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Follow the Yellow Brick Road: Perusing the Path to Constitutionally Permissible Reparations for Slavery and Jim Crow Era Governmental Discrimination

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ABSTRACT

A growing body of scholarship has developed around the issue of reparations for the holocaust, slavery, and other social injustices. Numerous articles have proposed reparations programs for America's legacy of race based slavery and segregation but the constitutionality of those programs has largely been ignored in the literature. Instead, most scholarship focuses on the legal or political justification for existing or new reparations proposals. This article charts new ground in the area by examining prototypical reparations proposals by the leading scholars in the field for compliance with the Court's equal protection requirements. The Supreme Court's affirmative action jurisprudence represents the legal terrain that a reparations program must traverse to comply with the Court's equal protection requirements. As a chief contribution to existing scholarship, the article maps a path to constitutionally permissible reparations for slavery and governmental segregation. Using this map, the article determines whether prominent reparations proposals are on the road to a constitutional determination or stuck in the woods.

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Follow the Yellow Brick Road: Perusing the Path to Constitutionally Permissible Reparations for Slavery and Jim Crow Era Governmental Discrimination

Carlton Waterhouse*

The Wizard of Oz represents one of America's most beloved films.[1] Drawn from Lewis Carol's series of novels written in the 1930s regarding the Land of Oz, the film quickly became an American classic.[2] Since its television premier in 1970, the film aired annually for decades on network television. The musical follows the journey of Dorothy in a magical Land of Oz. One of the best-known features of the film is a road paved with yellow bricks that Dorothy must follow to reach a powerful wizard in the Emerald City. That wizard, Dorothy is told, is the only person with the ability to return her back home. The yellow brick road provides the only path to the wizard. The road also provides her protection from a wicked witch who means her no good. If Dorothy veers from the road she faces the double peril of not reaching the wizard and of being captured by the witch. Along the road, three companions, who also want the wizard to grant them a request, join Dorothy. Journeying together, the band encounters a multitude of challenges, but ultimately presents their request before a fearsome wizard who requires that they return with the witch's broomstick to gain his assistance. When they return with the broomstick they are amazed to discover that the wizard is merely a peddler of gimmicks and that the things they sought from the wizard were always within their own power to grasp. In considering the story, the viewer's initial response may be to view the peddler's deception and the journey to the Emerald City as an impediment to the groups' ability to achieve its goals. Upon reflection, however, the peddler serves as the perfect foil to enable the group's members to recognize and realize their own potential. Without the journey to the Emerald City and the challenges they faced, each of the group's members may have resigned themselves to what seemed to be their fated lot: a brainless scare crow, a heartless tin man, a cowardly lion, and a lost young girl unable to return home. Through their struggle to achieve a near impossible challenge they each found the power within themselves that they needed to achieve that for which they dreamed.

Like the outcome for Dorothy and her companions, Randall Robinson maintains in the Debt, his popular book about reparations, that regardless of whether reparations are achieved African Americans will benefit greatly from their pursuit.[3] This article seeks to explore the subject of reparations through the lens of a legislative enactment to provide redress to African American victims of governmental racial discrimination during the Antebellum and Jim Crow Eras of American history. The article eschews argument regarding the warrant for such a reparations program in favor of an investigation of the constitutionality of reparations under contemporary Supreme Court Equal Protection jurisprudence.[4]

Reparations commentators propose myriad approaches to redress for America's enslavement and legal subjugation of blacks.[5] The proposals range from individual or collective

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1 In 2007, the American film institute rated it as one of the top ten American movies of the last 100 years. http://connect.afi.com/site/PageServer?pagename=micro_100landing

2 http://www.imdb.com/title/tt0032138/.

3 Randall Robinson, *The Debt: What America Owes to Blacks*, 242-243 (2000).

4 *See* Boris Bittker *The Case for Black Reparations*,105-127 (1973), for an analysis of the issue in the early 1970s. *See also* Al Brophy *Reparations Pro and Con*, 158-164 (2005) and Roy L. Brooks, The Constitutionality of Black Reparations in *When Sorry Isn't Enough* 374-389 (Roy L. Brooks ed.,1999) for more abbreviated considerations of the question.

5 *See generally* Roy Brooks, Toward A Perpetrator-Focused Model of Slave Redress, 6 Afr.-Am. L. & Pol'y Rep. 49 (2004); Alfred L. Brophy, Some Conceptual and Legal Problems in Reparations for Slavery, 58 N.Y.U. Ann. Surv. Am. L. 497 (2003); Rhonda Magee, *The* Master's Tools, From the Bottom Up: Responses to African-American

financial payments to the creation of trust funds to be used for institutional development within black communities.[6] This article analyzes the varied proposals for their ability to survive a likely challenge under the Fifth and Fourteenth Amendments of the Constitution. Rather than advocate for any particular approach to redress on its merits, this article attempts to focus on the legal hurdles facing potential legislative reparations programs.

Some commentators argue that American reparations for slavery ought to be distinguished and differentiated from reparations for Jim Crow Era injustices.[7] Specifically, this article considers legislative redress for governmental discriminatory practices against blacks from the Antebellum period of American history to the passage of the Civil Rights Act of 1968. While most reparations theorists argue that slavery is the necessary antecedent to Jim Crow and continuing racial discrimination, this article examines enslavement and other forms of racial discrimination as potentially independent bases for reparations. Commentators argue that slavery established the foundation for the racial bias against blacks that spanned three centuries. While, as a matter of law, formal American enslavement ended in the late 1860s,[8] the damage it caused would be felt over generations to come. However, as Boris Bittker made clear in his early work on reparations, the governmental and social responses to blacks following the end of slavery did as much to shape the next century as the preceding centuries of slavery.[9]

The racial peonage of the South and the second-class citizenship experienced in the North greatly shaped the lives of the first and subsequent generations of blacks born after slavery's end.[10] These acts of injustice, in the form of discrimination, exclusion, and subordination arguably warrant a legislative response, on their own. Moreover, the principal victims of the governmental and private practices of racial discrimination carried on in this era remain with us today. Unlike the twelve generations of Africans who suffered through colonial and American slavocracy, who have since perished, a forgotten and neglected group of African Americans who bore the brunt of Jim Crow Era animus remain. In fact, the vast majority of African Americans over 70 years old lived through open racial exclusion, mistreatment and discrimination at all levels of government and much of the private sector. In banking, commerce, religion, military service, housing, education, entertainment, sports, travel, and every other aspect of life they faced open discrimination. From 1900 to 1964 millions of black adults and children were denied educational, political, and economic opportunities.[11] Neither the 1954 decision in *Brown v. Board of Education,* nor the passage of the *Civil Rights Acts of 1964, 1965,* and *1968* remedied the harms suffered by blacks whose lives had largely been defined over the preceding decades by

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Reparations Theory in Mainstream and Outsider Remedies Discourse, 79 Va. L. Rev. 863 (1993); Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323 (1987); Charles J. Ogletree, Chapter 17 Addressing the Racial Divide: Reparations, 20 Harv. BlackLetter L.J. 115 (2004); Natsu Taylor Saito, Beyond Reparations: Accommodating Wrongs or Honoring Resistance?, 1 Hastings Race & Poverty L.J. 27 (2003); Eric K. Yamamoto, Racial Reparations: Japanese American Redress and African American Claims, 19 B.C. Third World L.J. 477 (1998); Robert Westley, Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?, 19 B.C. Third World L.J. 429 (1998).

6 Al Brophy, *Reparations Pro and Con* 7-18 (2005).

7 Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (2005); Boris Bittker, *The Case for Black Reparations* (1973); and Emma Coleman Jordan, *Economic Justice: Race, Gender, Identity and Economics* (with Angela P. Harris, Foundation Press, 2005), "A History Lesson, Reparations for What?" 58 *New York Univ. Annual Survey of American Law* (2003) each suggest a focus on this period as well.

8 Recent research shows that many blacks continued in a state of servitude well the Twentieth Century. See generally Douglas A. Blackmon, *Slavery by Another Name* (2008).

9 Boris Brittker, *The Case for Black Reparations* (1973).

10 Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (2005).

11 Id.

denial and exclusion.[12] Instead, the legislation sought and achieved the prospective reform of American society.[13] An entire generation of prior victims, however, was largely neglected by this legislation which failed to offer remedial aide for the African Americans who were too old to benefit from the new employment and educational opportunities that were being created.[14] After more than one half century of being denied opportunities based on their race, these African Americans were left without viable relief for the educational and economic deficiencies that resulted.[15]

Japanese American victims of a wrongful three year government internment during World War II were similarly forgotten until the late 1980s when Congress acted to redress the governments past conduct.[16] Although the war time conduct was challenged and examined by the Supreme Court in *Korematsu v. U.S.*, 323 U.S. 214 (1944), the Court upheld the executive branch internment of Japanese Americans despite the discriminatory nature of the policy. It was over forty years later when the federal courts and the U.S. Congress revisited the question.[17]

In the *Civil Liberties Act of 1988* the US Congress approved a reparations program for surviving internees that included a $20,000 cash award and an educational fund.[18] Prior to the legislation the federal courts examined the *Korematsu* opinion through a series of decisions.[19] Following the congressional action, the DC Circuit weighed in through its rejection of an Equal Protection challenges to the Act in *Jacobs v. Barr*. In the case, the Court provides the rationale upon which the federal government may base a reparations program.[20] This article examines the Court's affirmative action jurisprudence through the prism of this case to set a legal framework through which legislative reparations programs may be reviewed. In that regard, the Supreme Court of the United States through its affirmative action jurisprudence provides the framework upon which state and federal reparations programs can be constructed.[21] In *Jacobs v. Barr*, the US Court of Appeals considered a challenge to the *Civil Liberties Act of 1988*, which provided monetary and other forms of redress to persons of Japanese descent who were wrongfully interned during World War II.

