Analysis Shows*, WASH. POST (July 2, 2020), <https://www.washpost.com/business/2020/07/02/black-property-tax/> [https://perma.cc/6LHT-LP6H].

³⁶⁷ *See id.*

³⁶⁸ *See* I.R.S., U.S. INDIVIDUAL INCOME TAX: PERSONAL EXEMPTIONS AND LOWEST AND HIGHEST BRACKET TAX RATES, AND TAX BASE FOR REGULAR TAX: 1913 TO 2018, tbl.23, <https://www.irs.gov/statistics/soi-tax-stats-historical-table-23>; [https://perma.cc/Q77M-97XZ]; *see also* *History of Federal Income Tax Rates*, BRADFORD TAX INST., <https://bradfordtaxinstitute.com/FreeResources/Federal-Income-Tax-Rates.aspx> [https://perma.cc/HN5S-ZSXA].

³⁶⁹ *See* I.R.S., *supra* note 368.

³⁷⁰ *See id.*

³⁷¹ Nick Noel et al., *The Economic Impact of Closing the Racial Wealth Gap*, MCKINSEY & COMPANY (Aug. 13, 2019), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap> [https://perma.cc/4VTF-9FAK]; *see* Brandon Fuller, *Understanding the Racial Wealth Gap*, FED. RESRV. BANK OF RICHMOND (2020), https://www.richmondfed.org/-/media/RichmondFedOrg/publications/research/econ_focus/2020/q4/at_the_richmond_fed.pdf [https://perma.cc/EF6H-V4NW]; *see also* *Survey of Consumer Finances 1989-2019*, BD. OF GOVERNORS OF THE FED. RESRV. SYS (Sept. 28, 2020), [https://www.federalreserve.gov/econres/scf/dataviz/scf/chart/#series:Retirement Accounts;demographic:racecl4;population:1,2,3,4;units:median;range:1989,2019](https://www.federalreserve.gov/econres/scf/dataviz/scf/chart/#series:Retirement%20Accounts;demographic:racecl4;population:1,2,3,4;units:median;range:1989,2019) [https://perma.cc/DF2T-Y57N].

³⁷² Aimee Picchi, *50 Years of Tax Cuts for the Rich Failed to Trickle Down, Economics Study Says*, CBS NEWS (Dec. 17, 2020), <https://www.cbsnews.com/news/tax-cuts-rich-50-years-no-trickle-down/> [https://perma.cc/CX95-XBN9].

³⁷³ *Id.*

³⁷⁴ *See id.*

3. *Tax Expenditures*

Substantial federal tax expenditures subsidize this wealth-building. Tax expenditures are carve-outs to taxes that would otherwise be owed, such as the itemized deductions or credits on an individual income tax return.³⁷⁵ Tax-expenditures reflect governmental policy supporting home equity, pensions, medical insurance, K–12 education, and college.³⁷⁶ Because these are largely itemized deductions, they offer the greatest advantage to high income earners who own their own home and who can elect to take itemized deductions instead of the standard deduction. This, in turn, benefits White taxpayers more than Black taxpayers. A recent American Bar Association article calling for an anti-racist restructuring of the U.S. tax systems notes, “The indirect nature of these tax expenditures obscures what is effectively government welfare for wealthy white taxpayers. The tax system today is the stealth equivalent of historical whites-only wealth-building.”³⁷⁷

4. *Capital Gains*

Our system of taxing wealth only at realization events, combined with the charitable income tax deduction and basis adjustment at death,³⁷⁸ further promotes, preserves, and protects White wealth advantage. Higher-income earners are more able to invest in appreciating assets such as stocks, bonds, and real estate.³⁷⁹ As these assets increase in value over time, there is no corresponding increase in the tax burden of their owners. The authors of the recent American Bar Association article point out that “[t]hese ‘unrealized capital gains’ make up a large portion of the wealth gap. In 2018, 69 percent of unrealized capital gains were held by the top 1 percent of income earners.”³⁸⁰

Thus, the top 1 percent can control when and whether to pay capital gains tax by timing sales to occur in lower income years, or by giving the asset to charity to both further decrease the tax bill and avoid a realization event altogether. Asset owners can also choose to avoid a realization event by retaining the assets until death, when I.R.C. Section 1014 permits an adjustment of basis to equal the date of death value.³⁸¹ Thus, at death, assets can be liquidated and passed on to heirs with a “stepped up” basis. Some argue that the basis adjustment at death prevents a double-taxation caused by the estate tax,³⁸² but, as we will see, most taxpayers will never pay an estate tax.

5. *Estate Tax*

The Estate Tax will be discussed in more detail in Part V of this Article, but there is perhaps no greater promoter of the racial wealth gap than the untaxed gifts and inheritances received by White families.³⁸³ Members of White families are three times more likely to receive an inheritance than members of Black families.³⁸⁴ And, increasingly, that inheritance is not subject to estate tax.

³⁷⁵ See, e.g., William McBride, *A Brief History of Tax Expenditures*, TAX FOUNDATION (Aug. 22, 2013), <https://taxfoundation.org/brief-history-tax-expenditures/>

³⁷⁶ See *id.*

³⁷⁷ Francine J. Lipman, Nicholas A. Mirsky & Palma Joy Strand, *#BlackTaxpayers-Matter: Anti-Racist Restructuring of U.S. Tax Systems*, AM. BAR ASS’N (Dec. 14, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/rbgs-impact-on-civil-rights/blacktaxpayersmatter/ [<https://perma.cc/QPT2-2MY4>].

³⁷⁸ See I.R.C. §§ 1001, 170(a) and 1014.

³⁷⁹ See *id.*

³⁸⁰ *Id.*

³⁸¹ See I.R.C. § 1014.

³⁸² See, e.g., Lawrence Zelenak, *Taxing Gains at Death*, 46 *Vanderbilt L. Rev.* 361 (1993) (discussion at footnotes 7 through 14 and accompanying text for various theories regarding the purpose of the basis adjustment at death).

³⁸³ See Jermaine Toney & Darrick Hamilton, *Economic Insecurity in the Family Tree and the Racial Wealth Gap* (May 27, 2021), <http://dx.doi.org/10.2139/ssrn.3397222> [<https://perma.cc/D9FN-S7DG>].

³⁸⁴ See Bhutta, *supra* note 325.

The Estate Tax was implemented in 1916, and from 1941 to 1976 the highest estate tax rate was 77 percent with exemptions of only \$40,000 to \$60,000.³⁸⁵ Since 1976, the exemptions have increased and the top tax rates have come down, dramatically so beginning with the George W. Bush administration's Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001.³⁸⁶ Prior to EGTRRA, the estate tax exemption was \$675,000 and the top estate tax rate was 55 percent.³⁸⁷ EGTRRA grew the exemption and lowered the estate tax rate over a 10-year period.³⁸⁸ However, EGTRRA included a sunset provision that set many of its provisions to expire in 2010, and in 2011, the estate tax rates would return to those set by pre-2001 law, with an individual exemption of \$1 million and a top estate tax rate of 55 percent.³⁸⁹ In December 2011, Congress forestalled the estate tax rate reset for 2011 and 2012 with the tax-cut compromise, which raised the exemption to \$5 million for individuals (\$10 million for married couples) and lowered the marginal estate tax rate to 35 percent.³⁹⁰

To avoid another sunset to pre-2001 levels in 2013, Congress again enacted last minute legislation to make a \$5 million exemption (adjusted for inflation) and a 40 percent estate tax rate permanent.³⁹¹

The Trump-era Tax Cuts and Jobs Act doubled the exemption beginning in 2018 so that the exemption is now \$12.06 million in 2022 and the estate tax rate is 40 percent.³⁹² This "bonus" exemption will expire after 2025, and the exemption amount will revert to its pre-2018 level (adjusted for inflation) in 2026 unless Congress acts to renew the legislation.³⁹³

6. State and Local Tax

State and local tax systems have also led to increased wealth disparity. In their important article on tax policy, Palma Joy Strand and Nicholas A. Mirkay write:

One of the primary reasons for such inequality is states' heavy reliance on sales and other consumption taxes, which often disproportionately affect low-income families because they spend a larger percentage of their income on consumables rather than on saving or investments. This inequality is exacerbated by the doubling of most states' sales tax rates since 1970, with little if any change on the top income tax rate. Further, as states and localities increasingly cut or avoid raising taxes (particularly, income taxes) but nonetheless search for additional revenue, many have increased their reliance on fees (e.g., admission to government-funded museums and state parks, costs for drivers' licenses and identification cards, and toll fees for roads and bridges), resulting in even greater regressivity than reported in recent studies.³⁹⁴

³⁸⁵ See, e.g., Darien B. Jacobson et al., *The Estate Tax: Ninety Years and Counting*, IRS, <https://www.irs.gov/pub/irs-soi/ninetyestate.pdf> [https://perma.cc/8V6T-TLS4].

³⁸⁶ See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001).

³⁸⁷ See Brian G. Raub, *Recent Changes in the Estate Tax Exemption Level and Filing Population*, IRS, <https://www.irs.gov/pub/irs-soi/05estate.pdf> [https://perma.cc/D292-RW AU].

³⁸⁸ See *id.*

³⁸⁹ See Gillian Brunet, *New Estate Tax Rules Should Expire After 2012*, CTR. ON BUDGET AND POL'Y PRIORITIES (May 26, 2011), <https://www.cbpp.org/research/new-estate-tax-rules-should-expire-after-2012> [https://perma.cc/Z6N7-FGQ7]; Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, §§ 302, 303(a)(2), 124 Stat. 3296, 3301 (2010) (also known as the 2010 Tax Relief Act).

³⁹⁰ See Brunet, *supra* note 389.

³⁹¹ See American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101(c), 126 Stat. 2313, 2318 (2013).

³⁹² See Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11061(a), 131 Stat. 2054, 2091 (2017) (an Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018).

³⁹³ See Julie Garber, *How the Federal Estate Tax Exemption Changed from 1997 to Today*, THE BALANCE, <https://www.thebalance.com/exemption-from-federal-estate-taxes-3505630> [https://perma.cc/6EV6-V7FF].

³⁹⁴ Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 NW. J. L. & SOC. POL'Y 265, 286 (2020).

Even through the tax policies of the federal government, states, and localities are not racist on their face, they have perpetuated racial disparities for decades.

IV. PRIOR EXAMPLES OF REPARATIONS

In his 2014 seminal article *The Case for Reparations*, Ta-Nehisi Coates notes that as to the need for national repair of past wrongs, “[We are not] the first to be summoned to such a challenge.”³⁹⁵ Coates is right—reparations are a part of the history of many nations, including our own. This Part of the Article is divided into two halves. In this first half, we delve into two examples of reparations paid by other nations in relation to the Holocaust and apartheid. In the second half, we explore two examples of reparations paid by the United States in connection to the seizure of Native American land and the internment of Japanese Americans.

While we are limiting our examination to four examples, many more—both international and domestic—exist, including (but not limited to) the ones listed below:

- *Emancipation of Russian Serfs*. Following the Emancipation Manifesto of 1861,³⁹⁶ by which Alexander II freed over twenty-three million people in a major agrarian reform, each Russian serf received “three acres of land and agricultural implements with which to begin his career of liberty and independence.”³⁹⁷
- *Rosewood Massacre*. On January 1, 1923, in collusion with law enforcement officials, White aggressors attacked the prosperous Black town of Rosewood, Florida, murdering eight Black residents, injuring dozens more, as well as looting and burning down the town.³⁹⁸ More than seventy years later, the Florida Legislature passed the Rosewood Compensation Act (the “Rosewood Act”) acknowledging the role of its officials in not preventing the massacre.³⁹⁹ The Rosewood Act granted each resident \$150,000 and provided reimbursements to each family between \$20,000 to \$100,000 for losses suffered.⁴⁰⁰ The Act also established a scholarship fund which annually provides grants of up to \$4,000 for college tuition and fees to the direct descendants of the Rosewood families and other minority students.⁴⁰¹
- *Tuskegee Syphilis Study*. Starting in 1932, the U.S. Public Health Service recruited 399 Black men from Alabama for a study entitled the Tuskegee Study of Untreated Syphilis in the Negro Male.⁴⁰² As part of this study, the men were told they had “bad blood” when in fact they had syphilis—a disease that can cause mental illness and lead to death.⁴⁰³ Even after penicillin became a widely available treatment for syphilis in the 1940s, the researchers continued the study for decades and

³⁹⁵ Coates, *supra* note 32, Part X.

³⁹⁶ See Marc Raeff, *The Sheep Unsafe*, 10 Green Bag, no. 3, 2007, at 393, 394 (reviewing STEPHEN F. WILLIAMS, LIBERAL REFORM IN AN ILLIBERAL REGIONS: THE CREATION OF PRIVATE PROPERTY IN RUSSIA 1906–1915 (Hoover Inst. Press 2006)).