This article envisions three occurrences. First it anticipates that the United States Congress will commission a study of reparations regarding slavery and segregation as well as other discriminatory practices of the federal government against African Americans prior to 1968.[22] Secondly, the article expects that the United States Congress and one or more state legislatures will provide some form of redress for governmental race discrimination during those periods. Finally, the article foresees one or more court challenges to federal and state governmental reparations as violations of the Equal Protection Clause of the Fourteenth

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12 Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events,* 26 Bos. C. Third World L.J. 207, 248-249 (2006). This article takes no position regarding the past acts of private citizens in during the Jim Crow Era, but instead presumes a Congressional finding of culpability of the federal and state governments to blacks who lived under the racially discriminatory practices that defined the period.

13 Id.

14 Id.

15 Id.

16 See generally Dean Masaru Hashimoto, The Legacy of Korematsu v. United States: A Dangerous Narrative Retold, 4 Asian Pac. Am. L.J. 72 (1996). See Eric K. Yamamoto, Margaret Chon, Carol L. Izumi, Jerry Kang & Frank H. Wu, Race, Rights and Reparation: Law and the Japanese American Internment (2001). See also Leslie T. Hatamiya, Righting A Wrong: Japanese Americans and the Passage of the Civil Liberties Act of 1988 (1993).

17 Leslie T. Hatamiya, Righting A Wrong: Japanese Americans and the Passage of the Civil Liberties Act of 1988 (1993).

18 Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. app. §§ 1989b to b-9 (1988)).

19 See *Hirabayashi v. U.S.*, 828 F.2d 591 (1987); *Korematsu v. U.S.*, 584 F.Supp. 1406 (1984); *Hohri v. U.S.*, 847 F.2d 779 (1987); and *Hohri v. U.S.*, 793 F.2d 304 (1986).

20 *Jacobs v. Barr,* 959 F.2d 313 (D.C. Cir. 1992).

21 Roy L. Brooks, The Constitutionality of Black Reparations in *When Sorry Isn't Enough* 374, 381 (Roy L. Brooks ed., 1999).

22 Comparable action by one or more state governments serves as an additional expectation of this article.

Amendment and the Due Process Clause of the Fifth Amendment. In anticipation of each of the above, the article provides a legal analysis of legislative reparations programs under an equal protection challenge. The basis of this framework rests in the Supreme Court's jurisprudence defining the role that the government may play in addressing past racial discrimination in the context of affirmative action.[23]

At different times and in distinctive ways, legal scholars Boris Bitker, Roy L. Brooks, and Alfred Brophy have all considered the question of the constitutionality of reparations for African Americans.[24] This article builds on, expands, and updates the efforts of these scholars based on recent Court decisions under the Equal Protection Clause. Building on Brooks' identification of affirmative action jurisprudence as the proper framework for assessing reparations programs, it argues that the Supreme Court's past and most recent affirmative action jurisprudence suggests that a passable road may exist to reach constitutional reparations.[25] One of its chief contributions is its analysis of recently proposed reparations programs for constitutionality.[26] As a general matter, the article finds that reparations proposals are neither uniformly consistent nor uniformly inconsistent with equal protection requirements. Programs, instead, fall into four categories: presumptively unconstitutional, presumptively constitutional, likely constitutional and likely unconstitutional.[27] While some types of reparations programs clearly run afoul of the Court's past decisions, other types, it maintains, fall squarely within the parameters articulated by the Court. A third and fourth category describe those programs less clearly within or beyond the Court's interpretation of Equal Protection Clause requirements.

Part II of the article lays out the likely challenges to the envisioned legislation. In anticipation of likely claims by plaintiffs, this section of the article considers the probable allegations of such suits. The article introduces the standard of review that courts should use in reviewing federal and state legislative reparations in Part III; the issue is revisited in Part IV as the constitutionality of four model reparations programs is examined. Part III also explores the arguments for and against a strict scrutiny analysis for an envisioned program and the means by which strict scrutiny could be avoided. The bulk of Part III examines the Court's recent Equal Protection Clause jurisprudence and then builds a framework of the requirements likely to be required by the Court under a strict scrutiny analysis—the governing standard used by the Court when examining racial classifications by state actors. The constitutionality of a Congressional or state based reparations program is examined using strict scrutiny. This part consists of two sections. The first section articulates the compelling state interest that the Congress and state legislatures will have to show exists to enact reparations programs. As a fundamental part of the compelling interest tests, the Court places an evidentiary burden upon the Congress and state legislatures to support a claim that the programs relate to specific acts of racial discrimination. The article addresses this implicit requirement as part of its discussion of the compelling interest that the Court requires to uphold racial classifications. The second section describes the narrow tailoring and close relationship between the past discrimination and the proposed remedial program required. Part IV of the article evaluates four prototypical reparations proposals for their ability to withstand the "searching analysis" the Court is likely to apply. The article concludes by categorizing reparations programs based on their likelihood of surviving an equal protection challenge.

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23 Roy L. Brooks, The Constitutionality of Black Reparations in *When Sorry Isn't Enough* 374, 381 (Roy L. Brooks ed., 1999).

24 Boris Bittker *The Case for Black Reparations*,105-127 (1973); Al Brophy *Reparations Pro and Con*, 158-164 (2005); and Roy L. Brooks, The Constitutionality of Black Reparations in *When Sorry Isn't Enough* 374-389 (Roy L. Brooks ed.,1999).

25 Namely, *Parents Involved In Cmty. Sch. v. Seattle Sch. Dist. No. 1, et. al*, 127 S.Ct. 2738 (2007); *Grutter v. Bollinger,* 539 U.S. 306 (2003); and *Gratz v. Bollinger,* 539 U.S. 244 (2003).

26 *Infra* Part IV.

27 *Infra* note ___.

PART II LIKELY CHALLENGES

Case A – Native Americans, Latinos, Asians, Black Immigrants, etc.

Likely plaintiffs in an equal protection challenge to reparations would be racial or ethnic minorities claiming that the federal or state government had racially discriminatory policies that harmed them but that they were excluded from a congressional or state reparations scheme. This claim loosely follows the complaint in *Jacobs v. Barr*.[28] In that case, a young man interned along with his father who was a German immigrant/national claimed that he was barred from receiving reparations along with Japanese internees.[29] The Appeals Court dispensed with the case based on the conclusion that the young man's father was interned pursuant to an interview rather than a mass internment.[30] The court found that the young man was not excluded based on his race in violation of his Fifth Amendment due process rights.[31] Instead the court ruled, the young man's internment along with his father was based on a personal interview and subsequent determination that his father individually posed a threat while most other German nationals/immigrants did not.[32]

The Court will likely dispense with these claimants as long as evidentiary findings precede the development of a reparations scheme that identify particular acts of racial discrimination carried out by the federal and state governments against blacks in particular.[33] Rather than random or particular instances, findings should go to systematic exclusions or discriminatory practices carried out, authorized, or sanctioned by the federal or state governments.[34]

Case B – Whites

A white plaintiff may challenge the reparations program as a violation of their equal protection rights if racial classification is required for participation. This claim offers a greater threat than case A because it goes to legislative authority to institute a racial reparations program rather than legislative discretion to choose which victims of past governmental discrimination will be its beneficiaries. This complaint would pose the most significant challenge to reparations.

PART III STANDARDS OF REVIEW

In evaluating legislation and other state action under the Equal Protection Clause, the Court applies different levels of scrutiny.[35] Each level of scrutiny corresponds to a degree of deference exercised by the Court.[36] The use of the standard recognizes the Separation of Powers

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28 *Jacobs v. Barr,* 959 F.2d 313 (D.C. Cir. 1992).
29 *Jacobs v. Barr,* 959 F.2d 313 (D.C. Cir. 1992).
30 *Jacobs v. Barr,* 959 F.2d 313 (D.C. Cir. 1992).
31 *Jacobs v. Barr,* 959 F.2d 313 (D.C. Cir. 1992).
32 *Jacobs v. Barr,* 959 F.2d 313 (D.C. Cir. 1992).
33 *United States v. Paradise,* 107 S.Ct. 1053, 1064 (1987); *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 506 (1989).
34 *United States v. Paradise,* 107 S.Ct. 1053, 1064 (1987); *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 506 (1989).
35 *See United States v. Carolene Products,* 304 U.S. 144, 153 n. 4 (1938) (comparing levels of scrutiny); *see also Loving v. Virginia,* 388 U.S. 1, 11 (1967) (subjecting racial classifications to strict scrutiny).
36 See Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 GEO. L.J. 279, 284-85 (1997); David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. CHI. L. REV. 935 (1989); George Rutherglen, Symposium: The Jurisprudence of Justice Stevens: Panel VI: Equal Prot.: Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality, 74 FORDHAM L. REV. 2313 (2006); Daniel R. Ortiz, The Myth of Intent in Equal Prot., 41 STAN. L. REV. 1105 (1989); Samuel Issacharoff,

Doctrine.[37] Through deference to the decisions of the legislative or executive branch of government at issue, the Court respects the powers of its coequal branches. Accordingly, the Court limits its intrusion into the activities of coordinate branches.[38] Legally challenged "state action" is subject to judicial review to determine its constitutionality. In carrying out the review, the Court employs levels of scrutiny that correspond to the intensity of the Court's analysis and corresponding deference to the coordinate branches actions.[39] Actions based on race and gender classifications receive a higher level of scrutiny from the Court.[40] As a consequence, these challenged actions require more pronounced justifications to meet constitutional muster. Concern that similarly situated persons receive equal treatment from government actions rests at the core of the judicially created reviewing standards.

Rational Basis

At the lowest level, legislative and executive actions must serve a rational basis.[41] This means that classifications used must be rationally related to a legitimate state interest.[42] When the Court finds that a rational relationship exists then the challenged action meets the requirements of constitutionality.[43] The Court provides the highest level of deference to the coordinate branches under this test. In examining social or economic based actions, the Court provides wide latitude. The Constitution, in those instances, allows even unwise decisions to proceed with the presumption that the democratic process will resolve them.[44] As long as the rational relationship between a legitimate governmental interest and the challenged action exists then no equal protection violation exists.[45] When quasi-suspect classifications of people underlie government action then heightened reviews may be required.[46] The Court has also used a "second order" rational basis review when quasi-suspect classifications motivate government action.[47] This review is below an intermediate level of scrutiny but more demanding than the first order rational basis test.

Intermediate Scrutiny

When suspect classifications appear in legislation or provide the basis for executive action the Court raises the level of scrutiny. Through the increased scrutiny, the Court seeks to

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Making the Violation Fir the Remedy: The Intent Standard and Equal Prot. Law, 92 YALE L.J. 328 (1982); and Sheila Foster, Intent and Incoherence, 72 TUL. L. REV. 1065 (1998).

37 Sheila Foster, Intent and Incoherence, 72 TUL. L. REV. 1065, 1100-1103 (1998).

38 Sheila Foster, Intent and Incoherence, 72 TUL. L. REV. 1065, 1100-1103 (1998).

39 Sheila Foster, Intent and Incoherence, 72 TUL. L. REV. 1065, 1100-1103 (1998).

40 Roy L. Brooks, The Constitutionality of Black Reparations in *When Sorry Isn't Enough* 374, 381-382 (Roy L. Brooks ed., 1999).

41 *Schweiker v. Wilson,* 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 67 L.Ed.2d 186 (1981); *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 174-175, 101 S.Ct. 453, 459-460, 66 L.Ed.2d 368 (1980); *Vance v. Bradley,* 440 U.S. 93, 97, 99 S.Ct. 939, 942, 59 L.Ed.2d 171 (1979); *New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976).

42 Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws,* 42 U.C. Davis L. Rev. 195, 231 – 32 (2008) (Citing *City of Cleburne v. Cleburne Living Ctr., Inc*., 473 U.S. 432, 440 (1985).

43 *Id.*

44 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

45 *Id.*

46 *See United States v. Carolene Products,* 304 U.S. 144, 153 n. 4 (1938) (comparing levels of scrutiny); *see also Loving v. Virginia,* 388 U.S. 1, 11 (1967) (subjecting racial classifications to strict scrutiny); *Craig v. Boren,* 429 U.S. 190, 197-98 (1976) (analyzing gender-based classifications).

47 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 458 (1985).

determine whether an appropriate basis underlies the challenged governmental action.[48] Race, national origin, gender, and family status all represent suspect classifications.[49] The use of any suspect classification necessitates more intensive analysis by the Court when reviewing the actions of coordinate branches under the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment.[50] While race, national origin and similar classifications necessitate a strict analysis; gender receives an intermediate level of scrutiny.[51] The Court rejects gender-based classifications unless they are "substantially related to a sufficiently important governmental interest."[52]

Prior to *Adarand v. Pena*, intermediate scrutiny also characterized the standard of review applied to benign racial classification used by the United States Congress.[53] Under this level of review, the Court determines if an important governmental objective motivates the challenged action and if the classification is substantially related to it.[54] Based on Congresses' unique power provided by section 5 of the Fourteenth Amendment to enforce the Amendment, the Congressional action designed to address the effects of past discrimination avoided strict scrutiny analysis.[55] In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court upheld a congressional plan that used racial classifications in order to promote diversity in broadcasting. The Court applied an intermediate level of scrutiny.[56] They found that the benign race-conscious measures used by Congresses were constitutionally valid.[57] As a basis, the Court explained that they "served important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives."[58] The Court majority rejected this approach five years later in *Adarand v. Pena,* 515 U.S. 200 (1995), in favor of one standard for the review of all race based classifications.[59]

<u>Strict Scrutiny</u>

In reviewing governmental action at the state and federal level, the Court makes a "searching examination" of governmental actions employing racial classifications.[60] In *Adarand*, the Court determined that the same standard of review required for state actions employing racial classifications under the Equal Protection Clause of the Fourteenth Amendment applied to federal action under the Fifth Amendments due process clause.[61] The congressionally devised small and disadvantaged business program at issue in that case used race as a rebuttable means of showing disadvantage. Writing for the majority, Justice O' Connor wrote, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of

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48 Sheila Foster, Intent and Incoherence, 72 TUL. L. REV. 1065, 1108-1110 (1998).
49 John W. Whittlesey, *Private Judges, Public Juries: The Ohio Legislature Should Rewrite R.C.* § 2701.10 *To Explicitly Authorize Private Judges to Conduct Jury Trials,* 58 Case W. Res. L. Rev. 543, 556 (2008).
50 Sheila Foster, Intent and Incoherence, 72 TUL. L. REV. 1065, 1108-1110 (1998).
51 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-441 (1985).
52 *Craig v. Boren*, 429 U.S. 190, 197 (1976).
53 *Metro Broad. Inc. v. FCC*, 497 U.S. 547 (1990).
54 *Adarand Constructors, Inc. v. Peña*, 515 U.S., at 227, 115 S.Ct. 2097
55 *Fullilove v. Klutznick*, 448 U.S. 448 (1980).
56 *Id.*
57 *Id.*
58 *Metro Broad. Inc. v. FCC*, 497 U.S. 547 (1990).
59 The Court endorsed a uniform approach to all race conscious measures. The Court decided that Congress warranted no more deference than any other governmental body at the state or federal level. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).
60 *Adarand Constructors, Inc. v. Peña*, 515 U.S., at 227, 115 S.Ct. 2097.
61 *Id.*

judicial scrutiny."[62] This represented a significant shift for the majority which a few years earlier had upheld a congressional based program using racial classifications to promote minority ownership of the broadcast media.[63] O'Connor argued that the standard for the federal and state governments had to be the same to ensure the protection of individual rights from the improper actions of government; she held in the case that the Court needed to perform a searching examination.[64]

This analysis is necessary whenever the government uses a racial classification for a governmental program.[65] The justification is that race should never serve as the motivation for governmental action unless that action is narrowly tailored to serve a compelling governmental interest. In this section, the article considers the arguments for and against using a strict scrutiny analysis for a racially specific reparations program and the types of programs that should avoid a strict scrutiny evaluation by the courts.

The plaintiff in *Adarand* complained that they lost a subcontract because the general contractor received a financial benefit under its federal construction project for choosing a certified disadvantaged business under the Small Business Administration.[66] While the SBA program allowed disadvantaged businesses to qualify on economic and other non-racial grounds, it also included a rebuttable presumption that racial minorities were disadvantaged.[67] *Adarand* challenged that aspect of the program as a violation of the government's Fifth Amendment obligation not to deny persons equal protection under the law.[68] Specifically, *Adarand* claimed that it would have received the subcontract if the general contractor had not been financially rewarded for hiring a SBA certified disadvantaged business.[69]

The Court rejected the reasoning it applied in *Metro Broadcasting and Fullilove*, ruling that congressional programs using racial classifications required strict scrutiny to determine if they violated the Fifth Amendment of the Constitution.[70] Unlike the affirmative action program upheld in *Fullilove*, however, this program included a rebuttable presumption of disadvantage based on race. In *Fullilove,* membership in a congressionally identified racial group enabled participation in the program.[71] Some commentators took issue with this decision by the Court categorizing it as a way to derail federal government efforts to address centuries of racial discrimination through a very modest set aside program for disadvantaged businesses.[72] Others focused attention on the contemporary use of racial classifications in government programs and branded efforts to the contrary as violative of the individual protections provided by the United

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62 *Id.* at 227.

63 *Metro Broad. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997 (1990). This case followed a lengthy battle over the standard of review required for Congressionally based programs seeking to remedy past discrimination. From the Court's 1980 plurality decision in Fullilove to the 1990 majority ruling in Metro Broadcasting, in which O'Connor wrote dissenting opinions, O'Connor and others had argued for greater scrutiny for congressional action. In theory if not in practice, the Adarand decision represented one of the last nails in the coffin of federal affirmative action programs.

64 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (quoting *Wygant v. Jackson Bd. of Ed*., 476 U.S. 267, 273, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion of Powell, J.))

65 *Loving v. Virginia,* 388 U.S. 1, 11 (1967).