³⁹⁷ DORITY, *supra* note 16, at 9. The Russian emancipation was not perfect. The landlords were paid generously for the lands (of their choosing) redistributed to the serfs, and the serfs were required to purchase the land through government-sponsored loans. Nevertheless, modern Russian historian Alexander Chubarov compares Russian and U.S. emancipation: “[T]he [Russian] emancipation was carried out on an infinitely larger scale [than the emancipation of slaves in the U.S.], and was achieved without civil war and without devastation or armed coercion.” ALEXANDER CHUBAROV, THE FRAGILE EMPIRE 75 (The Continuum Pub. Co. 1999); see, e.g., Michael Lynch, *The Emancipation of the Russian Serfs, 1861*, HIS. REV., no. 47, 2003.

³⁹⁸ See Kenneth B. Nunn, *Rosewood*, in WHEN SORRY ISN’T ENOUGH: THE CONTRO-VERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 435, 435 (Roy L. Brooks ed., 1999).

³⁹⁹ See H.B. 591, 13 Leg. 2d Sess. (Fla. 1994).

⁴⁰⁰ See *id.*

⁴⁰¹ See *id.*

⁴⁰² See Alison Mitchell, *Clinton Regrets ‘Clearly Racist’ U.S. Study*, N.Y. TIMES (May 17, 1997), <https://www.nytimes.com/1997/05/17/us/clinton-regrets-clearly-racist-us-study.html> [https://perma.cc/ZDM7-3NZE].

⁴⁰³ See *id.*

withheld treatment.⁴⁰⁴ “By the time the study was exposed and shut down in 1972, 128 of the [399] men involved had died from syphilis or related complications, and 40 of their wives and 19 of their children had become infected.”⁴⁰⁵ As part of a class action settlement,⁴⁰⁶ the U.S. government paid the victims and their heirs \$10 million.⁴⁰⁷ Subsequently, President William J. Clinton issued an official apology admitting that the government “did something that was wrong—deeply, profoundly, morally wrong. It was an outrage to our commitment to integrity and equality for all our citizens.”⁴⁰⁸ At the time of the apology, President Clinton also announced the government’s creation of post-graduate fellowships in bioethics, which emphasized recruiting minority students, along with a \$200,000 grant for the establishment of a Center for Bioethics in Research and Health Care at Tuskegee University in Alabama.⁴⁰⁹

As we keep in mind that the history of reparations is long and complex, we start our review by examining the reparations paid in connection to the Holocaust.

A. Holocaust Victims

During World War II, the Nazi regime—along with its allies and collaborators—systematically murdered six million Jews in a genocide known as the Holocaust.⁴¹⁰ Murders were carried out in gas vans and chambers as well as mass shootings; meanwhile, other victims were imprisoned and forced into slave labor in concentration camps.⁴¹¹ The end of World War II in 1945 marked the demise of the Nazi regime and the beginning of the reparations process for the Holocaust.⁴¹² As Ta-Nehisi Coates states in *The Case for Reparations*, “[r]eparations could not make up for the murder perpetrated by the Nazis. But they did launch Germany’s reckoning with itself, and perhaps provided a road map for how a great civilization might make itself worthy of the name.”⁴¹³

1. Initial Resistance to Reparations

A survey of West Germans at the time showed that the journey to reparations would be an uphill climb:

- 5 percent felt guilt about the Holocaust;

⁴⁰⁴ See April Dembosky, *It’s not Tuskegee. Current Medical Racism Fuels Black Americans’ Vaccine Hesitancy*, L.A. TIMES (Mar. 25, 2021), <https://www.latimes.com/science/story/2021-03-25/current-medical-racism-not-tuskegee-expls-vaccine-hesitancy-among-black-americans> [https://perma.cc/C6CK-D32C].

⁴⁰⁵ *Id.*

⁴⁰⁶ While a class action settlement may not fit within the traditional definition of reparations, this case settled for “unique reasons,” including the following ones noted by the presiding judge:

[T]he United States was rightfully and grievously embarrassed at being exposed for having sponsored, financed, and operated a project that for forty years callously experimented with and risked the very lives and health of a large number of unknowing black citizens. It is evident that at this particular time it was in the best interest of the United States Government to close the last chapter of this sordid book as expeditiously and honorably as possible.

Pollard v. United States, 69 F.R.D. 646, 648 (M.D. Ala. 1976).

⁴⁰⁷ See Mitchell, *supra* note 402.

⁴⁰⁸ *Id.*

⁴⁰⁹ See *id.*; see also Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 695 n.19 (2003).

⁴¹⁰ See Learn, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/learn> [https://perma.cc/VS9D-J494].

⁴¹¹ See U.S. Holocaust Mem’l Museum, *Killing Centers: An Overview*, HOLOCAUST ENCYC., <https://encyclopedia.ushmm.org/content/en/article/killing-centers-an-overview> (last edited May 14, 2021) [https://perma.cc/43TU-GCGD].

⁴¹² See Alan Taylor, *World War II: The Fall of Nazi Germany*, ATLANTIC MAG. (Oct. 9, 2011), <https://www.theatlantic.com/photo/2011/10/world-war-ii-the-fall-of-nazi-germany/100166/> [https://perma.cc/XVS7-VS7M].

⁴¹³ Coates, *supra* note 32.

- 29 percent believed their country owed Jews restitution; and
- The remaining 66 percent either thought that Jews bore at least some of the responsibility for what happened to them, or that only people who committed the atrocities should pay reparations.⁴¹⁴

2. *Conference on Jewish Material Claims against Germany*

Despite the resistance, the work on reparations persisted. In 1951, over twenty Jewish national and international organizations met in New York City.⁴¹⁵ This meeting resulted in the creation of a non-political and non-partisan body focused on the negotiation of reparations for Holocaust survivors.⁴¹⁶ As its upcoming negotiations would focus on material claims only, the body became known as the Conference on Jewish Material Claims Against Germany, or the Claims Conference.⁴¹⁷

After six months of negotiations, the Claims Conference, the State of Israel, and the German government reached an agreement.⁴¹⁸ The German government committed to making payments directly to the victims of the Holocaust as well as paying Israel three billion deutschemark annually over a 12-year period for the resettlement of Holocaust survivors.⁴¹⁹ Furthermore, the German government agreed to pay 450 million deutschemark over a twelve year period for the benefit of the Claims Conference.⁴²⁰ The Claims Conference used these funds to rebuild Jewish communities throughout Europe and to support Holocaust survivors through social service agencies.⁴²¹

3. *United States Involvement*

Though miles apart, the U.S. government played an active role in Holocaust reparations. The U.S. government put pressure on Swiss banks to settle a class action lawsuit for their questionable actions during the Holocaust.⁴²² During the Holocaust, Jews deposited funds in Swiss bank accounts to prevent their wealth being stolen by the Nazis.⁴²³ However, when the owners or their direct heirs tried to reclaim their funds after World War II, the banks denied the existence of their accounts and recategorized the funds as the banks' own profits.⁴²⁴ Ultimately, the banks offered \$1.25 billion as a settlement.⁴²⁵

Separately, the executives from over a dozen German corporations admitted to using slave labor during the Holocaust.⁴²⁶ The U.S. government pressured the corporations to pay several billion dollars in reparations to those victims and their families.⁴²⁷ These examples show that while the U.S. was not the party paying reparations, it was indeed a participant in the reparations process for the Holocaust.

⁴¹⁴ See TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, 271–72 (2005).

⁴¹⁵ See *History*, CONF. ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, <http://www.claimscon.org/about/history/> [https://perma.cc/2U8J-75UB].

⁴¹⁶ See *id.*

⁴¹⁷ See *id.*

⁴¹⁸ See *id.*

⁴¹⁹ See Menachem Z. Rosensaft & Joana D. Rosensaft, *The Early History of German Jewish Reparations*, 25 *FORDHAM INT'L L.J.* S1, S3 (2001).

⁴²⁰ See *id.*

⁴²¹ See CONF. ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, *supra* note 415.

⁴²² See Amy Waldman, *Holocaust Accord Ends Plan for Sanctions*, *N.Y. TIMES*, Aug. 14 1998, at A8.

⁴²³ See Stuart E. Eizenstat, *What Holocaust Restitution Taught Me About Slavery Reparations*, *POLITICO* (Oct. 27, 2019), <https://www.politico.com/magazine/story/2019/10/27/slavery-reparations-holocaust-restitution-negotiations-229881/> [https://perma.cc/E995 -HLCG].

⁴²⁴ See *id.*

⁴²⁵ See Waldman, *supra* note 422, at A8.

⁴²⁶ See *id.*

⁴²⁷ See *id.*

B. Post-Apartheid

1. *Apartheid Regime*

The second example of international reparations comes from South Africa. From 1948 through the early 1990s, South Africa had a system of institutionalized racism, known as Apartheid.⁴²⁸ During this period, the government passed a series of laws that expressly discriminated against the non-white population in South Africa.⁴²⁹ For example, in 1950, the Group Areas Act “created the legal framework for varying levels of government to establish particular neighbourhoods [sic] as ‘group areas,’ where only people of a particular race were able to reside” and own homes.⁴³⁰ The law applied retroactively, so once an area was declared a group area, all of the people who were not a part of the designated racial group were displaced and their houses demolished.⁴³¹ In addition to government-mandated segregation, the laws of the apartheid regime significantly limited non-White South African’s land ownership and also enabled business owners to refuse service to non-white South Africans.⁴³²

2. *Truth and Reconciliation Commission (TRC)*

As a democratic government formed in 1994, restitution for Apartheid’s victims became one of the government’s most urgent tasks.⁴³³ In 1995, the Promotion of National Unity and Reconciliation Act established the Truth and Reconciliation Commission (TRC)—designed to build a bridge between “the apartheid past and the democratic future.”⁴³⁴ The TRC took on the tasks of investigating human rights violations from 1960 to 1994 as well as enabling victims to share their stories, granting amnesty, and drafting recommendations for reparations.⁴³⁵ In order to accomplish its tasks, the TRC created three committees:

- *The Committee on Human Rights Violations.* In an effort to restore the dignity of the nation and its citizens, the Committee on Human Rights Violations (CHRV) created a space for the victims of Apartheid to talk about what they endured as well as Apartheid’s effects on them, their families, and their communities.⁴³⁶ With the help of community-based organizations, the CHRV collected statements from over 21,000 victims.⁴³⁷ The CHRV then invited approximately 2,000 victims to tell their stories in public hearings.⁴³⁸ The CHRV designed the hearings in a way that enabled the victims to freely tell their stories, so the hearings did not become court trials.⁴³⁹ In this spirit, the

⁴²⁸ See John Mukum Mbaku, *International Law and the Struggle Against Government Impunity in Africa*, 42 HASTING INT’L & COMP. L. REV. 73, 82 (Winter 2019).

⁴²⁹ See Benjamin Zinkel, *Apartheid and Jim Crow: Drawing Lessons from South Africa’s Truth and Reconciliation*, J. DISP. RESOL. 229, 233 (2019).

⁴³⁰ *The Group Areas Act of 1950*, SOUTH AFR. HIST. ONLINE, <https://www.sahistory.org.za/article/group-areas-act-1950> [https://perma.cc/KT44-XXV8].

⁴³¹ See *id.*

⁴³² See Zinkel, *supra* note 429, at 233–34.

⁴³³ See Penelope E. Andrews, *Reparations for Apartheid’s Victims: The Path to Reconciliation?*, 53 DEPAUL L. REV. 1155, 1162–163 (Spring 2004).

⁴³⁴ *Id.* at 1163; see also Desmond Tutu, *South Africa*, BRITANNICA, <https://www.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa> [https://perma.cc/T E6W-L6E9].

⁴³⁵ See BRITANNICA, *supra* note 434.

⁴³⁶ See Sam Garkawe, *The South African Truth and Reconciliation Commission: A Suitable Model to Enhance the Role and Rights of the Victims of Gross Violations of Human Rights?*, 27 MELBOURNE U. L.R. 334, 366 (Aug. 2003).

⁴³⁷ See *id.* at 367.

⁴³⁸ See *id.*

⁴³⁹ See *id.*

CHRV did not permit cross-examination at the hearings and did not have any technical legal rules, such as the hearsay rule of evidence.⁴⁴⁰

- *Committee on Amnesty*. While international law deemed Apartheid to be a crime against humanity, the TRC decided to view the crimes of Apartheid as “individual acts of gross violations of human rights.”⁴⁴¹ So rather than granting blanket amnesty, the Committee on Amnesty (CA) possessed the authority to grant amnesty to individual applicants.⁴⁴² The two main criteria for amnesty were that the applicant (1) fully disclosed his or her actions and (2) that the applicant’s act, omission, or offense were associated with a political objective.⁴⁴³ When the CA granted amnesty, victims were precluded from suing the applicant in civil court; however, if the CA declined amnesty, victims could pursue an action against the applicant in civil court.⁴⁴⁴ As Sam Garkawe mentions in his article about the TRC, “[f]or this reason, the amnesty process was often described as a ‘carrot’ (the allure of amnesty) and ‘stick’ (the threat of prosecutions) approach to inducing perpetrators to come forward.”⁴⁴⁵ Ultimately, the CA granted amnesty to 849 applicants, but refused amnesty to 5,392 applicants.⁴⁴⁶
- *The Committee on Reparation and Rehabilitation*. While the prior two committees primarily focused on the truth of what occurred during Apartheid, the Committee on Reparation and Rehabilitation (CRR) envisioned a post-Apartheid South Africa and set out steps to make its vision a reality. In determining its reparations policies, the CRR outlined five guiding principles: “redress, restitution, rehabilitation, restoration of dignity and reassurance of non-repetition.”⁴⁴⁷

While the CRR recommended making urgent—but interim—payments to victims who could demonstrate an immediate need, it also noted that reparations should extend beyond monetary payments to victims.⁴⁴⁸ Accordingly, the CRR also outlined a series of non-monetary reparations:

- (a) Legal and Administrative. “[I]ssuing of death [certificates], exhumations, reburials and ceremonies, provision of headstones and tombstones, declarations of death, expungement of criminal records and the expediting of outstanding legal matters.”⁴⁴⁹
- (b) Community. “[R]enaming streets and facilities, erecting memorials and monuments, and conducting culturally appropriate ceremonies to commemorate the victims of repression during the apartheid era.”⁴⁵⁰
- (c) National. “[R]enaming of public facilities, the erection of memorials and monuments, and possibly the institution of a day of remembrance.”⁴⁵¹

⁴⁴⁰ See *id.*

⁴⁴¹ Andrews, *supra* note 433, at 1166.

⁴⁴² See *id.*; see also Joe R. Feagin & Ella McFadden, *Documenting the Costs of Slavery, Segregation, and Contemporary Racism: Why Reparations Are in Order for African Americans*, 20 HARV. BLACK LETTER J. 49, 67 (Spring 2004).

⁴⁴³ See CONST. OF THE REPUBLIC OF S. AFR., 1996.

⁴⁴⁴ See Garkawe, *supra* note 436, at 354.

⁴⁴⁵ *Id.* The author states, “The ‘carrot and stick’ terminology was used by the then Minister of Justice, Dullah Omar, who was responsible for the establishment of the TRC.” *Id.* at n.190.

⁴⁴⁶ See Dep’t of Just. and Const. Dev. of the Republic of S. Afr. Amnesty Hearings & Decision, TRUTH & RECONCILIATION OFF. WEBSITE, <https://www.justice.gov.za/trc/> [https://perma.cc/45P2-3RMR].

⁴⁴⁷ Garkawe, *supra* note 436, at 374.

⁴⁴⁸ See *id.* at 375.

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* at 374.

- (d) Community Rehabilitation. Improving the “health and social services, skills training,” developing “specialized trauma counselling services, family-based therapy,” and helping with “education and housing provision.”⁴⁵²

Ultimately, the TRC recommended that “victims and survivors of human rights violations should receive reparation payments totaling \$430 million paid over several years.”⁴⁵³ The recommendation, however, was never fully implemented. In 2003, the government announced a one-time payment of approximately \$4,000 for each victim identified by the CHRV and community rehabilitation programs that would be a part of “broader development programs for all South Africans.”⁴⁵⁴

C. Native Americans

The previous examples show that reparations are not a novel concept. Moreover, reparations are not limited to international settings. Reparations appear throughout U.S. history. The following Subsections explore the reparations paid to two groups by the U.S. government—Native Americans and Japanese Americans, beginning in chronological order with reparations paid to Native Americans.⁴⁵⁵

1. Theft of Native American Land

The eighteenth and nineteenth centuries in the United States are stained with the genocide of Native Americans.⁴⁵⁶ This period of conquest and colonization included the forced relocation of Native Americans to reservations and, for the children, relocation to what was known as “Kill the Indian, Save the Man” boarding schools, the goal of which was to remove Native Americans from their culture and assimilate them into White society.⁴⁵⁷ One of the defining harms of this period was the theft of Native American land “under the cover of law.”⁴⁵⁸

Disproportionately high numbers of Native Americans enlisted in World War II, igniting a movement to compensate Native American for the theft of their lands.⁴⁵⁹ Out of this momentum came the first reparations program of the U.S. government.⁴⁶⁰

2. Indian Claims Commission

Historically, Native Americans experienced a disjointed system of justice for their claims against the U.S. government.⁴⁶¹ In 1946, Congress established the Indian Claims Commission Act (the “ICC Act”) in an effort to give tribes a designated path by which to address their future claims, including ones involving

⁴⁵² *Id.*

⁴⁵³ Feagin & McFadden, *supra* note 442, at 67.

⁴⁵⁴ Ereshnee Naidu-Silverman, *What South Africa Can Teach the U.S. About Reparations*, WASH. POST (June 25, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/06/25/what-south-africa-can-teach-us-about-reparations/> [https://perma.cc/3KBK-ENZQ].

⁴⁵⁵ *See id.*

⁴⁵⁶ *See generally* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, *passim* (1992); *see also* Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713, 718 (1986).

⁴⁵⁷ Daniel R. Wildcat, *Why Native Americans Don’t Want Reparations*, WASH. POST (June 10, 2014) <https://www.washingtonpost.com/posteverything/wp/2014/06/10/why-native-americans-dont-want-reparations/> [https://perma.cc/TVZ3-DSS4].

⁴⁵⁸ *Id.*

⁴⁵⁹ *See* Erin Blakemore, *The Thorny History of Reparations in the U.S.*, HIST. (Aug 28, 2019), <https://www.history.com/news/reparations-slavery-native-americans-japanese-internment> [https://perma.cc/8M8R-T6CQ].

⁴⁶⁰ *See id.*

⁴⁶¹ *See* Nell Jessup Newton, *Compensation, Reparations & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 468 (1994).

property.⁴⁶² Additionally, the ICC Act established the Indian Claims Commission (“ICC”) and tasked it with investigating and resolving any and all claims that arose before 1946.⁴⁶³ Under the ICC Act, reparations would be based on each tribe’s history as well as the proportionate responsibility of the U.S. government for the tribe’s losses.⁴⁶⁴

Pursuant to the ICC Act, the ICC was designed to hear all types of claims—from theft of land by treaties that were signed under duress to treaty violations.⁴⁶⁵ In practice, the ICC adopted the structure of a claims court.⁴⁶⁶ Under this structure, the ICC could only grant monetary damages and even those were limited.⁴⁶⁷ Additionally, its adversarial system pitted the U.S. Department of Justice against each tribe.⁴⁶⁸

Ultimately, the ICC awarded approximately \$1.3 billion to 176 tribes and bands, averaging “about \$1,000 per person of Native American ancestry.”⁴⁶⁹ Most of the funds were put in trust accounts for which the U.S. government serves as trustee.⁴⁷⁰

A formal apology came in 2009 within the 2010 defense appropriations bill.⁴⁷¹ The bill stated that the United States apologizes for the “many instances of violence, maltreatment, and neglect inflicted on Native Peoples by citizens of the United States.”⁴⁷²

D. Internment of Persons of Japanese Descent During World War II

1. *The Internment*

The second example of reparations paid by the United States also has ties to World War II. During this war, President Franklin D. Roosevelt issued an executive order authorizing the designation of “Military Areas” within the United States that permitted the forcible removal of any or all persons in these spaces.⁴⁷³ Under the authority of the executive order and operating under a fear that “Japanese-Americans on the West Coast might aid an invading Japanese army or commit acts of espionage and sabotage,” the West Coast was designated a Military Area and all persons of Japanese ancestry were to be excluded.⁴⁷⁴ This designation led to the displacement, including the forcible removal, of approximately 120,000 United States citizens and residents of Japanese descent and their subsequent detention in concentration camps.⁴⁷⁵

⁴⁶² See *id.*; see also Indian Claims Commission Act of 1946, Pub. L. No. 726, ch. 959, § 2(5), 60 Stat. 1049, 1050 (1946).

⁴⁶³ See *id.*

⁴⁶⁴ See Newton, *supra* note 461, at 469.

⁴⁶⁵ See Posner & Vermeule, *supra* note 409, at 694.

⁴⁶⁶ See Newton, *supra* note 461, at 469.

⁴⁶⁷ See *id.*

⁴⁶⁸ See *id.*; see generally Newton, *supra* note 456, at 779–84 (discussing, *inter alia*, refusal to compensate Apache Tribe for 27 years of wrongful imprisonment).

⁴⁶⁹ Blakemore, *supra* note 459.

⁴⁷⁰ See *id.*

⁴⁷¹ See John D. McKinnon, *U.S. Offers an Official Apology to Native Americans*, WALL ST. J. (Dec. 22, 2009), <https://www.wsj.com/articles/BL-WB-15589> [https://perma.cc/S754-4HK3].

⁴⁷² Blakemore, *supra* note 459.

⁴⁷³ See Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). Congress later authorized the enforcement of this order on March 21, 1942, through Public Law 77-503.

⁴⁷⁴ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 654 (Richard A. Epstein et al. eds., Aspen Publishers 2005); see also JOHN L. DEWITT, FINAL REPORT, JAPANESE EVACUATION FROM THE WEST COAST ch. 1–2 (1942).

⁴⁷⁵ See CHEMERINSKY, *supra* note 474, at 654; see also Natsu Taylor Saito, *Beyond Reparations: Accommodating Wrongs or Honoring Resistance?*, 1 HASTINGS RACE & POVERTY L.J. 27, 29 (Fall 2003).

2. *Commission on Wartime Relocation and Internment of Civilians*

Public discussion of the internment did not immediately commence upon the conclusion of the war.⁴⁷⁶ Rather, the discussion gained traction during the Civil Rights Movement as the third generation of Japanese Americans were coming of age.⁴⁷⁷

In 1980, Congress created the Commission on Wartime Relocation and Internment of Civilians, which hosted hearings throughout the country.⁴⁷⁸ As legal scholar Natsu Taylor Saito notes, “These events were really the heart of the struggle for reparations—an instance in which the government actually sought and recorded the truth, and people finally came forward to tell their stories, many of them for the first time ever.”⁴⁷⁹

3. *Civil Liberties Act of 1988*

Based on the Commission’s recommendations, Congress passed the Civil Liberties Act of 1988.⁴⁸⁰ As part of the Act, each internment survivor received a \$20,000 check accompanied by a letter of apology from President Clinton stating the following:

In passing the Civil Liberties Act of 1988, we acknowledged the wrongs of the past and offered redress to those who endured such grave injustice. In retrospect, we understand that the nation’s actions were rooted deeply in racial prejudice, wartime hysteria, and a lack of political leadership. We must learn from the past and dedicate ourselves as a nation to renewing the spirit of equality and our love of freedom. Together, we can guarantee a future with liberty and justice for all.⁴⁸¹

Additionally, the U.S. government created a public education fund to support “creative work in the fields of elementary and secondary education, legal analysis and education, the production of documentary films, art programs, and various kinds of memorials.”⁴⁸²

E. Analysis of Reparations Examples

All the examples we referenced in this Part provide unique elements for consideration in the development of any reparations program:

- traveling to local communities to create a space for the victims to be heard in a non-adversarial setting;
- forming a coalition to address reparations from diverse perspectives;
- issuing compensatory payments directly to the injured or their descendants;
- funding educational and community-based programs; and
- issuing a formal apology from the highest-ranking government leader.

But perhaps the most impactful element of these examples is simply their existence. Reparations are not a new concept; rather, they are sewn into the historical fabric of our nation and others around the world.

⁴⁷⁶ See Saito, *supra* note 475, at 30–31.

⁴⁷⁷ See *id.*

⁴⁷⁸ See *id.* at 31.

⁴⁷⁹ *Id.*; see also Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1303–07 (1993).

⁴⁸⁰ See Civil Liberties Act of 1988, Pub. L. No.100–383, 102 Stat. 904 (1988).

⁴⁸¹ Letter from Bill Clinton, President of the U.S., to recipients of reparation checks (Oct. 1, 1993) (on file with Cal. St. Univ.).

⁴⁸² Saito, *supra* note 475, at 32.

The next Part of this Article addresses how we might approach the funding and implementation of reparations for slavery in the U.S.

V. OPTIONS FOR REPARATIONS IN THE UNITED STATES

A. Federal Level - Estate Tax as a Funding Source

The physical, psychological, and financial pain inflicted upon African Americans by chattel slavery and the de facto and de jure racial discrimination that followed makes full reparations both imperative and impossible. Perhaps this is why many legal commentators are sympathetically gleeful in announcing their opposition.⁴⁸³ Reparations seem most implausible when the focus is on slavery alone,⁴⁸⁴ given the difficulty of quantifying the magnitude of the initial wrongs in order to determine an appropriate remedy for the biological descendants of Black slaves.