66 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

67 *Id.*

68 *Id.*

69 *Id.*

70 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

71 *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

72 See Alexander Koteles, Adarand: Brute Political Force Concealed As A Constitutional Colorblind Principle, 39 How. L.J. 367 (1995) and E'Vinski Davis, Adarand Constructors, Inc. V. Pena: Turning Back The Clock On Minority Set-Asides, 23 S.U. L. Rev. 79 (1995).

States Constitution.[73] To understand how courts will view a congressional reparations scheme for blacks, close attention is needed to the Courts' decisions running from *Fulliove v. Klutznick* to *Parents Involved in Community Schools v. Seattle School District*. This article surveys those cases for their relevance in evaluating the constitutionality of reparations schemes for African Americans.

The majority decision in *Adarand* written by Justice O'Connor provides important lessons that should serve as significant guidelines for a congressional reparations program for past governmental racial discrimination. Taken together with insights gained from the Court's decisions in *Metro Broadcasting v. F.C.C., Fullilove v. Klutznick, United States v. Paradise,* and other cases these lessons provide a critical framework for evaluating potential reparations programs.[74] In *Adarand*, the Court made two significant decisions that departed from its past decisions: 1) congressionally based remedial programs employing racial classifications require strict scrutiny; and 2) congressional motivation to remedy past discriminatory conduct does not change the Courts' bias against race based remedies and no longer receives the deference from the court previously recognized in Fullilove, Croson, and Metro Broadcasting.[75]

PART IV NARROWLY TAILORED TO MEET A COMPELLING STATE INTEREST

Section One

Compelling State Interests

The Court's equal protection jurisprudence articulates two distinct bases for the use of racial classifications relevant in the reparations context.[76] The Court has affirmed remediation of past discrimination and of diversity as legitimate grounds for the use of racial classifications.[77] This section examines the Courts requirements for each of the motivations and their relevance for reparations programs. The section begins with a review of the most recently affirmed basis: diversity.

The University of Michigan Law School devised an admissions program that considered race along with other factors to decide admissions.[78] The policy adopted by the school's faculty allowed the use of applicant's racial identity, along with academic ability, experience, and potential and other factors to fashion the incoming first year class.[79] A commitment to ethnic and racial diversity in addition to other types of diversity was an express feature of the challenged policy, which included a "special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics, and Native Americans."[80] Without the commitment, the policy noted, students from the aforementioned groups might not be represented in the student body at meaningful levels.[81] Accordingly, the Law School sought to maintain a critical mass of underrepresented minorities in

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73 See L. Darnell Weeden, Creating Race-Neutral Diversity in Federal Procurement in a Post-Adarand World, 23 Whittier L. Rev. 951 (2002) and George R. La Noue & John C. Sullivan, Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences, 41 Santa Clara L. Rev. 103, 159 (2000).

74 *See Metro Broad. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997 (1990); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United States v. Paradise*, 107 S.Ct. 1053 (1987).

75 *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995).

76 *Grutter v. Bollinger*, 539 U.S. 306 (2003) "But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination." 539 U.S. 306, 328 (2003).

77 *United States v. Paradise,* 107 S.Ct. 1053, 1064 (1987);*Grutter v. Bollinger,* 539 U.S. 306 (2003).

78 *Id.* at 315-316.

79 *Id.*

80 *Id.* at 316.

81 *Id.*

implementing its policy in order to cement those students ability to make particular contributions to the Law School's character."[82] Using educational benefits as its justification, the Law School maintained that diversity enhanced the education of its students through the increased exposure to the range of perspectives that it allowed.[83]

Foremost, the Court's analysis required a determination of whether the Law School had a compelling interest in the attainment of a racially diverse class. To make its determination the Court deferred to the school's educational judgment and the evidence presented that the school's admissions policy promoted "cross-racial understanding," helped to break down stereotypes, and enhanced students' ability to understand people of different races.[84] Amici played a prominent role in the Court's decision.[85] Parties ranging from the Association of American Law Schools to Fortune 500 companies and the United States Military petitioned the Court to emphasize the critical role of diversity in developing future leaders of American society.[86] Drawing from these diverse sources along with educational studies and the Law School's expert's, the Court held that the Law School had a compelling state interest in the attainment of a diverse student body. Four years later, the Court's holding in Grutter would be tested at the primary and secondary levels of two state public school systems.

In *Parents Involved*, the Court assessed the constitutionality of two school assignment and transfer programs employing racial classifications.[87] The challenged program from Seattle used students' race in an effort to achieve and promote diversity in its ten public high schools. Although the school system allowed incoming ninth graders to select preferred schools, when the demand for a school exceeded the spaces available the school system used a series of tiebreakers—the second of which considered the students race and the racial makeup of the school selected.[88] Under the program, students were classified as white or non-white.[89] Oversubscribed schools were assessed to ascertain if they were integration positive or negative.[90] Integration positive schools accepted whites or nonwhites under the racial tiebreaker who otherwise may have been denied a space.[91] The Jefferson County program in Kentucky set guidelines for the racial makeup of its non-magnet public schools.[92] The guidelines set black student enrollment at a minimum of 15 percent and a maximum of 50 percent.[93] Assignment requests for students to schools at either extreme risked denial if the student's race would place the school outside the Jefferson County Public Schools' guidelines.[94] The program applied to both initial student assignments and student transfer requests.[95]

In assessing the two cases, the plurality rejected the defendants' claims that a compelling state interest existed to attain diversity in their public schools.[96] The Court stated:

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82 *Id.*
83 *Id.* at 319-320.
84 *Id.* at 330.
85 *Id.* at 331 – 333.
86 *Id.*
87 *Parents Involved In Cmty. Sch. v. Seattle Sch. Dist. No. 1, et. al*, 127 S.Ct. 2738 (2007).
88 Sibling attendance and geographical proximity represented the first and third tiebreakers.
89 *Parents Involved In Cmty. Sch. v. Seattle Sch. Dist. No. 1, et. al,* 127 S.Ct. 2738, 2746-2748 (2007).
90 *Id.*
91 *Id.*
92 *Id.* at 2749-2750.
93 *Id.*
94 *Id.*
95 *Id.* The plaintiff parent was denied a transfer request for her son to attend kindergarten at a school a mile of her home rather than school by the district ten miles away.
96 *Id.* at 2758-2759.

> The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity." While the school districts use various verbal formulations to describe the interest they seek to promote--racial diversity, avoidance of racial isolation, racial integration--they offer no definition of the interest that suggests it differs from racial balance.[97]

The Court distinguished the school system programs from the plan upheld in *Grutter v. Bollinger* based on the use of race as one of many equally weighted factors used in fostering diversity at the University of Michigan Law School.[98] Unlike *Grutter*, the Court found that the challenged systems before it rested solely on students' racial identity—an impermissible basis according to the plurality.[99]

Reminiscent of Powell's opinion in *Regents of University of California v. Bakke*, Justice Kennedy did not concur in the plurality's rejection of racial diversity/racial integration as a compelling state interest for primary and secondary education.[100] In a separate opinion on this issue distinct from the majority and the dissent, Kennedy decides, "In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition."[101] At the core of Kennedy's concurrence is his determination that racial diversity can serve as a compelling governmental interest for public school systems to use racial classifications when sufficiently tailored to comply with the strictures of Grutter.[102]

The dissent also found that a compelling state interest existed in the case to promote "racial integration."[103] Together with the dissent, Kennedy's concurrence creates a majority of justices who affirm student diversity as a compelling state interest to use racial classifications among other factors in primary and secondary school assignment and transfer plans.[104] In conjunction with the Courts earlier decision in *Grutter, Parents Involved* recognizes a compelling state interest in promoting diversity in education.[105] This conclusion may have substantial ramifications for some types of reparations programs. We will explore the significance of these determinations below, after considering the Court's longstanding recognized compelling state interest in remedying past discrimination.

The Court has consistently recognized that the states and the federal governments have a compelling interest in remedying specific instances of past discrimination.[106] In *United States v. Paradise*, decided one term before *Richmond v. J.A. Croson Co.*, the Court held that a state promotion plan that required that fifty percent of state trooper promotions be awarded to qualified black candidates was justified by a compelling governmental interest in remedying past discrimination in the Alabama Department of Public Safety.[107] The Court found that, "The Government unquestionably has a compelling interest in remedying past and present

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97 *Id.* at 2759.
98 *Id.* at 2753-2754.
99 *Id.* at 2757-2759.
100 *Regents of University of California v. Bakke,* 438 U.S. 235 (1978); *Parents Involved,* 127 S.Ct. 2738 (2007).
101 *Parents Involved*, 127 S.Ct. 2738 at 2792 (2007).
102 *Id.*
103 *Id.* at 2820. The dissent also finds that the plans were sufficiently constrained in their design to comply with the requirements of strict scrutiny as well.
104 *Parents Involved,* 127 S.Ct. 2738 at 2790-2791 (2007) (Justice Kennedy, concurring in part and concurring in the judgment).
105 *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).
106 *Parents Involved,* 127 S.Ct. 2738 (2007); *Grutter,* 539 U.S. 306 (2003).
107 *United States v. Paradise*, 107 S.Ct. 1053 (1987); *Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989).

discrimination by a state actor."[108] In the case, the Court upheld a District Court Order requiring the plan in order to remedy decades of racial discrimination in hiring found by the District Court.[109]

The Court elaborated the limits of governmental interests in developing a state program intended to remedy past discrimination in *Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989).[110] The City of Richmond, Virginia sought to remedy what it identified as decades of racial discrimination in the construction industry.[111] Upon review of the record, the Court concluded that, "none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry."[112] Instead, the Court found that the record evidence only demonstrated past societal discrimination and that no compelling state interest to remedy such discrimination warranted the use of racial classifications.[113] In this regard, the Court focused its concern on the evidentiary basis presented to support the city's plan.[114]

Congressional findings in *Fullilove v. Klutznick* showing nationwide discrimination in the construction industry represented one of the bases that Richmond depended on in justifying its minority set aside program.[115] In reviewing the record, the Croson Court determined that the plan lacked any testimony of specific acts of racial discrimination in Richmond itself.[116] Statistical evidence presented by the city that showed the limited participation of blacks and other non-white racial groups was rejected by the Court as not being probative because it compared city population levels to representation in the construction industry—an improper comparison, the Court found, to show discrimination.[117] Rather, the Court noted, statistical comparisons must be made to the qualified applicant base to make a *prima facie* showing of racial discrimination.[118] Ultimately, the Court rejected the District Court's determination that record evidence supported the city's determination that past racial discrimination had impacted the number of minority contractors in Richmond.[119]

Meeting the compelling state interest requirement to support reparations may proceed along either of the preceding paths—diversity or remedy—each with its own risks.