This Article attempts to change both the focus and framework of reparations dialogue. The *focus*, as revealed in Parts II and III of this Article, is instead on government-encouraged, endorsed, sponsored, codified, and enforced subjugation of Black Americans, with the economic damages of such actions revealing themselves in today's racial wealth gap.⁴⁸⁵ The *framework* for this discussion is the subject of this Part V—America's breach of its most fundamental ideal, *equality of opportunity*. Viewing Black reparations through the framework of equality of opportunity leads us to a unique source of funds to begin repairing the breach.⁴⁸⁶

America was racialized by the theory of Whiteness as superior. The basis for race-based denigration of Africans is referred to by sociologists and racial commentators as “white supremacy.”⁴⁸⁷ The malevolence of European degradation of Africans permitted chattel slavery to create a racial “caste system”⁴⁸⁸ that denied and continues to deny African-Americans the full opportunity to pursue life, liberty, and happiness. The 400 years of intentional deprivation of Blacks their due wages, property, life, liberty, and happiness, when transformed into money, or money's worth, creates a stolen inheritance. The logical remedy of a government-sponsored theft of Black wealth and inheritance is to use government taxation of inheritances to redistribute the wealth of those most benefiting from America's ongoing systemic racism to those most hurt by the intrinsic unfairness and injustice of racism.

⁴⁸³ See Richard A. Epstein, *Symposium: The Jurisprudence of Slavery Reparations: The Case Against Black Reparations* 84 B.U. L. REV. 1177 (Dec. 2004).

⁴⁸⁴ See, e.g., BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* 12 (First Beacon Press, 2d ed. 2003) (“But to concentrate on slavery is to understate the case for compensation, so much so that one might suspect that the distant past is serving to suppress the ugly facts of the recent past and of contemporary life. In actuality, slavery was followed not by a century of equality but by a mere decade of faltering progress, repeatedly checked by violence” Thus, as slavery receded into the background, it was succeeded by a caste system embodying white supremacy.).

⁴⁸⁵ See *supra* Parts II & III.

⁴⁸⁶ See *supra* Part V.

⁴⁸⁷ See, e.g., ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* 28 (2018) (“Most white people do not identify [themselves as] white supremacists and so take great umbrage to the term being used more broadly. For sociologists and those involved in current racial justice movements, however, white supremacy is a descriptive and useful term to capture the all-encompassing centrality and assumed superiority of people defined and perceived as white and the practices based on this assumption. White supremacy in this context does not refer to individual White people and their individual intentions or actions but to an overarching political, economic, and social system of domination.”).

⁴⁸⁸ ISABEL WILKERSON, *CASTE* 69 (2020) (“[T]he word racism may not stand as the only term or the most useful term to describe the phenomena and tensions we experience in our era. Rather than deploying racism as an either/or accusation against an individual, it may be more constructive to focus on derogatory actions that harm a less powerful group rather than on what is commonly seen as an easily deniable, impossible-to-measure attribute Caste, on the other hand, predates the notion of race and has survived the era of formal, state-sponsored racism that had long been openly practiced in the mainstream. The modern-day version of easily deniable racism may be able to cloak the invisible structure that created and maintains hierarchy and inequality. But caste does not allow us to ignore structure. Caste is structure. Caste is ranking. Caste is the boundaries that reinforce the fixed assignments based upon what people look like. Caste is a living, breathing entity. It is like a corporation that seeks to sustain itself at all costs.”); see also Higdon, *supra* note 358 (providing the definition of racism).

This concept of stolen inheritances is currently illustrated by the staggering realities of the racial wealth gap—the glaring disparities in the net worth of White and Black families.⁴⁸⁹ An interesting and alarming statistic is the fact that if the current rate of economic growth is maintained, it would take 200 years to eradicate the racial wealth gap.⁴⁹⁰ This is almost as long as the nearly 250 years of government-supported slavery. Discussions of American wealth disparity are now ubiquitous. The specific claim made in this Part is that the much-maligned federal estate, gift, and generation skipping taxes⁴⁹¹ (hereafter, collectively, the “Estate Tax”) are perfectly designed to correct the twenty-first century wealth disparity created by “swollen fortunes”.⁴⁹² an Estate Tax imposed on swollen fortunes should be used to refund stolen fortunes. The federal government’s use of the Estate Tax to decrease swollen fortunes is not a novel idea.

Suggesting that Estate Tax is the ideally designed to provide for Black reparations is no small matter. Eminent commentator and jurist Professor Eric Posner and his co-author wrote that the *design* for payment of reparations may be the most important component of any reparations discussion.⁴⁹³ The logic of Estate Tax as the funding source to solve one of America’s most “wicked problems”⁴⁹⁴ will be discussed in this Part, using five contentions:

1. America’s Jeffersonian claim that all human beings are created with an equal right to “life, liberty and the pursuit of happiness” assumed comparable economic starting positions for all citizens and immediately created tension about inherited wealth.
2. The federal Estate Tax is based on Jefferson’s eighteenth century egalitarianism and was intended to reallocate the swollen fortunes of would-be aristocrats to give every American an equal start in the race of life.
3. Justice dictates that revenue from the Estate Tax on swollen fortunes should initially be earmarked for Black people at the bottom of the wealth disparity continuum. In America, the best metric of the “forgotten 40 acres” is the racial wealth gap.
4. The current Estate Tax provisions create an ideal legislative vehicle to begin replacing the stolen inheritance with tax revenues and charitable contributions from swollen fortunes.

⁴⁸⁹ See William Darity, Jr. et al., *What We Get Wrong About Closing the Racial Wealth Gap*, THE SAMUEL DUBOIS CTR. ON SOC. EQUITY (Apr. 2018), at 2, 8–9, <https://insightcced.org/wp-content/uploads/2018/07/Where-We-Went-Wrong-COMPLE-TE-REPORT-July-2018.pdf> [https://perma.cc/BR8N-F9CC] (“The racial wealth gap is large and shows no signs of closing. Recent data from the Survey of Income and Program Participation (2014) shows that black households hold less than seven cents on the dollar compared to white households. The white household living near the poverty line typically has about \$18,000 in wealth, while black households in similar economic straits typically have a median wealth near zero. . . . At the other end of America’s economic spectrum, black households constitute less than 2 percent of those in the top one percent of the nation’s wealth distribution; white households constitute more than 96 percent of the wealthiest Americans.”).

⁴⁹⁰ See Angela Hanks et al., *Systematic Inequality: How America’s Structural Racism Helped Create the Black-White Wealth Gap*, CTR. FOR AM. PROGRESS 10 (2018), <https://community-wealth.org/content/systematic-inequality-how-americas-structural-racism-helped-create-black-white-wealth-gap> [https://perma.cc/C8YM-GCAG].

⁴⁹¹ See Pub. L. No. 99–514, 100 Stat. 2095 (1986).

⁴⁹² President Theodore Roosevelt coined the term “swollen inheritance.” See *infra* note 536.

⁴⁹³ See Posner & Vermeule, *supra* note 409, at 690 (“Within the normative debates, proponents of reparations often focus monomaniacally on the historical injustices inflicted upon victim groups, while minimizing the serious problems of policy design that reparations pose. Opponents of reparations, on the other hand, minimize the relevant injustices and portray reparations proposals as outlandish or even unprecedented, overlooking that federal and state governments have often paid reparations in one form or another. Most generally, commentators on all sides of the issue focus excessively on abstract questions about the justice of reparations while ignoring institutional and prudential questions about how reparations schemes should be designed. *As we shall see, answers to the design questions will themselves help to determine whether and when reparations should be paid in the first place.*”).

⁴⁹⁴ See discussion of “wicked problems,” *infra* Part V.A.10.

5. Charitable contributions have always complemented the wealth re-allocation goals of the Estate Tax, and just as charitable organizations partner with the government on social welfare endeavors, there should be a charitable, public-private partnership regarding reparations.

The following Subsections will explore each of these arguments and ideas in greater detail.

1. *Jeffersonian Ideals Apply to Reparations Argument*

The entitlement to reparations implies some breach of duty by the American people and their government.⁴⁹⁵ The underlying promise of America is almost universally understood to be the right to pursue the equity value of life, liberty, and happiness because of the universal assumption of the *equality* of opportunity. Interestingly, America's ideals of equity and equality clashed in two major ways with the individual self-interest of the men in power at the time the country began.

2. *Paradox of Individual Liberty and Slavery*

First, there was the problem of slavery and equality of personhood. How exactly do you declare freedom from servitude to Britain by asserting American equality while importing and then legalizing chattel slavery, the worst form of servitude? The answer was plain and simple—each contradiction was in colonists' political and economic self-interest.⁴⁹⁶

Politically, the paradox of individual liberty and slavery was known, but ignored, by America's early leaders because they desperately needed the assistance of European trading partners, especially France, and the French were the third-largest slave traders, behind Portugal and Britain.⁴⁹⁷ Before cotton, the colonists' single most valuable product was tobacco, which required an ever-growing pool of cheap labor.⁴⁹⁸ It was this economic imperative of cheap labor that drove the statutory creation of involuntary servitude in Virginia and other colonies.⁴⁹⁹

3. *Paradox of Disavowing Inherited Wealth While Owning Inherited Wealth*

The second paradox to be overcome by the founding fathers was the problem of how to handle inherited wealth and its built-in inequality of opportunity. Thomas Jefferson's view of society was formed "by the ideal of an agrarian society in which the economic functions were performed chiefly by independent small farmers."⁵⁰⁰ Moreover, one of republicanism's central tenants required "securing and then maintaining a nearly equal distribution of wealth among the voting citizenry."⁵⁰¹

⁴⁹⁵ The availability of judicially created slavery reparations has been a topic of great interest to legal scholars and was exhaustively reviewed by Boris I. Bittker. See BITTKER, *supra* note 484. Court cases have generally been unable to fashion a judicial remedy for slavery, White supremacy, and anti-Black racism. Most notably, the Seventh Circuit has held that plaintiffs suing in their capacity as descendants of former slaves lacked standing to assert claims concerning injuries to their ancestors. See *In re African American Slave Descendants Litig.*, 471 F.3d 754, 759–61 (7th Cir. 2006), *cert. denied* 552 U.S. 941 (2007). As Judge Posner wrote in that decision: "[T]here is a fatal disconnect between the victims and the plaintiffs. When a person is wronged he can seek redress, and if he wins, his descendants may benefit, but the wrong to the ancestor is not a wrong to the descendants." *Id.* at 759.

⁴⁹⁶ See IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEA IN AMERICA* 107 (2017).

⁴⁹⁷ See Joshua J. Mark, *Tobacco & Colonial American Economy*, *WORLD HIST. ENCYC.* (Feb. 12, 2021), <https://www.ancient.eu/article/1681/tobacco--colonial-american-economy/> [https://perma.cc/B5HC-MM2R].

⁴⁹⁸ *See id.*

⁴⁹⁹ *See id.*

⁵⁰⁰ JENS BECKERT, *INHERITED WEALTH* 73 (English ed., Princeton Univ. Press 2008) (2004); *see also* BOYD AND CATANZARITI EDS., *PAPERS OF JEFFERSON, Jefferson to Madison, October 28, 1785*.

⁵⁰¹ BECKERT, *supra* note 500.

And Thomas Jefferson was an ideal ambassador of this paradox. He combined a forceful argument for freedom from autocratic rulers with individual inherited wealth in both land and slaves.⁵⁰² The man best articulating America's resentment of British aristocracy was America's most powerful aristocrat.⁵⁰³

4. Estate Tax as an Egalitarian Wealth Reallocation System

The equal-starting-line narrative was an imperative for the ideal of American meritocracy. Yet inherited wealth runs directly counter to the idea that one can achieve success and power by skill and merit alone.⁵⁰⁴ America's initial revulsion to the wealth concentration of primogeniture and fee entails made it easy for populist politicians to promote "breaking up" concentrated wealth through taxation during periods of economic volatility, labor unrest, social inequality, and/or progressive activism. And, in the 30 years leading up to the enactment of the Estate Tax, America experienced all of these.

5. History and Purpose

The Estate Tax began as a revenue raising stamp tax, briefly morphed into a federal inheritance tax to fund wars, and then was rationalized as a wealth redistribution vehicle.⁵⁰⁵ As Professor Boris Bittker explained, the original proponents of the Estate Tax were clear about their legislative intention to use federal taxes to combat wealth concentration.⁵⁰⁶ Specifically, "[p]rogressives, including President Theodore Roosevelt, advocated both an inheritance tax and a graduated income tax as tools to address inequalities in wealth."⁵⁰⁷

The Estate Tax was not enacted until World War I in 1916,⁵⁰⁸ with a purpose not only of funding the war, but also to implement Roosevelt's progressive tax policy ideals and mitigate the negative effects of unearned inheritances. The increases in the Estate Tax exemptions discussed in Part III.G of this Article have left the Estate Tax only a shell of its former self. Only about 1,900 decedents' estates were subject to estate tax in each of 2018 through 2020,⁵⁰⁹ and the Estate Tax is the lowest source of revenue at the federal level, accounting for only 0.5 percent of the nation's tax revenue in 2019.⁵¹⁰

⁵⁰² See DARTY, *supra* note 16, at 76–77 (“In 1757, at the young age of fourteen, . . . Thomas Jefferson inherited [from his father] fifty slaves, 1,900 acres that comprised the Monticello estate, and his father’s vast library. From his mother, . . . he inherited a position of respect and noblesse oblige within the Virginia aristocracy In 1773, less than a year after Jefferson married the young widow Martha Wayles Skelton, her father died, bequeathing an estate to the couple that consisted of 135 slaves and 11,000 acres of land.”).