Section Two

Narrowly Tailored Program Requirements

Even when a government actor can show a compelling state interest for a challenged action, the Court will require that actions utilizing racial classifications be narrowly tailored.[120] To meet this obligation, the Court looks to a series of factors including, "the necessity of the

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108 *United States v. Paradise,* 107 S.Ct. 1053, 1064 (1987).
109 *Id.* at 1066.
110 *Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989).
111 *Id.*
112 *Id.* at 506.
113 *Id.*
114 *Id.* at 498-506.
115 *Id.* at 504. In *Fullilove*, the Court upheld a federal plan, which required that no less than 10% of federal funds for local public works projects are used by state grantees to obtain services or supplies from minority businesses. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980).
116 *Richmond,* 488 U.S. at 504 (1989).
117 *Id.*
118 *Id.* at 502-503.
119 *Id.* at 503-504.
120 *Parents Involved*, 127 S.Ct. 2738 at 2790-2791 (2007) (Justice Kennedy, concurring in part and concurring in the judgment).

relief and efficacy of alternative remedies; the flexibility and duration of the relief...and the impact of the relief on the rights of third parties."[121] The Court will inspect proposed programs for constitutionality using these and other criteria, as appropriate, to ensure the "the most exact connection between justification and classification."[122] Demonstrating that a proposed reparations program has been narrowly tailored arguably represents the most substantial challenge to the constitutionality of legislative reparations programs. Since attaining diversity, in some limited contexts, and remedying specific acts of past discrimination have both been recognized as compelling governmental interest, legislative reparations programs likely face their greatest hurdle in persuading the Court that a particular program is sufficiently constrained in its scope, duration, and impact on non-beneficiaries.

In Grutter, the Court made a detailed analysis of the University of Michigan Law School's use of racial classifications in its admissions program.[123] Its analysis provides a framework for evaluating programs consistency with constitutional constraints the Court requires under the Equal Protection Clause of the Constitution. The Court identified four critical elements of the admissions plan that marked its constrained approach to attaining diversity: individualized consideration to applicants irrespective of race[124]; assurance that all factors contributing to diversity are meaningfully considered along with race[125]; good faith consideration of workable race-neutral alternatives to achieve diversity[126]; and no undue harm to members of any racial group[127].

The Court repeatedly emphasized the flexibility of the program as a hallmark of its approach.[128] Programs that employ rigid racial measures that reduce individuals to a racial identity lack the dexterity needed under the Court's analysis.[129] In contrast, the Court found that the University of Michigan considered each applicant in a competitive process irrespective of his or her racial identity.[130] Using this process, the numbers of racial minorities in the applicant pool "differed substantially" from the numbers enrolled and "varied considerably" for each racial group yearly.[131] This indicated to the majority that the program avoided racial balancing disfavored by the Court.[132]

The Law School also demonstrated to the Court that non-racial diversity received meaningful consideration through its frequent admission of non-racial minority applicants with test scores and grades below those of other applicants who are rejected from across the racial spectrum.[133] "The Law School does not, however, limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity" the Court explained.[134] This flexibility in the program persuaded the Court that race represented one of many factors that the school used to fulfill its compelling interest to attain a diverse class rather than an impermissible motive.[135]

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121 *United States v. Paradise*, 107 S.Ct. 1053, 1066 (1987).
122 *Parents Involved*, 127 S.Ct. 2738 at 2752 (2007) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)).
123 Grutter v. Bollinger, 539 U.S. 306, 334-343 (2003).
124 *Id.* at 336-337.
125 *Id*. at 337-338.
126 *Id.* at 339-340.
127 *Id.* at 341.
128 *Id.* at 334.
129 *Id.* at 335.
130 *Id.* at 337.
131 *Id.* at 336.
132 *Id.*
133 *Id.* at 338.
134 *Id.*
135 *Id.* at *328.*

The consideration of race neutral alternatives drew the Court's attention in *Parents Involved* as well as *Grutter* though with different results.[136] In *Parents Involved,* the Court determined that the school districts, "failed to show that they considered methods other than explicit racial classifications to achieve their stated goals."[137] Distinguishing the case from *Grutter*, the Court noted the relative insignificance of the transfer programs in determining the racial diversity of the schools.[138] Justice Kennedy, in his concurrence in the case, stated that non-racial approaches would have proven equally effective in achieving diversity in the districts reviewed.[139] The districts' failure to consider non-race based alternatives to achieve their diversity goals colored the Court's review of their programs and its ultimate determination that they were not sufficiently constrained to comply with the Court's strict scrutiny analysis.[140] Grutter, in contrast, included a longitudinal analysis of admissions over a five year period that assessed the effect of a race neutral admissions policy on the University of Michigan Law School's ability to attain its diversity goal.[141] Moreover, because the school's goal was diversity across a range of factors beyond race, several race-neutral alternatives were ruled out as incompatible with the school's goal of attaining diversity while maintaining its commitment to academic selectivity.[142]

The potential harm that a program will cause to non-beneficiaries is also examined under the Court's strict scrutiny analysis.[143] In *Grutter*, the Court found that the law School's diversity program did not unduly harm non-minority applicants because "it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants."[144] In the diversity context, the potential for undue harm flows from the winners and losers created by government programs. When race determines the outcome, rather than serving as one of many factors, the Court may find too great a burden placed on non-beneficiaries.

Richmond v. J.A. Croson provides a sustained examination of a program intended to remedy past discrimination.[145] In its strict scrutiny analysis, the Court closely reviewed the program details to determine its constitutional legitimacy. This section considers the Court's analysis articulated in *Croson* to elaborate the parameters of a narrowly tailored remedial program under strict scrutiny. The City of Richmond based the challenged program in Croson on the federal program approved by the Court in *Fullilove v. Kluznick*.[146] Beyond statistical data revealing the dearth of minority contractors in the construction industry, the Court found little evidence specific to the city underlying its program.[147] This had significant ramifications for the Court's analysis of the constitutionality of the proposed remedy.[148] The Court remarked, "it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way."[149] Two of the factors used to assess whether programs show sufficient constraints, nonetheless, received the

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136 *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003), *Parents Involved*, 127 S.Ct. 2738 at 2760 (2007).
137 *Parents Involved*, 127 S.Ct. 2738 at 2760 (2007).
138 *Id.*
139 *Id.* at 2792-2793 (Justice Kennedy, concurring in part and concurring in the judgment).
140 *Id.* at 2759-2760.
141 *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003). The Law School's expert forecast a decrease of 10% or more in the number of underrepresented racial minorities if race-neutral criteria were used.
142 *Id.* at 340.
143 *United States v. Paradise*, 107 S.Ct. 1053, 1066 (1987).
144 *Grutter v. Bollinger*, 539 U.S. 306 at 341 (2003).
145 *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 507-511 (1989).
146 *Id.* at 504.
147 *Id.* at 506.
148 *Id.* at 507.
149 *Id.*

Court's attention—the consideration of race neutral alternatives and the flexibility of the relief.[150]

The Court stated that Richmond did not appear to have considered any race-neutral alternatives.[151] The Court went on to show the impact of the City's failure to consider alternatives, noting the absence of record evidence to the contrary.[152] The majority identified several race neutral alternatives to Richmond's program.[153] These alternatives, it maintained, could all effectively increase minority participation without using racial classifications.[154]

In contrast to the federal plan upheld in *Fullilove v. Klutznick*, setting aside 10% of federal construction grants to minority contractors[155], the Richmond Plan required that party's awarded prime contracts with the city award 30% of the subcontracts to minority businesses.[156] In further distinction from the federal plan, the Richmond Plan only allowed waivers when minority contractors were "unavailable or unwilling to participate"[157] while the federal plan allowed a waiver when a minority contractor charged a price "that was not attributable to the present effects of prior discrimination."[158] "The 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing" the Court determined.[159] The Court found that the Plan's rigid quota and inattention to race neutral measures are inconsistent with a narrowly tailored approach.[160]

The Court raised an additional concern regarding the proposed remedy important for our purposes. Based on the wide range of beneficiaries, under the Plan, the Court expressed concerns of over inclusivity. Because minority groups could benefit who had not been shown to have suffered past discrimination in the Richmond construction industry, the Court expressed misgivings about the "remedial" nature of the challenged program.[161] The Court elaborated:

> Under Richmond's scheme a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.[162]

Implicit in the Court's concern is the perceived benefit that minority contractors will disproportionately gain over white contractors. Despite the fact that minority contracts were less than one percent for all of the minority groups combined for the preceding five year period and that blacks made up fifty percent of Richmond's residents, the Court showed that excluding white contractors from competition for a set percentage of contracts without specific evidence of past discrimination placed what the Court viewed as an unacceptable burden on white contractors

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150 *Id.* at 507-508.
151 *Id.*
152 *Id.* at 507-510.
153 *Id.* at 509 - 510.
154 *Id.*
155 *Id.* at 487.
156 *Id.* at 477.
157 *Id.* at 478-479.
158 *Id.* at 489.
159 *Id.* at 508.
160 *Id.* To the majority, the Richmond City Council's support of the plan seems to have represented racial politics. The opinion conspicuously notes that blacks held five of nine council seats and that it passed by a vote of 6 to 2 with one councilman abstaining. Defending the heightened scrutiny applied, the majority writes "A law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature" (quoting John Hart Ely, The Constitutionality of Reverse Racial Discrimination). Id. at 496.
161 *Id.* at 506.
162 *Id.* at 508.

limited to the remaining 70% of contracts.[163] The Court makes clear in the case that a program that distributes burdens and benefits based on race does not meet strict scrutiny requirements unless the racial benefits correspond to specific racial discrimination identified in the record.[164] The burden of this obligation rests upon the government to justify its use of racial classifications.[165]

PART V REPERATIONS PROPOSALS REVIEWED

The article considers four types of reparations programs in this part: social transformation (bottom up programs)[166]; community/institution building (trust based programs)[167]; opportunity based [168](financial support programs); and individual compensation.[169] Maxine Burkett and Alfred Brophy each propose social transformation based reparations programs.

Social Transformation Based Reparations

Social transformation programs focus on an American vision that addresses the longstanding challenges of race and class subordination. Advocates of this approach have not typically specified how such a reparations program would function.[170] However, a commitment to poverty elimination and racial justice represent common themes. Likely programs under this approach would arguably include more robust government programs to fund college education on the basis of financial need, increased funding for education at the primary and secondary level, a commitment to a living wage, and universal health care.[171] Depending on how social transformation programs are structured they may completely avoid significant constitutional analysis receiving only a rational basis review.[172] Programs based on financial criteria do not implicate equal protection concerns and will only be examined for their rational relationship to a

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163 *Id.* at 508-510.
164 *Id.*
165 *Parents Involved In Cmty. Sch. v. Seattle Sch. Dist. No. 1, et. al*, 127 S.Ct. 2738 at 2789 (2007). (Justice Kennedy, concurring in part and concurring in the judgment).
166 Maxine Burkett*, Reconciliation and Non-Repetition: A New Paradigm for African-American Reparations,* 86 Or. L. Rev. (2007); Eric Yamamoto*, Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America (2000); Alfred* L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery,* 58 N.Y.U. Ann. Surv. Am. L. 497 (2003).
167 Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. Third World L.J. 429 (1998); Roy L. Brooks, *Atonement and Forgiveness*: A New Model for Black Reparations (2004); Carlton Waterhouse, *A Series of Unfortunate Legal Events*, 26 Bos. C. Third World L.J. 207 (2006); Manning Marable *In Defense of Black Reparations*' -- Part Two of Two available at http://www.freepress.org/columns/display/4/2002/485 (October 9, 2002).
168 Charles Ogletree, *Repairing The Past: New Efforts In The Reparations Debate In America*, 38 Harv. C.R.-C.L. L. Rev. 279, 307 (2003), Randall Robinson, *The Debt: What America Owes to Blacks*, 244-245 (2000).
169 *See* Alfred Brophy, *Reparations Pro and Con*, 173-175 (2006) (discussing different reparations plans). *See also* James Hackney, *Ideological Conflict, African American Reparations, Tort Causation And The Case For Social Welfare Transformation*, 84 B.U. L. Rev. 1193 (2004) (discussing the relationship between reparations plans and political ideology).
170 See generally, Maxine Burkett*, Reconciliation and Non-Repetition: A New Paradigm for African-American Reparations,* 86 Or. L. Rev. 99 (2007); Eric Yamamoto*, Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America* (2000)*;* Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery,* 58 N.Y.U. Ann. Surv. Am. L. 497 (2003). *See also* Robin D.G. Kelly, A Day of Reckoning in *Redress for Historical Injustices in the United States: On Reparations for Slavery, Jim Crow, and Their Legacies* 218 (eds. Michael Martin and Marilyn Yaquinto, 2007).
171 See Alfred Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U Ann. Surv. Am. L. 497, 555. Maxine Burkett, Reconciliation and Nonrepetition, 86 Or. L. Rev. 99, 156 (2007).
172 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

legitimate state interest.[173] However, Brophy and Burkett suggest some racial component to these programs as well.[174] If some program beneficiaries qualify for funding or other government benefit based on race rather than financial need then the program will require strict scrutiny analysis under *Adarand v. Pena*.[175] In that case, the government provided benefits for disadvantaged businesses—allowing race to serve as a presumption of disadvantage.[176] While the Court did not decide the case itself, it did hold that the congressional program was subject to strict scrutiny overturning *Metro Broadcasting v. F.C.C.* and remanding the case to the lower court.[177]

A multiracial reparations agenda focused on social transformation that provides benefits to disadvantaged whites as well as African Americans and other racial minorities will have to be narrowly tailored to meet a compelling governmental interest.[178] The Court's first question for such a program would be whether the government had demonstrated a compelling interest in the program.[179] In that respect, the Court would look to some findings by the Congress or a state legislature to support the program.[180] It is not clear what social transformation advocates would envision as the likely basis of such programs, but if they look to the history of racial discrimination against minority groups they may point to findings of specific government mistreatment of racial minorities or even use statistical evidence of disparity in particular aspects of society to support special benefits. With adequate evidence, the Court may find a compelling government interest to use racial classification to remedy past discrimination.[181]

Two challenges come to mind under this approach, nonetheless. If slavery, race discrimination, and poverty are equally included in the bases of social transformation programs then the motivation of the programs seems disjointed. Would the federal or state governments place slavery, Jim Crow, and other forms of racial discrimination, along with poverty as coequal reasons for the program? The inclusion of poverty as general category on a non-racial basis arguably contradicts a motivation to remedy past discrimination, especially since the largest group of beneficiaries would likely be white. Additionally, the extension of benefits to disadvantaged whites, slave descendants, and members of other racial groups simultaneously does not immediately suggest a common nexus. Even if the Court found a compelling interest to remedy the effects of slavery and acts of governmental discrimination, contemporary disadvantage experienced by whites and even the past racial discrimination against other racial minorities seem attenuated from that motivation. The Court's decision in Croson makes clear that findings need to support programs under a strict scrutiny analysis.[182] The nature of findings that would unify the government's interest in remedying past racial discrimination, slavery and contemporary disadvantage for whites is difficult to envision. Basing the program on past racial discrimination by government actors or identified social discrimination in an industry or area would allow for a multiracial legislative program to remedy past discrimination. This would fall short, however, of the social transformation vision of reparations, which requires that class and racial issues be addressed through such programs.

The Court's strict scrutiny requirements also require that government action using racial classifications be narrowly tailored. Social transformation based reparations intentionally seek

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173 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

174 See Afred Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U Ann. Surv. Am. L. 497, 555 (2003). Maxine Burkett, Reconciliation and Nonrepetition, 86 Or. L. Rev. 99, 156 (2007).

175 *See* Alfred Brophy, *Reparations Pro and Con* 159 (2006).

176 *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995).

177 *Metro Broad. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997 (1990).

178 *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995).

179 *Supra* Part IV.

180 *Richmond v. J.A. Croson Co.,* 488 U.S. 469,506 (1989).

181 *United States v. Paradise,* 107 S.Ct. 1053, 1064 (1987).

182 *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 506 (1989).

the broadest base of recipients possible both to address the significant class and racial injustices extant in society and to promote a broad political spectrum. Narrowly tailoring such programs to remedy past discrimination, however, may prove as difficult as establishing a compelling governmental interest for their creation. To the degree that reparations for social transformation provide benefits to a cross racial group of individuals who are united by their current disadvantage based on race or class rather than past discrimination, proposed programs seem outside of the Court's definition. In *Croson*, the Court expressed particular dismay over the City's inclusion of Alaskan Aleuts and other racial minorities in the Richmond plan without any identified or likely history of past discrimination in the City.[183] Social transformation programs that lump disadvantaged whites, African Americans, and other racial minorities together will risk the same concerns.[184] A program based on disadvantage irrespective of race would fare much better under the Court's searching analysis, as it looks specifically to race neutral alternatives available to serve the asserted governmental interest. [185] In the alternative, a program that benefited an assortment of racial groups who suffered identified past discrimination by government or other actors would fall more squarely within the Court's requirements for program constraints closely tied to remedial goals.[186] Social transformation programs that intend to remedy past discrimination while also addressing poverty or class disparity on a non-racial basis will likely run afoul of the Court's view of the Equal Protection Clause requirements. The same programs may fair differently if presented on the basis of diversity.