⁵⁰³ DARTY, *supra* note 16, at 76 (“The Declaration of Independence could have been a document affirming universal rights. To the extent that black people are construed as fully human, championing liberty and freedom for some—‘We hold these truths to be self-evident, that all men are created equal’—while condemning blacks to eternal servitude is highly problematic. Republicanism affirmed the ascendancy of the colonial aristocracy while maintaining a fine line of control over the masses of poor whites, providing opportunities for some of them to obtain land and own slaves while assuring even the most impoverished whites that they could exercise dominance over blacks.”).

⁵⁰⁴ See BECKERT, *supra* note 500, at 13.

⁵⁰⁵ See Jacobson, *supra* note 385.

⁵⁰⁶ See BORIS BITTKER & LAWRENCE STONE, FEDERAL INCOME, ESTATE AND GIFT TAXATION 983 (4th ed., Little Brown & Co. 1972).

⁵⁰⁷ BORIS I BITTKER ET AL., FEDERAL ESTATE AND GIFT TAXATION 4 (9th ed., Thompson/West 2005).

⁵⁰⁸ See *id.* at 120.

⁵⁰⁹ See *How Many People Pay the Estate Tax?*, TAX POL’Y CTR., <https://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax> [https://perma.cc/GL2R-5XAP]. In 2019, there were 2,854,838 American deaths. With only about 1,900 of these paying estate tax, the Estate Tax affects 0.06655% of the population. See *Preliminary US Death Statistics Show Over 3.4 Million Total Deaths in 2020 — 20% More Deaths Than in 2019*, USA FACTS (Dec. 15, 2020), <https://usafacts.org/articles/preliminary-us-death-statistics-more-deaths-in-2020-than-2019-coronavirus-age-flu/> (last updated May 5, 2021) [https://perma.cc/8MHG-TWCD].

⁵¹⁰ See *Updated Budget Projections: 2019-2029*, CONG. BUDGET OFF. (May 2, 2019), <https://www.cbo.gov/publication/55151> [https://perma.cc/2TYM-7PZ7].

6. *Criticism of Estate Tax*

Modern commentators starting from the 1950s all the way to 2019 have lamented that the current federal Estate Tax has lost mooring to any rational legislative purpose, and they argue that it should be abandoned as completely ineffective.⁵¹¹ They note that it does not raise meaningful revenue or redistribute concentrated wealth.⁵¹² One commentator described the tax as a “zombie tax”—a sort of dead concept that stalks around creating unjustified fear and not much else.⁵¹³

Wealth owners and their representatives argue that the Estate Tax is a failed revenue raiser and inhibits capital formation and economic growth.⁵¹⁴ These legacy wealth-owners focus on the early history of the estate, inheritance, and stamp taxes as revenue raisers for wars that have already been fought and funded.⁵¹⁵ Another of their arguments focuses on the “step-up in basis” rules to suggest that the Estate Tax may lose more than it collects.⁵¹⁶ The path of “swollen fortunes” politics is clear—disable, deny, or disassociate the Estate Tax from the goal of ameliorating wealth disparity and then urge repeal of the tax because it has no purpose and is detrimental to wealth creation processes of those seeking to swell-up their wealth.

Obviously, a tax designed to prevent large accumulations of capital by individuals within a capitalist economy will have some effect on U.S. capitalism. However, a tax on wealth after death, by definition, is not a tax that inhibits the economic activity of the deceased wealth owner because the deceased no longer own their wealth. The inability of the descendants of the decedent to lay claim to their ancestor’s post-mortem estate without the affirmative action of the law, the courts, and the government makes a governmental tax on inheritances the fairest of all taxes. As to any taxable estate, the federal government has the first claim to an unmarried decedent’s wealth.

7. *Estate Tax Embodies Egalitarianism*

There is a historical connection between Jefferson’s founding-fear of concentrated wealth and wealth disparity, and the recent social unrest caused, in part, by the widening racial wealth disparity. The Estate Tax was and is the logical means to address wealth disparity and especially racial wealth disparity caused by America’s breach of its founding promise to its citizens.

Jens Beckert, a German economic-sociologist makes a strong historical link from Jefferson’s promises to the 2020 Black Lives Matter protest:

This criticism of the dynastic concentration of wealth was not based on the idea of class warfare aimed at a socialist model of equality, but was a direct expression of the liberal meritocratic tradition from the founding period of the United States. . . . One of the principles which controlled the action of Jefferson . . . [was] to give all [citizens] as nearly as practicable an equal start in the race of life. . . . [B]eginning in the 1890s, there was increasingly a climate of public opinion in which the demand for the (progressive) taxation of inheritance was no longer perceived solely as socialist radicalism, but as a necessary measure of reform to enhance equality of opportunity, as a counterweight to the existing concentration of wealth, and as a contribution to tax equity—and thus as an expression of the realization of American values.⁵¹⁷

⁵¹¹ See, e.g., DANIEL MILLER, *THE ECONOMICS OF THE ESTATE TAX* 1, 35–38 (1998), <https://ssrn.com/abstract=644343> [<https://perma.cc/8KA9-6HXW>].

⁵¹² See, e.g., *id.* at 5.

⁵¹³ See Samuel D. Brunson, *Afterlife of the Death Tax*, 94 *INDIANA L. J.* 355, 356 (2019) (“In many ways, the current estate tax is a zombie, neither fully alive nor fully dead.”).

⁵¹⁴ See *id.* at 359.

⁵¹⁵ See *id.* at 357.

⁵¹⁶ See *id.* at 371.

⁵¹⁷ BECKERT, *supra* note 500, at 177–78.

Louis Eisenstein is regarded as having “produced some of the most erudite tax law scholarship from the mid 1940s to the mid 1960s.”⁵¹⁸ His article, *The Rise and Decline of The Federal Estate Tax*, is frequently cited for its definitive research and knowledge-based conclusions.⁵¹⁹ Eisenstein carefully describes the well-worn path of Estate Tax opponents that the Estate Tax was designed to raise revenue.⁵²⁰ Contrary to the conclusion of at least two Estate Tax experts quoting him,⁵²¹ Eisenstein does not use the revenue-raising legislative history of the Estate Tax to encourage abolishment of the tax.⁵²² Quite the contrary,⁵²³ Eisenstein’s final conclusion lines up perfectly with Beckert’s conclusion:

Many years ago John Stuart Mill made a proposal which we would do well to borrow and revise. The estate tax should fix a limit on “what anyone may acquire by the mere favour (sic) of others without any exercise of his faculties.” If “he desires any further accession of fortune, he shall work for it.” Or in Theodore Roosevelt’s exuberant language, he should “show the stuff that is in him when compared with his fellows.” When inheritance does much more, it gravely and inexcusably augments inequality of opportunity. It then becomes hereditary economic power, which is no more tenable than hereditary political power.⁵²⁴

If we genuinely believe in a substantial equality of opportunity, then we should cheerfully desire an Estate tax [that] truly levels [the playing field]. We cannot have one unless we also have the other.

Professor Berle has recently reminded us of Jefferson’s “picture of the ideal United States.” It was “a country in which none was very rich; none very poor; all were producers, all owners and consumers.” Within its limitations the estate tax has much to contribute toward the consummation of Jefferson’s vision.⁵²⁵

Thomas Jefferson originally articulated America’s promise of equal opportunity against the tyranny of England’s landed aristocracy. However, virtually all commentators on the history of Estate Tax point to Andrew Carnegie and the sweeping conclusions of his “Gospel of Wealth” as the boldest and most influential articulation of the redistribution imperative. The harshness of Carnegie’s commentary on swollen fortune must be quoted to be believed:

Men who continue hoarding great sums all their lives, the proper use of which for public ends would work good to the community, should be made to feel that the community, in the form of the state, cannot thus be deprived of its proper share. *By taxing estates heavily at death the state marks its condemnation of the selfish millionaire’s unworthy life.*⁵²⁶

Carnegie’s comments could be easily dismissed as the guilty musings of a gilded era robber-baron, but they were picked up by President Theodore Roosevelt as he advocated for an estate tax.⁵²⁷ In a speech in 1906, Roosevelt declared:

⁵¹⁸ Terrance O’Reilly, *Tax Legal Scholarship to 1970*, 34 VA. TAX REV. 269, 306 (2014).

⁵¹⁹ See, e.g., Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 N.Y.U. TAX L. REV. 223 (1956) (417 citations to this Article on LexisNexis).

⁵²⁰ See *id.* at 225.

⁵²¹ See Carlyn McCaffrey & John C. McCaffrey, *Our Wealth Transfer Tax System - a View from the 100th Year*, 41 ACTEC L. J. 1, 39 (2015–2016).

⁵²² See Eisenstein, *supra* note 519.

⁵²³ See *id.*

⁵²⁴ *Id.* at 258–59.

⁵²⁵ *Id.* at 259.

⁵²⁶ ANDREW CARNEGIE, THE GOSPEL OF WEALTH 8–9 (2017) (1889), <https://www.carnegie.org/publications/the-gospel-of-wealth> [<https://perma.cc/6XYF-5ZYM>] (emphasis added).

⁵²⁷ See BITTKER & STONE, *supra* note 506, at 983 (quoting the 1906 speech of Theodore Roosevelt to Congress advocating for a progressive inheritance tax).

It is important to this people to grapple with the problems connected with the amassing of enormous fortunes, . . . As a matter of personal conviction, . . . I feel that we shall ultimately have to consider the adoption of some such scheme as that of a progressive tax on all fortunes . . . —a tax so framed as to put it out of the power of the owner of one of these enormous fortunes to hand on more than a certain amount to any one individual; the tax, of course, to be imposed by the National and not the State government. Such taxation should, of course, be aimed merely at the inheritance or transmission in their entirety of *those fortunes swollen beyond all healthy limits*.⁵²⁸

President Roosevelt’s prediction got it exactly right. The prime object of the tax on transferred wealth should be to put a constantly increasing burden on swollen fortunes. At the time of Roosevelt’s words in 1906, those swollen fortunes could have been easily and clearly traced back to the profits of slave labor and the stolen promise of land to the freed slaves.

8. *Earmarking Estate Tax for Reparations*

Following the history of Carnegie and Roosevelt, William Gates, Sr. (an attorney and father of Microsoft Corporation’s co-founder, Bill Gates, Jr.) and Chuck Collins powerfully supported the redistribution of swollen fortunes using estate tax in their book, *Wealth and Our Commonwealth: Why America Should Tax Accumulated Fortunes*, by highlighting the importance of “earmarking” estate tax revenues for a positive public purpose:

For many ordinary Americans, the estate tax is a remote issue in their lives. The vast majority will never pay it, nor do they perceive any particular benefit from it. Its revenue flows into the treasury, paying for general government services, the benefits of which are often difficult to see during the course of daily life. . . . It is our view that public support for the estate tax would greatly increase if people saw a direct connection between the tax and their quality of life. There is something poetic about allocating estate tax revenues to particular initiatives that strengthen equality of opportunity in America.⁵²⁹

As will be shown in the following subsections, Black reparations is the best earmark for estate taxes because it will strengthen equal opportunity for the group treated most unequally in America.

9. *Measuring Damages through the Racial Wealth Gap Lens*

By far, the largest wealth disparity in the history of the United States is between Black citizens of African ancestry and White citizens of European ancestry.⁵³⁰ The statistics on the wealth disparity between Blacks, Latinx, and Whites is made shockingly clear by the Federal Reserve’s annual study of consumer finances.⁵³¹ Over the past three decades, a polarizing racial wealth divide has grown between White

⁵²⁸ Theodore Roosevelt, President of the U.S., *The Man with the Muck Rake* (Apr. 14, 1906) (transcript available at <https://voicesofdemocracy.umd.edu/theodore-roosevelt-the-man-with-the-muck-rake-speech-text/> [https://perma.cc/CCE7-P2PC]) (emphasis added).

⁵²⁹ BILL GATES, SR. & CHUCK COLLINS, *WEALTH AND OUR COMMONWEALTH: WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES*, epilogue (2002).

⁵³⁰ See Bhutta et al., *supra* note 325; Fabian T. Pfeffer & Alexandra Killewald, *Intergenerational Wealth Mobility and Racial Inequality*, AM. SOCIO. SOC’Y, <https://www.asanet.org/intergenerational-wealth-mobility-and-racial-inequality> [https://perma.cc/YDR6-VXJF] (animating the intergenerational aspects of the racial wealth gap); see also Raj Chetty et al., *Race and Economic Opportunity in The United States; An Intergenerational Perspective*, NAT’L BUREAU OF ECON. RSCH. (March 2018), <https://academic.oup.com/qje/article/135/2/711/5687353> (last updated December 2019) [https://perma.cc/SN9Q-9V49].