Federal or state government programs benefiting individuals based on a desire to promote diversity in education, business, or otherwise fit more readily into the Court's equal protection requirements. In Grutter, the Court recognized attaining diversity in higher education as a compelling governmental interest.[187] Following the Court's approach in Grutter, state legislatures could work in conjunction with state universities to develop the type of reparations program envisioned by those seeking social transformation through revised admissions criteria.[188] These types of programs could broaden access to higher education through admissions decisions as well as scholarship and low interest loan and loan forgiveness programs. In the educational sphere, Grutter would seem to allow diversity based reparations programs that would benefit under represented racial minorities as well as disadvantaged white students.[189] Any proposed programs would nonetheless have to meet the Court's requirement that they be narrowly tailored to meet a compelling governmental interest. Public colleges and universities, the state legislatures, or each would need to provide a basis for implementation of the proposed program through findings like those of the University of Michigan Law School that the failure to consider race would significantly decrease the number of underrepresented racial minorities attending the state schools.[190] Like the University of Michigan program, schools and the legislature will have to show that race represents one of many factors considered by decision makers.[191] To support such a showing, program administrators may need to demonstrate that white disadvantaged students are admitted over some underrepresented racial minorities as with the University of Michigan program.[192] Additionally, program implementation can strive for flexible targets to reach a critical mass of students but not rigid goals.[193] Racial balancing has

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183 *Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989).
184 *Id.*
185 *Id.*
186 *Id.*
187 *Grutter v. Bollinger*, 539 U.S. 306 (2003).
188 *Id.* at 340-341.
189 *Id.* at 340-341.
190 Failure to tailor the program to the context and history at a particular school may open up a challenge.
191 *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).
192 *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003).
193 *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

been resoundingly and repeatedly rejected by the Court as a basis for racial classifications. Program designers will have to convincingly demonstrate a commitment to diversity on a wide range of criteria rather than racial balancing.[194]

While school admissions programs can readily follow the University of Michigan Law School model, the applicability of the Michigan model to scholarship or loan related programs was not addressed by the Court. Scholarship funds limited to students based on diversity would seem permissible under Grutter as long as diversity was defined in the broad terms applied to admissions.[195] Federal or state legislators seeking to make funds available to students from disadvantaged racial groups along with other students in order to help promote diversity in higher education could potentially do so under Grutter by making funds available to a wide range of students across racial groups. Through the use of criteria that ensured fund distribution well beyond racial identity, a diversity based social transformation reparations program could make significant strides toward increased college attendance and graduation in the society.

Beyond education, the Court also addressed the issue of diversity in Metro Broadcasting v. FCC.[196] Applying intermediate scrutiny, the Court found that a program to allow distress sales to minority media firms served an important governmental interest.[197] The dissent by Justice O'Connor took issue with the standard applied and the conclusion reached by the Court.[198] With regards to the use of racial classifications she maintained:

> In both the challenged policies, the FCC provides benefits to some members of our society and denies benefits to others based on race or ethnicity. Except in the narrowest of circumstances, the Constitution bars such racial classifications as a denial to particular individuals, of any race or ethnicity, of 'the equal protection of the laws.' [citations omitted] The dangers of such classifications are clear. They endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.[199]

However, the dissent also contended that modern equal protection jurisprudence had only recognized remedying the effects of past racial discrimination as sufficient warrant for the governmental use of racial classifications.[200] Despite O'Connor's rejection of this limited approach to equal protection in her majority opinion in Grutter, [201] it is unknown whether a majority of the current Court would recognize a compelling state interest in achieving diversity beyond the educational sphere; it seems unlikely. While a program limited to the disadvantaged as measured by neutral criteria irrespective of race would satisfy the Court's concerns, race neutral criteria used to aid the most disadvantaged of the society would fail to qualify as reparations in the eyes of many.

Yet, the Court's recognition of a compelling state interest other than the remediation of the effects of past racial discrimination in Grutter may suggest a comparable extension to various aspects of the society where racial minorities are substantially underrepresented. A reparations program focused on social transformation and modeled closely on the approach taken by the University of Michigan would have the best chance of surviving a constitutional challenge. Those sponsoring and defending such a program would have to meet two significant hurdles. If the program's intent is diversity then some criteria or preexisting mechanism will be needed to

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194 *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003).
195 *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003).
196 *Metro Broad. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997 (1990).
197 *Metro Broad. v. FCC,* 497 U.S. 547, 110 S.Ct. 2997 (1990).
198 *Metro Broad. v. FCC,* 497 U.S. 547, 603 (1990).
199 *Metro Broad. v. FCC,* 497 U.S. 547 at 603 (1990).
200 *Metro Broad. v. FCC,* 497 U.S. 547, 613-614 (1990).
201 *Grutter v. Bollinger*, 539 U.S. 306 (2003).

ensure that non-racially disadvantaged persons participate as well.[202] In Grutter, one admissions process served to determine who would be admitted.[203] Diversity represented only one among multiple criteria.[204] A reparations program following the Grutter model would have to distribute benefits to a range of beneficiaries and not just the racially disadvantaged.[205] This may correlate with the social transformation approach to reparations; curiously, as described above the program resembles the statutory provisions at issue in Adarand though the basis in Adarand was remediation rather than diversity. Nonetheless, the Court never determined if the program was sufficiently constrained to meet strict scrutiny—remanding the case for factual determination—so it remains unclear whether the current Court would allow such a program on remedial, much less, diversity grounds. In light of the Court's rejection of the diversity rationale in *Metro Broadcasting* as racial balancing, and the plurality's recent inveigh against diversity as a rationale in secondary and primary education, in Parents Involved, a reparations program that allocates contracting or other commercial opportunities based on racial identity in order to promote diversity arguably falls well outside of the Court's view of constitutional programs.[206] As described, this program would be presumptively unconstitutional.

To pass constitutional muster, a diversity program in the commercial sphere should employ race neutral criteria favoring persons from disadvantaged backgrounds irrespective of race.[207] If race was replaced by economic disadvantage as qualifying criteria, the program would redistribute social benefits to the disadvantaged of the society as desired by social transformation advocates. Racial diversity, however, may significantly decrease among beneficiaries. One likely result would be diminished or possibly negligible representation of African Americans among beneficiaries.[208] Such an outcome would still work toward social transformation but would strain the programs relationship to its ostensible motivation—America's history of slavery and Jim Crow discrimination against blacks—to dissolution. In effect, under such a program the question for advocates may become whether racial diversity or a Rawlsian vision of distributive justice rests at the core of the approach.[209]

Community/Institution Building Reparations Programs

Roy L. Brooks and Robert Westley represent chief advocates of community/institution building reparations programs.[210] Each has argued for a reparations program for African

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202 *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003).
203 *Grutter v. Bollinger*, 539 U.S. 306, 315-316 (2003).
204 *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).
205 *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003).
206 Higher education has unique features which may be used to explain the Grutter decision that are absent from the commercial sphere.
207 To conform to the requirements of Grutter broad diversity including race, class, gender, geography, etc., would need to be combined with some "neutral" criteria to evaluate candidates. For contract preferences such as those at issue in Adarand or special purchase options like those at issue in Metro Broadcasting, the Court would have to decide if market participants who do not qualify for the program should have to bear the burden of racial classifications as a criteria used in administering the program. To qualify under Grutter, the program would arguably have to expand a group of participants qualifying on nonracial criteria to include a more diverse group of participants. A state legislature or the United States Congress could develop a program to support diversity in government contracting; it is unclear whether the Court would extend the Grutter rationale beyond the educational sphere.
208 Competition with the large numbers of economically disadvantaged whites and Latinos along with other candidates makes this very likely.
209 See John Rawls, *A Theory of Justice* (1971) (advancing a theory of distributive justice based).
210 The author has also proposed institution building reparations in previous works. See *A Series of Unfortunate Events*, 26 B.C. Third 207 (2006).

Americans using a trust fund to build up black communities.[211] For Brooks, Westley, and others, community building reparations focus on investments into black communities that improve the educational, economic, and other opportunities that community members have available to them.[212] Through community development programs, supporters seek to remedy economic, educational, and other forms of racial disparity facing African Americans.[213] These disparities can be traced back to Jim Crow segregation, if not slavery, in the view of most commentators discussing African American reparations; trust funds represent a way to redress economic, educational, and other harms at the community rather than the individual level.[214]

Brooks and Westley each propose a governmental disbursement to a nongovernmental trust fund that would be used for community development—improving the quality of schools and supporting the development of black businesses. Although this format avoids the traditional equal protection challenges raised when governments show preferences to individuals in college admissions or government contracting opportunities, the distribution of government monetary resources to a trust that discriminates based on race could raise equal protection concerns. Whether or not such a program violated the Equal Protection Clause would depend upon the details of the program itself and the trust. In this section, I consider how a race neutral program and a race specific program would fare when viewed as quasi-governmental organizations.