⁵³¹ See *Survey of Consumer Finances*, FED. RSRV. (Sept. 28, 2020), http://www.federal_reserve.gov/econres/scfindex.htm [https://perma.cc/TS8H-M8VX].

households and households of color.⁵³² Since the Reagan-era tax cuts were implemented in the 1980s, median net worth among Black families has been stuck in a range from \$8,000 to \$24,000.⁵³³ Meanwhile, White household median net worth grew from \$124,600 in 1992 to \$189,100 in 2019, adjusting for inflation.⁵³⁴

A 2019 study on the racial wealth divide prepared for the Institute for Policy Studies revealed the following:

- “Between 1983 and 2016, the median Black family saw their wealth drop by more than half after adjusting for inflation, compared to a 33 percent increase for the median White household. Over that same period, the number of households with \$10 million or more skyrocketed by 856 percent.”
- “If the trajectory of the past three decades continues,” the racial wealth gap will continue to widen: “[t]he median Black family is on track to reach zero wealth by 2082.”
- “The proportion of all U.S. households with zero or ‘negative’ wealth, meaning their debts exceed the value of their assets, has grown from one in six in 1983 to one in five households today. Families of color are much likelier to be in this precarious financial situation. Twenty-seven percent of Black families . . . have zero or negative wealth, compared to just 8 percent of White families.”⁵³⁵

The Black/White wealth disparity operates at every level of Black/White wealth using accumulated net worth as the definition of wealth. The richest Whites are about eight to ten times richer than the richest Blacks. The poorest decile of Whites are eight to ten times richer than the poorest decile of Blacks. Black people with similarly situated jobs and income to Whites are significantly less likely than their White counterparts to be able to boost the next generation to a standard of living above (or even on par with) their standard of living.⁵³⁶

If the population is divided into income quintiles, the lowest 20 percent of White earners have a median net worth of about \$18,000, far exceeding the median net worth of \$7,600 of Black earners in the next highest income quintile and coming close to the \$22,000 median net worth of Black earners in the middle income quintile.⁵³⁷ The wealthiest 400 Americans own more wealth than the entire Black population.⁵³⁸

Simply stated, racial wealth inequalities in the United States today are the direct result of the previously cataloged patterns of government created and perpetuated racialized social and legal structures and policies that skewed distribution of land, labor, and political voting power.

10. Using Swollen Fortunes to Pay for Stolen Inheritances

In 1973, a city planning professor and a public policy design professor recognized that 1960s protest movements were attempting to change the “underlying systemic processes of contemporary American

⁵³² See *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FEDERAL RESERVE (Sept. 28, 2020), <http://www.federalreserve.gov/econres/notes/s/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm> [https://perma.cc/6BEN-VL5V].

⁵³³ See *id.*

⁵³⁴ See Bhutta et al., *supra* note 325.

⁵³⁵ Chuck Collins et al., *Dreams Deferred: How Enriching The 1% Widens The Racial Wealth Divide*, INST. FOR POL’Y STUDIES & PROSPERITY NOW 3 (2019), https://inequality.org/wp-content/uploads/2019/01/IPS_RWD-Report_FINAL-1.15.19.pdf [https://perma.cc/CN53-EK4Z].

⁵³⁶ Thomas Shapiro et al., *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, INST. ON ASSETS & SOC. POL’Y (2015), <https://heller.brandeis.edu/iere/pdfs/racial-wealth-equity/racial-wealth-gap/roots-widening-racial-wealth-gap.pdf> [https://perma.cc/98GN-CWJR].

⁵³⁷ See Darity et al., *supra* note 489, at 9.

⁵³⁸ See *id.* at 4.

society” because public policy had failed to do so.⁵³⁹ Professors Rittel and Webber noted that science, technology, engineering, and mathematics solution tools had solved the “benign” problems impeding our desired standard of living. However, the besetting social problems of poverty, war, and climate change were not amenable to science and math solutions. Instead, these were “wicked problems.”⁵⁴⁰ Wicked problems are completely unstructured, hopelessly tangled into adjoining realities, and relentlessly mutating into more malignant forms. A wicked problem is not wicked in a morally evil sense, but wicked in a malevolent, viral sense.

Anti-Black racism is an example of a “*wicked problem*.” As a result, one should not expect reparations to be a solution. At best, reparations would be a type of vaccine that diminishes one debilitating symptom of racism—racial wealth disparity. Opposition to reparation payments because they are not a final solution to racism is a bad faith argument.

Resistance to Black reparations often boils down to two primary objections. First, who should pay for it, given that the greatest sins committed against Black Americans were committed generations ago. Second, how much should be paid, given funding limits and the fact that there is no sum great enough to fully repair the country’s past wrongs against Black people. Various estimates of the reparation cost range from \$500 billion to over \$17 trillion.⁵⁴¹ This section proposes that key objections are easier to overcome by first identifying the source of funding for reparations. Earmarking the federal Estate Tax to pay for the study, administration, and ongoing distribution of reparations that address all the elements mentioned in H.R. 40 discussed in Part II.C.

11. Reparations in Evanston, Illinois

At the local level, the City of Evanston, just north of Chicago, adopted an approach to determining reparations that combined the H.R. 40 process with a predetermined funding source. On March 22, 2021, the City Council of Evanston enacted Resolution 37-R-27, “Authorizing the Implementation of the Evanston Local Reparations Restorative Housing Program and Program Budget.”⁵⁴²

Lawmakers carefully identified and then confessed to the city’s historic governmental policy of Black exclusion, redlining and Jim Crow segregation.⁵⁴³ The Council then looked for a pool of tax dollars from a source outside the normal budget that would tie back to one or more of the historical wrongs inflicted against Black people in Evanston. The new tax on recently approved cannabis sales was an ideal funding solution. Evanston obtained statistical evidence of police racial profiling for marijuana arrests by demonstrating that Black people in Evanston were stopped, detained, arrested, and convicted of cannabis related offenses at a disproportionately higher rate than White people. Certainly, a tax on legalized cannabis use is a logical funding source to repay the victims of the city’s prior racial injustices. Given that Evanston’s history of residential segregation was the harm that most clearly resulted in economic deprivation of the city’s Black people, the City Council decided to make Black residents of Evanston from 1916 to 1969 (or their descendants) the potential beneficiaries of the reparation funds and agreed that the funds would provide benefits in the areas of home ownership, home improvement, and mortgage assistance.⁵⁴⁴

⁵³⁹ Horst W. J. Rittel & Melvin M. Webber, 4 *Dilemmas in a General Theory of Planning* Policy Sciences, no. 2, 157 (June 1973); see also Robin Kundis Craig *Resilience Theory and Wicked Problems*, 73 *VANDERBILT L. R.* 1733 (Dec. 12, 2020).

⁵⁴⁰ Rittel & Webber, *supra* note 539.

⁵⁴¹ See Patricia Cohen, *What Reparations for Slavery Might Look Like in 2019*, *N.Y. TIMES* (May 23, 2019), <https://www.nytimes.com/2019/05/23/business/economy/reparations-slavery.html> [https://perma.cc/84DZ-AQPD].

⁵⁴² Memorandum from Kimberly Richardson, Interim Assistant City Manager, City of Evanston, to Honorable Mayor and Members of the City Council, at 1 (Mar. 22, 2021), <https://cityofevanston.civicweb.net/document/50624/Adoption%20of%20Resolution%2037-R-27.%20Authorizing%20the.pdf?handle=E11C7B73E1B6470DA42362AB80A50C46> [https://perma.cc/96A5-6CA8].

⁵⁴³ See *id.* at 2, 5.

⁵⁴⁴ See *id.* at 2-3.

12. Clear Connections Between the Harm, Source, and Recipients

In like manner, the use of Estate Tax ties a current tax to a current problem created by historic and government-sponsored, encouraged, or ignored racism. There is a clear connection between slavery and discriminatory housing policies of the past and the White/Black wealth disparity of today. Addressing the racial wealth gap will require a much more nuanced approach than simply handing out cash payments. This should not cause consternation or surprise because the “40 acre” agreement was *not* an agreement for cash payments.⁵⁴⁵ The 40-acre promise represented an equal starting line—an opportunity to create current income and future wealth through property ownership. Had the 40-acre promise been seen through to fruition, the land set-aside would have allowed for self-sustaining Black communities and provided natural incentives for productivity.

13. Georgetown University Example

Many reparation initiatives under discussion at this time do not necessarily have a compelling benefit/detriment connection. It is often easy to show the monetary benefit to the wrongdoing entity but hard to justify the financial enrichment to individuals who were not the original victims. The current effort by Georgetown University is an example. In 1838, two of the nation’s top Jesuit priests sold 272 enslaved men, women, and children to pay the debts and ensure the survival of what would become Georgetown University.⁵⁴⁶ A memory project was started by a wealthy alumnus and the school to trace the ancestry of the sold slaves, whose names were all clearly delineated in the school’s records.⁵⁴⁷ Today, the identities of the victims’ living descendants have been genetically established, and a debt repayment of some sort is sought.⁵⁴⁸ The problem is connecting the benefit that Georgetown gained by sale of the slaves (\$3.3 million in today’s dollars)⁵⁴⁹ to a compensable detriment being suffered by the descendants.

Georgetown University’s combined endowment is \$1.5 billion.⁵⁵⁰ A proximate causation argument for damages would say that since the school would not be in existence “but for” the immoral sale of the slaves, the entire endowment should be paid into a reparation fund. In fact, the slave descendants have asked for a billion-dollar fund, and the leaders of the newly created Descendants Trust & Reconciliation Foundation have stated that \$1 billion remains the long-term fundraising goal.⁵⁵¹

The Descendants Trust & Reconciliation Foundation, formed by the GU272 Descendants Association and the Jesuits, will “support the educational aspirations of descendants for future generations and play a prominent role in engaging, promoting and supporting programs and activities that highlight truth, accelerate racial healing and reconciliation, and advance racial justice and equality in America.”⁵⁵² This solution carefully avoids discussion of any dollar-for-dollar payments to the descendants.

⁵⁴⁵ For a discussion of Special Field Order No. 15, see *supra* Part II.A.

⁵⁴⁶ See Rachel L. Swarns, *272 Slaves Were Sold to Save Georgetown. What Does It Owe Their Descendants?*, N.Y. TIMES (Apr. 16, 2016), <https://www.nytimes.com/2016/04/17/us/georgetown-university-search-for-slave-descendants.html> [https://perma.cc/VW8S-E4SN].

⁵⁴⁷ See *id.*

⁵⁴⁸ See *id.*

⁵⁴⁹ See *id.*

⁵⁵⁰ See FAQs, GEORGETOWN UNIV. INV. OFF. <https://investments.georgetown.edu/faqs/#3> [https://perma.cc/47HR-3WEY].

⁵⁵¹ See Rachel L. Swarns, *Catholic Order Pledges \$100 Million to Aton for Slave Labor and Sales*, N.Y. TIMES (Mar. 15, 2021), <https://www.nytimes.com/2021/03/15/us/jesuits-georgetown-reparations-slavery.html> [https://perma.cc/LYD6-HQ34].

⁵⁵² *Descendants Truth & Reconciliation Foundation Launches Billion Dollar Vision of Racial Healing in America*, P.R. NEWSWIRE (Mar. 16, 2021), <https://www.prnews.wire.com/news-releases/descendants-truth--reconciliation-foundation-launches-billion-dollar-vision-of-racial-healing-in-america-301247895.html#:~:text=WASHINGTON%20C%20March%2016%202021%20%2Fmove%20America%20toward%20deep%20racial> [https://perma.cc/ZJ5Y-J9X5]; *Jesuits Pledge \$100 Million in Reparations to Descendant of Enslaved People*, NAT’L CATH. REP. (Mar. 17, 2021), <https://www.ncronline.org/print/news/justice/jesuits-pledge-100-million-reparations-descendants-enslaved-people> [https://perma.cc/WMD8-F3C8].

If the Descendants Trust & Reconciliation Foundation is true to its stated purpose of “supporting the educational aspirations of descendants [of Georgetown’s sold slaves],” the endeavor will almost certainly face the same backlash that is frequently raised as an argument against reparations. Any direct payments will likely be declared to be an unearned and unfair advantage. This is what occurred with affirmative action, which has now become the “reverse discrimination” rallying cry for those who remain actively opposed to racial repair.⁵⁵³

14. *Black Reparations, Not Slave Reparations*

Use of the Estate Tax as the source of funds, and identifying the White/Black wealth disparity as the targeted problem, avoids the problem faced by the Jesuits of how and whether to provide direct compensation to the identified descendants of the enslaved persons who were sold. The wealth disparity problem in America is well-documented and has led many to advocate for the use of new tax policies as a solution.⁵⁵⁴ Establishing that historic racism, from the “forgotten 40 acres” to the segregationist policies that followed, placed Black people at the bottom of this already proven wealth disparity creates the targeted group in need of repair—Black Americans.

Statistically, every person identified or identifiable as an African-American is a victim of wealth disparity. Even if a Black person has accumulated wealth that groups them in an affluent category, the Black person’s accumulated wealth will be 1/8th to 1/10th what it should be.⁵⁵⁵ Exactly how to remedy the racial wealth gap is a wicked problem indeed and will require the research of the group described in H.R. 40 and ongoing vigilance of the best and brightest Black people and their allies. Solving for Black reparations should be viewed in the same manner as the problems tackled by the Department of Education, the Department of Housing and Urban Development, and the Department of Labor: worthy of its own federal agency (and one that would likely serve some of the same functions as the agencies listed, thereby moving some tax dollars from the old agencies to the new).

15. *Black Reparations as a Means to Correct Other Ills*

One obstacle to broadening the scope of reparations from the harm of slavery alone to include all the other racially-motivated wrongs that have put Black Americans at the bottom of economic measures of success is that other groups who have been victims of systemic discrimination in the United States may object. Surely, Black Americans felt overlooked when the government turned its attention to Native Americans and Japanese Americans in the 1990s but did not embark on a similar program of reparations for them. Nevertheless, the past has shown us that a financial investment specifically targeted to alleviate the effects of past and current discrimination for one group can also benefit the public as a whole. This was particularly true in the case of the Americans with Disabilities Act (“ADA”),⁵⁵⁶ which helped more than just the disabled. Ultimately, Congress used tax code expenditures as a reparation-like subsidy to redress discrimination against disabled Americans.⁵⁵⁷

⁵⁵³ See, e.g., Vann R. Newkirk, II, *The Myth of Reverse Racism*, ATLANTIC MAG. (Aug. 5, 2017) (describing how the idea of White victimhood is increasingly central to the debate over affirmative action), <https://www.theatlantic.com/education/archive/2017/08/myth-of-reverse-racism/535689/> [https://perma.cc/QU2S-N5XF].

⁵⁵⁴ See, e.g., Greg Leiserson et al., *The Distribution of Wealth in the United States and Implications for a Net Worth Tax*, WASH. CTR. FOR EQUITABLE GROWTH (Mar. 21, 2019), <https://equitablegrowth.org/the-distribution-of-wealth-in-the-united-states-and-implications-for-a-net-worth-tax/> [https://perma.cc/R2YE-J5JE].

⁵⁵⁵ See Collins et al., *supra* note 535.

⁵⁵⁶ See 42 U.S.C. §§ 12101–12213.

⁵⁵⁷ The Disabled Access Credit provides a non-refundable credit for small businesses that incur expenditures for the purpose of providing access to persons with disabilities. An eligible small business is one that earned \$1 million or less or had no more than 30 full time employees in the previous year; they may take the credit each and every year they incur access expenditures. See *Tax Benefits for Businesses Who Have Employees with Disabilities*, I.R.S., <https://www.irs.gov/businesses/small-businesses-self-employed/tax-benefits-for-businesses-who-have-employees-with-disabilities> (last updated June 26, 2021) [https://perma.cc/EB6P-H9JQ].

The public access benefits created by the ADA benefit all Americans and is celebrated each time a mother with a baby stroller, a young athlete with a sports injury, a traveler with a rolling suitcase, a college student moving in with a hand cart or dolly, or a millennial jetting around town on an electric scooter approaches a sidewalk crossing that is level with the street. In like manner, reparations aimed at the racial wealth divide will break down barriers for all Americans. The elimination of the zero-sum, win-lose binary argument is critical to the success of reparations. This and other important win-win commentary relevant to any reparations program is discussed in Heather McGhee’s book, *The Sum of Us*.⁵⁵⁸

If the Estate Tax is earmarked for the study and implementation of Black reparations, the answer to the question of “how much to pay” will be self-evident—the country will pay what it can afford. The federal estate and gift taxes collected in 2019 were \$16 billion.⁵⁵⁹ One suggestion might be to use the Estate Tax revenue amount as the budget for a new Department of Black Reparations. Interestingly, \$16 billion is roughly the current budget for the Department of Commerce.⁵⁶⁰ It is imperative that the victimized people determine and administer the reparations due to them. While Estate Tax is a compelling *source* for Black reparations, the Estate Tax revenues have no relationship to the *dollar-value* of the reparations that are owed.

In terms of who to pay, the Evanston, Illinois example provides a framework.⁵⁶¹ If you are Black and you or your direct ancestors lived in the United States between 1619 (the inception of slavery)⁵⁶² and 1968 (the enactment of the Fair Housing Act),⁵⁶³ you should be eligible for relief. These dates or parameters could change based on an alternative logical premise, but the gist is the same—any Black American who has lived in the United States long enough has been the victim of the country’s caste system. If ancestry must be proved, DNA and genealogy developments are readily available today. One Black-owned company has more DNA samples of Africans than any company in the world.⁵⁶⁴

The final question of what form of payment reparations should take is harder to answer. We propose this should not be answered until a truth-seeking and listening process has been undertaken, following the formula of the past examples of reparations outlined in Part IV of this Article.

16. Charitable Contributions Create Public-Private Partnership in Wealth Reallocation

Racial repair is a matter of justice based on broken promises and human rights violations. By definition, reparations do not and cannot proceed from a request for benevolence. Nonetheless, the tax incentives provided for transfers of wealth that can be categorized as charitable provide an opportunity for a voluntary form of transfers to an injured individual on behalf of the government that inflicted the injury. Individuals have historically sought to ameliorate past evils through charity. The meaning of the word philanthropy is “love of Anthropol-humankind.” Andrew Carnegie was so effective in making lifetime charitable gifts that

⁵⁵⁸ See HEATHER MCGHEE, *THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER* 274 (2021) (“As our country becomes more diverse, there’s a way to design our policy making to get the best out of all our communities and create from the bottom of the social hierarchy an upward spiral of mutual benefit. . . . Policy advocate Angela Glover Blackwell calls this ‘the curb-cut’ effect, after a fix created by people using wheelchairs that now also helps non-disabled people carrying large loads or pushing strollers.”).

⁵⁵⁹ See *The Budget and Economic Outlook: 2020 to 2030*, CONG. BUDGET OFF. (Jan. 2020), www.cbo.gov/publication/56020 [https://perma.cc/YF6C-JZW5]. “For 2019, the total net estate tax reported on all estate tax returns filed in the year was just over \$13.2 billion.” *Estate Tax Returns Filed for Wealthy Decedents, Filing Years 2010-2019*, I.R.S., <https://www.irs.gov/pub/irs-pdf/p5332.pdf> [https://perma.cc/PFA9-CWZM] (revised Feb. 2021).

⁵⁶⁰ See *Department of Commerce*, USASPENDING.GOV, <https://www.usaspending.gov/agency/department-of-commerce?fy=2022> (last visited Jan. 20, 2022) [https://perma.cc/7M65-4NKW].

⁵⁶¹ See *supra* Part V.A.11.

⁵⁶² See *supra* note 12 and accompanying text.

⁵⁶³ See *supra* note 9.

⁵⁶⁴ See AFRICAN ANCESTRY, <https://africanancestry.com/> [https://perma.cc/63F4-STNG].

his wife and descendants had to downsize their lifestyle after his death. Carnegie's pattern of charitable giving was a motivating factor for the Giving Pledge started by Bill Gates and Warren Buffett.⁵⁶⁵

The charitable deduction from gift and estate taxes is also definitive proof that our transfer tax system was designed for redistribution of wealth.⁵⁶⁶ Unlike the federal income tax, the federal transfer taxes are completely avoidable by post-mortem transfers to tax-exempt organizations.⁵⁶⁷ The Estate Tax is a completely voluntary tax. In effect, it is a penalty tax for decedents who have swollen fortunes and no accompanying charitable intent.

There are many Black allies who undoubtedly would support and want to personally fund a Black reparations effort, particularly if a charitable deduction from income, gift, and estate taxes could be obtained while doing so. A charitably inclined person should be able to give directly to Black reparations. Under current law, however, a private reparations trust funded by one donor or one family that makes distributions to individual Black people would not be expressly authorized by the Internal Revenue Code ("IRC"). A donation must be made to a qualifying charitable organization to be deductible.⁵⁶⁸

The Jesuit reparations fund is tax exempt under the church exemption or school exemption.⁵⁶⁹ The City of Evanston is tax exempt as a municipality.⁵⁷⁰ If Estate Tax is to be the public source of funds for a federal reparations program, then private efforts to redistribute wealth through reparations should be permitted as well, just as a public-private partnership currently exists for all manner of social welfare programs. A privately-funded reparations trust or foundation helping the U.S. government repay its 40-acres debt could qualify as gift to the government, which would qualify as a "public charity" under IRC 501(c)(3)⁵⁷¹ and the accompanying exempt provisions for income, estates, and gifts under IRC sections 170(c)(1), 2055(a)(1), 2522(a)(1). Public charity status would be possible if the federal government declared that reversing anti-Black racism is a public policy.⁵⁷² Then and only then would a transfer to privately-funded reparations trust qualify as a transfer on behalf of the U.S. government.

Even with a public charity status, there are still restrictions that would be counterproductive for the goal of reparations. For example, Section 501(c)(3) requires that "no part of the net earnings . . . inure . . . to the benefit of any private individual." This limitation could be fatal to a fund making regular cash payments to Black individuals. The alternative suggested here is to create a new class of charity by adding an additional subsection to the end of 501(c). Given that Section 501(c) currently ends at 501(c)(29), Congress could

⁵⁶⁵ See Richard Feloni, *Warren Buffett Says These Billionaires' Letters Might Be More Valuable than their Money*, BUS. INSIDER (Sept. 21, 2016, 4:01PM), <https://www.busi.nessinsider.com/warren-buffett-says-giving-pledge-letters-are-more-valuable-than-money-2016-9> [https://perma.cc/457U-NAPB]; see also *History of the Giving Pledge*, GIVING PLEDGE, <https://givingpledge.org/About.aspx> [https://perma.cc/WL5V-VXDJ].

⁵⁶⁶ See generally Edward A. Zelinsky, *Why the Buffett-Gates Giving Pledge Requires Limitation of the Estate Tax Charitable Deduction*, 16 FLA. TAX REV. 393, 412–18 (2014).

⁵⁶⁷ See *id.* at 426. Professor Zelinsky concludes that because Estate Tax is completely avoidable through the charitable deduction it must be amended to be a dependable source of government revenue. See *id.* at 427.

⁵⁶⁸ See I.R.C. §§ 170(a) & (c), 501(c)(3); see also *Thomason v. Comm'r*, 2 T.C. 441, 443 (T.C. 1943) ("Charity begins where certainty in beneficiaries ends, for it is the uncertainty of the objects and not the mode of relieving them which forms the essential element of charity.").

⁵⁶⁹ See I.R.C. § 170(c)(2).

⁵⁷⁰ See I.R.C. § 170(c)(1).

⁵⁷¹ See I.R.C. § 501(a).

⁵⁷² See I.R.C. § 170(c)(1) (permitting a charitable deduction for income tax where a payment is made to a State, or the United States, but only if the contribution or gift is made for exclusively public purposes). In *Bob Jones University v. United States*, the United States Supreme Court implied that preventing racial discrimination is a fundamental public policy, stating,

We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not "charitable" should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy. But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice.

461 U.S. 574, 592 (1983).

reserve subsections (30) through (39) of the Code and refer to the new class of charity as a “501(c)(40) Reparations Organization.”

IRC Section 501(c)(40) would state the governmental purpose of reversing historic anti-Black racism. It could waive the private inurement rules for non-related individuals and even allow for lobbying activities related to its anti-racism exempt purpose. Administratively, the 501(c)(3) exemption process requires the IRS to affirmatively grant exempt status.⁵⁷³ It should be anticipated that during an era of white supremacy resurgence, the IRS could refuse to grant exempt status to applicants of a 501(c)(40) Reparations Organization. This problem could be addressed by patterning the Reparations Organizations after a 501(c)(4) Social Welfare Organization.

Social Welfare Organizations under 501(c)(4)⁵⁷⁴ are typically thought of as lobbying organizations, but also include homeowners’ associations and volunteer fire departments.⁵⁷⁵ They are not eligible for a charitable income tax deduction.⁵⁷⁶ As such, social welfare organizations are subject to fewer restrictions than 501(c)(3) public charities.⁵⁷⁷ The application process for tax-exempt status under 501(c)(4) is a more of a notice than a request for permission.⁵⁷⁸ Rather than patterning 501(c)(40) after (c)(3) perhaps it would be easier and better to pattern the new section after Social Welfare Organizations under 501(c)(4), but without the private inurement prohibition of 501(c)(4)(B)⁵⁷⁹ and with a clear income tax and Estate Tax exemption.

The 501(c)(40) should be carefully designed to be simple and more advantageous than any other charitable giving vehicle. For income taxes this should mean that there would be no adjusted-gross income (“AGI”) limitation for deductions under IRC Section 170.⁵⁸⁰ Giving the 501(c)(40) Reparations Organization the greatest possible advantages would allow the federal government to partially privatize its payment of the “forgotten 40 acres” and create a cottage industry of Reparations Organizations having as their mission a redress of White/Black wealth disparity, and would create a welcome tax shelter drawing the best and brightest minds to develop new planning techniques.

A required limiting factor of all 501(c)(40) Reparation Organizations would be to allow the federal agency created to oversee reparations the power to regulate and enforce the disbursement of funds to ensure the reparations purpose was being met, even as that purpose may evolve over time. The secondary goal of the 501(c)(40) Reparations Organizations would be to create large pools of wealth under the control of descendants of slaves. Studies have shown that it is the power to make strategic gifts to grandchildren during their lives that makes inherited wealth such an advantage. Hopefully, the 501(c)(40) could turn private donors into *de facto* grandparents, creating the possibility of a grandparent gift for Black people lacking financial security so that they could take career, housing, and entrepreneurial risks.

Creating a private wealth charitable industry around 501(c)(40) Reparations Organizations would perfectly allow for wealthy donors to be tax motivated to do Black reparations without social objection.

⁵⁷³ See *Tax Exempt Status for Your Organization*, I.R.S. 24 (2021), <https://www.irs.gov/pub/irs-pdf/p557.pdf> [<http://perma.cc/2U8Y-5FZB>]. Some organizations, such as churches, are automatically exempt under this section. See *id.*

⁵⁷⁴ See I.R.C. § 501(c)(4)(A):

Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

⁵⁷⁵ See I.R.S., *supra* note 573, at 47–48.

⁵⁷⁶ See I.R.C. § 501(a).

⁵⁷⁷ See I.R.S., *supra* note 573, at 28–48.

⁵⁷⁸ See *Instructions for Form 1024-A* I.R.S. 1 (2021), <https://www.irs.gov/pub/irs-pdf/i1024a.pdf> [<https://perma.cc/FBW3-YPJH>].

⁵⁷⁹ See I.R.C. § 501(c)(4)(B) (“Subparagraph (A) shall not apply to an entity unless no part of the net earnings of such entity inures to the benefit of any private shareholder or individual.”).

⁵⁸⁰ See I.R.C. § 170(a)(1) & (b)(1)(B).

B. State and Local Reparations Efforts

At the state and local level reparations can address repair in creative ways that avoid the political compromises often necessitated by Congressional legislation. We may find that Congressional efforts drive state and local efforts, but it is perhaps more likely that state and local efforts will drive the Congressional effort. In addition to the example noted in Evanston, Illinois, similar reparations endeavors have been introduced in Asheville, North Carolina; Providence, Rhode Island; and California.⁵⁸¹

1. State and Local Support for H.R. 40

Since the introduction of H.R. 40 in 1989, the National Coalition of Blacks for Reparations in America (“N’COBRA”) has been instrumental in urging state legislators and city officials to pass resolutions endorsing and supporting H.R. 40.⁵⁸² For example, in 2020, the United States Conference of Mayors at its 88th conference adopted a resolution urging the passage of H.R. 40.⁵⁸³ City councils governing cities in Arkansas, California, Georgia, Illinois, Maryland, Michigan, Mississippi, Missouri, New Jersey, Ohio, Pennsylvania, Texas, Vermont, Virginia, and the District of Columbia have all passed specific resolutions in support of H.R. 40.⁵⁸⁴

2. State and Local Commissions on Reparations

California passed and signed into law AB-3121 Task Force to Study and Develop Reparation Proposals for African Americans, which is virtually identical to H.R. 40.⁵⁸⁵ The California mandate has created the first-in-the-nation task force “to study and recommend reparations for African Americans.”⁵⁸⁶ The task force consists of nine members—five appointed by the Governor, and two each by the leaders of the state Senate and Assembly—“drawn from diverse backgrounds to represent the interests of communities of color throughout the state, and have experience working to implement racial justice reform.”⁵⁸⁷ The task force held its inaugural meeting on June 1, 2021, launching a two-year process to address the harms of slavery and systemic racism in California.

Kamm Howard, the co-chair of N’COBRA, has published a guide for local reparation efforts.⁵⁸⁸ Howard argues that any local reparations effort should have three components: (1) tasking a group of representative Black people to perform an accurate and authoritative study of the wrong; (2) proposals for administration, identification of recipients, and implementation; and (3) funding. H.R. 40 seeks to perform these components in the order listed.⁵⁸⁹ Evanston, Illinois developed the commission and study first, then created the funding source before addressing administration and implementation. Several educational and

⁵⁸¹ See Richardson, *supra* note 542; see also Neil Vigdor, *North Carolina City Approves Reparations for Black Residents*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2020/07/16/us/reparations-asheville-nc.htm> [https://perma.cc/2SKY-QBUQ].

⁵⁸² See NKECHI TAIFA, *BLACK POWER, BLACK LAWYER: MY AUDACIOUS QUEST FOR JUSTICE* 176 (2020).

⁵⁸³ See *88th Annual Meeting In Support of the Commission to Study & Develop Reparation Proposals for African Americans Act* (H.R. 40/S. 1033), U.S. CONF. OF MAYORS, <https://www.usmayors.org/the-conference/resolutions/?category=a0F4N00000PdLmjUAF&meeting=88th%20Annual%20Meeting> [https://perma.cc/Q6N6-6SND] (“NOW, THEREFORE, BE IT RESOLVED, that the United States Conference of Mayors supports the Commission to Study and Develop Reparation Proposals for African-Americans Act[.]”).

⁵⁸⁴ See TAIFA, *supra* note 544, at 177.

⁵⁸⁵ See Assemb. B. 3121, 2019-2020 Sess. (Cal. 2020).

⁵⁸⁶ Janie Har, *California Task Force Launches Study of Slave Reparations*, ASSOC. PRESS (June 1, 2021), <https://apnews.com/article/california-race-and-ethnicity-governme-nt-and-politics-19c5c68059a6dd821296ac5fcc24043a> [https://perma.cc/7KUV-DEGV].

⁵⁸⁷ *Reparations Task Force Members*, OFF. OF THE ATTY’Y GEN. FOR THE STATE OF CAL., <https://oag.ca.gov/ab3121/members> [https://perma.cc/G8PZ-PZAR].

⁵⁸⁸ See KAMM HOWARD, *LAYING THE FOUNDATION FOR LOCAL REPARATIONS* (2020).

⁵⁸⁹ See *Commission to Study & Develop Reparation Proposals for African Americans*, H.R. Res. 40, 117th Cong. (2021).

religious organizations have essentially started by identifying an amount of funding, and then performing the study and beginning the administration and implementation phases. This Article suggests that H.R. 40 identify the Estate Tax as a source of funds before addressing administration, recipients, and implementation.⁵⁹⁰ If reparations are implemented at the state and local level, there are suitable alternatives to the Estate Tax.

3. *State and Local Reparations Funding – Alternatives to Federal Estate Tax*

a. *State Estate Tax*

At the state level, an estate tax could also be earmarked to provide a source for reparations. Prior to 2001, all states imposed an estate tax at death. The Internal Revenue Code offered a dollar-for-dollar credit on the federal Estate Tax for state estate taxes paid, so the state estate tax did not increase a decedent's overall Estate Tax liability—the states just took their share of the money owed to the federal government, up to a cap of 16% of the taxable estate. The Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”) repealed the state death tax credit, and now there are only twelve states, plus the District of Columbia, that have an estate tax, and six states that have an inheritance tax. Maryland is the only state that has both.⁵⁹¹ State death taxes (including both estate taxes and inheritance taxes) generated a combined \$5.3 billion in revenue in 2018.⁵⁹² Similar to the Estate Tax at the federal level, redirecting the revenue raised from state estate taxes would not have a significant budgetary impact. Prior to the enactment of EGTRRA, the state estate taxes levied in 2000 “still provided less than 1 percent of combined state and local own-source general revenue.”⁵⁹³

b. *Mansion Property Tax*

An “additional tax” on mansions (the plantations of today’s aristocracy) over and above the property tax is another logical way to generate revenue for reparations at the local level. Given that most states’ tax policies are regressive and not progressive,⁵⁹⁴ a mansion tax would also tilt the balance in the direction of progressivity. Currently, the wealthy are able avoid paying taxes on many of their most valuable assets, which may include “stocks and bonds, real estate and personal possessions like boats, jewelry and artwork.”⁵⁹⁵ A mansion tax would attempt to correct this tax avoidance by taxing arguably the most valuable asset of wealthy taxpayers.

Real property taxes on the values of homes “are levied at the local level in all states; sixteen states also have state property taxes.”⁵⁹⁶ Because governments typically levy taxes annually, “this form of tax would produce revenue from the owners of expensive homes each year; [whereas] real estate transfer taxes produce revenue only when homes are sold.”⁵⁹⁷

⁵⁹⁰ See Richardson, *supra* note 542.

⁵⁹¹ See *Estate and Inheritance Taxes*, URB. INST. <https://www.urban.org/policy-center/s/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/estate-and-inheritance-taxes>, [https://perma.cc/A8BK-6G7E].

⁵⁹² See *id.*

⁵⁹³ *The State of State (and Local) Tax Policy*, TAX POL’Y CTR., <https://www.taxpolicycenter.org/briefing-book/how-do-state-estate-and-inheritance-taxes-work> [https://perma.cc/N64A-QWXW] (updated May 2020).

⁵⁹⁴ See discussion *supra* Part III.G.

⁵⁹⁵ Michael Leachman & Samantha Waxman, *State “Mansion Taxes” on Very Expensive Homes*, CTR. ON BUDGET AND POL’Y PRIORITIES (Oct. 1, 2019), <https://www.cbpp.org/research/state-budget-and-tax/state-mansion-taxes-on-very-expensive-homes> [https://perma.cc/4DTW-2E29].

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.*

It is estimated that a “nationwide tax of 1 percent on homes over \$1 million could generate about \$47 billion per year,”⁵⁹⁸ although there are legal barriers (such as constitutional bans on new taxes) in several states.⁵⁹⁹

The Urban Institute estimated the revenue potential of a property tax surcharge of 1 percent on homes worth \$2 million or more and 2 percent on homes worth \$5 million or more in seven states plus the District of Columbia. In all states estimated, such a tax would fall on fewer than 2 percent of all homes, yet it would raise amounts ranging from \$29 million (in Maine) to \$4.3 billion (in California).⁶⁰⁰

Together, the states could bring in more revenue through a mansion tax than the federal government currently generates from the Estate Tax.

4. *Real Estate Transfer Tax*

As a corollary to a mansion tax, a surcharge could also be levied on the real estate transfer tax paid on the sale or transfer of high-value homes. Seven states already do this, with increased rates of transfer tax applying at the following levels:⁶⁰¹

1. Connecticut: Increased tax rates on the transfer of property valued over \$800,000 and again at \$2.5 million.⁶⁰²
2. District of Columbia: Higher transfer tax rates for properties exceeding \$400,000.⁶⁰³
3. Hawaii: Seven graduated transfer tax brackets with the highest bracket at \$10 million.
4. New Jersey: Increased rates on the transfer of property valued over \$350,000 and again at \$1 million.
5. New York: Higher transfer tax rates for residences of \$1 million or more, and in New York City, the tax rate is increased for homes valued at over \$3 million, with graduated rates stepping up the tax to the highest bracket for homes over \$25 million.
6. Vermont: Higher transfer tax rates for properties exceeding \$100,000.
7. Washington State: Graduated rates increase for homes sold that are worth over \$500,000, \$1.5 million and \$3 million.

Even a mansion tax imposed on second homes or vacation homes could raise significant revenue. If Evanston’s example of using increased tax revenue to provide funds for new home purchases, home improvements, and loan repayment is successful, more states and localities could implement their own systems of reparations using revenue generated from taxing wealthy landowners.

⁵⁹⁸ *Id.* at n.9.

⁵⁹⁹ *See id.* at n.10.

⁶⁰⁰ *Id.* at n.11.

⁶⁰¹ *See* Leachman & Waxman, *supra* note 595.

⁶⁰² *See id.*

⁶⁰³ *See id.*

VI. CONCLUSION

The disappointment of partial emancipation suffered by Black people in this country rests, to a significant degree, upon the failure of the Andrew Johnson administration to figure property ownership at the core of what freed people were owed as repair for their enslavement and to recognize their identity as persons, not property. The racial caste system that developed to justify slavery continued in the American psyche, at both the individual level and at all levels of government, for decades to follow. It is not too late to repair the harm. By using the Estate Tax to fund reparations (starting with a truth-seeking, reconciliation process used in past examples of reparations), we can pivot the country away from the continuing racial wealth divide and shift to the egalitarian promise of Thomas Jefferson, where every person begins life's journey from the same starting line.