A race neutral reparations trust fund would operate to further community development without establishing racial preferences for carrying out its activities. The NAACP provides one of many examples of organizations committed to equality for all Americans that is multiracial and non discriminatory in its approach to its mission. The organization which began as a multiracial coalition continues this approach today. Its employment policy, below, reflects its commitment to nondiscrimination:

> This policy states NAACP's position on discrimination. This policy applies to all NAACP employees, volunteers, members, clients, and contractors. The NAACP does not discriminate on the basis of race, creed, color, ethnicity, national origin, religion, sex, sexual orientation, gender expression, age, height, weight, physical or mental ability, veteran status, military obligations, and marital status. This policy also applies to internal promotions, training, opportunities for advancement, terminations, outside vendors, organization members and customers, service clients, use of contractors and consultants, and dealings with the general public.[215]

Because of its mission, the organization's services and advocacy focus upon the needs of racial minorities but its approach to doing so rejects racial exclusion and discrimination. A reparations trust following the same approach could avoid equal protection concerns even if it was considered a quasi-governmental entity. If the fund focused upon correcting educational, economic, and political disparities between African Americans and other groups without discriminating in its hiring and contracting it could provide a range of services and benefits to African American communities to enhance the quality of education, employment opportunities,

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211 Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. Third World L.J. 429, 470 (1998); Roy L. Brooks, *Atonement and Forgiveness*: *A New Model for Black Reparations* (2004).

212 Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. Third World L.J. 429 (1998); Roy L. Brooks, *Atonement and Forgiveness*: A New Model for Black Reparations (2004).

213 Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. Third World L.J. 429 (1998); Roy L. Brooks, *Atonement and Forgiveness*: A New Model for Black Reparations (2004).

214 Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. Third World L.J. 429, 470 (1998); Roy L. Brooks, *Atonement and Forgiveness*: A New Model for Black Reparations (2004).

215 http://www.naacp.org/about/jobs/index.htm

and political representation available to community residents without violating the principles of the Equal Protection Clause.[216]

Arguably, challenges to these types of programs would need to show that the organization discriminated in its membership or employment practices to violate the Equal Protection Clause or excluded community residents from benefits based on their race. A focus upon aiding particular communities' needs—in this case communities disadvantaged by America's legacy of slavery and segregation—should not trigger equal protection concerns even if the fund was a quasigovernmental body subject to equal protection under the state action doctrine.[217] Aid to public and private community schools through funding, volunteer service, or equipment donation by a reparations trust fund would keep within safe distance from equal protection concerns. Likewise, nonpartisan political education programs, activities, events, and community organizing open to all community members regardless of race should not trigger Fourteenth or Fifth Amendment constitutional concerns. Economic based programs could pose a more significant issue but not necessarily. Low interest business loans, management consultation, business and marketing plan assistance, as well as micro loan services made available to local businesses employing community residents and creating management or career development opportunities for local residents could be provided on a non-racial basis. All of the above programs ostensibly fit within community building programs advocated as a means of reparations.[218] Through a focus upon community membership rather than the racial identity of program participants one or more trust funds established to support these programs would comply with Equal Protection Clause requirements under the state action doctrine. If challenged, a trust sponsoring these programs should only be subject to a rational basis review even if held to constitute state action.[219] Accordingly, these programs are presumptively constitutional. Individual support based reparations programs do not as readily avoid equal protection concerns.

Individual Support Based Reparations Programs

Trust fund proposals for reparations include college tuition, health care coverage, and business support for African Americans.[220] These proposals would make eligibility based on racial identity.[221] In the event, that trust funds designated for these purposes originated from the federal and/or state governments then a challenge to the operation of such trusts as a violation of the Equal Protection Clause would be highly likely. While the Supreme Court has not addressed the issue directly, lower courts have held that state action is more readily found when racial discrimination is involved; lowering the threshold required for sustaining such a challenge.[222] A government funded trust that limits funding to African Americans may be required to comply with strict scrutiny under the Court's equal protection jurisprudence.

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216 Consider Justice Thomas' concurrence in *U.S. v. Fordice*, 505 U.S. 717, 748-749 (1992), "[I]t hardly follows that a State cannot operate a diverse assortment of institutions-including historically black institutions-open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another."

217 *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965 (1972). See, however, *Greenya v. George Washington Univ.*, 512 F.2d 556, 560 (D.C. Cir. 1975) (finding that a lesser degree of governmental involvement may constitute 'state action' with respect to racial discrimination).

218 See Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. Third World L.J. 429 (1998); Roy L. Brooks, *Atonement and Forgiveness*: A New Model for Black Reparations (2004).

219 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

220 Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. Third World L.J. 429 (1998); Roy L. Brooks, *Atonement and Forgiveness*: A New Model for Black Reparations 156-157 (2004).

221 Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. Third World L.J. 429, 473 (1998).

222 *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965 (1972).

Brooks proposes an Atonement trust fund that would be limited to African Americans born during a set period of time.[223] The fund could then be used by of for beneficiaries to pay for educational expenses or to provide investment or business start up resources.[224] Under the proposal the fund would last for a limited period of years and would be maintained by the federal government and operated by commissioners.[225] Because of the federal involvement, Brooks' proposal seems squarely within the state action doctrine. Upon challenge, it would have to meet the Court's strict scrutiny requirements.[226]

Race specific programs, like Brooks' would have to be narrowly tailored to meet a compelling state interest.[227] The federal and state governments' interest in remedying past discrimination has been found to be compelling by the Court.[228] Under strict scrutiny, however, the Court looks at programs on a case by case basis to assess whether a compelling state interest supports the specific program at issue.[229] Brooks' proposal to make funds available to blacks for education and investment follows the remedial model followed by the Court in past affirmative action cases.[230] In these cases, the Court repeatedly upheld remedial programs that provided remedies prospectively through promotion or hiring programs that benefitted members of the racial group formerly discriminated against.[231] Brooks' program provides a comparable prospective benefit to African Americans. Under the proposed program, however, the Court would have to determine whether a compelling state interest existed for the federal or particular state government to implement the proposed program based on its past slavery and segregation practices.[232] I suggest that the Court's decision would depend on the particular findings and approach taken by the legislatures involved.

A race based reparations program based generally on America's history of slavery and Jim Crow segregation will likely fail to meet the Court's requirements. The Court has repeatedly rejected societal discrimination as the basis of remediation. Reparations based on specific findings of federal or state government based racial discrimination, however, should be treated differently by the Court. Particular findings made by legislatures that identity past discriminatory government practices that current legislative bodies seek to remedy warrant greater consideration by the Court. Consistent with the Court's ruling in *U.S. v. Paradise*, state governments as well as the federal government may employ remedies for past discrimination that provide prospective remedies on the basis of race.[233] Brooks' proposal falls readily within those parameters as long as it is based on specific government findings regarding past governmental discrimination; allegations and facts regarding general societal history fail to satisfy the Court's requirements.[234]

Because of the vast time period covered under claims for slavery and segregation, legislative findings need to connect past racial discrimination during slavery with governmental practices of discrimination during the Jim Crow Era.[235] Findings that show a continued pattern of racial discrimination into the 21st century stand the best chance of satisfying the Court. Factual findings that show the support of slavery and other acts of government discrimination prior to the 13th amendment combined with findings of racial discrimination by government

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223 Roy L. Brooks, *Atonement and Forgiveness*: A New Model for Black Reparations 160 (2004).
224 Roy L. Brooks, *Atonement and Forgiveness*: *A New Model for Black Reparations* 161-163 (2004).
225 Roy L. Brooks, *Atonement and Forgiveness*: *A New Model for Black Reparations* 161(2004).
226 *Supra* Part IV.
227 Roy L. Brooks, *Atonement and Forgiveness*: *A New Model for Black Reparations* 159-160 (2004).
228 *United States v. Paradise,* 107 S.Ct. 1053, 1064 (1987).
229 *Supra* Part IV.
230 *United States v. Paradise,* 107 S.Ct. 1053, 1064 (1987).
231 *United States v. Paradise,* 107 S.Ct. 1053, 1064 (1987).
232 *Supra* Part IV.
233 *United States v. Paradise*, 107 S.Ct. 1053 (1987).
234 *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 506 (1989).
235 *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 506 (1989).

actors prior to the passage of civil rights legislation of the 1960s would meaningfully connect governmental discrimination against blacks during the antebellum period with governmental practices of racial discrimination against blacks in the more recent period. Findings of governmental racial discrimination predating the 1960s civil rights legislation may be criticized as too attenuated from the present to support a compelling governmental interest in any proposed remedy. Such a claim, however, would run afoul of legislative power to address historic events through contemporary legislation. Moreover, the large number of surviving African Americans who lived through the period of government discrimination suggests continued legislative authority and a compelling interest to offer remediation for the harms done to them.[236] The Civil Liberties Act of 1988 employs a similar logic—providing remediation directly to surviving internees or their immediate families.[237]

Even if the Court finds a compelling state interest exists for direct race based reparations, to meet constitutional scrutiny it will have to be narrowly tailored.[238] The efficacy of alternative remedies; the flexibility and duration of the relief provided; and the impact of the relief on the rights of third parties all represent factors used by the Court to make this determination.[239] Brook's proposal includes educational and financial counseling for beneficiaries to assist them in choosing schools and in using funds for business investments.[240] As described, the program allows considerable flexibility; preferred by the Court over rigid quotas or dictates used to achieve racial balancing.[241] The program also includes a sunset provision to bring it to a close.[242] This mechanism limits the program to a discrete time period consistent with the Court's concerns that race based governmental action be narrowly constrained.[243] Perhaps, the biggest hurdle that race based support programs face is the Court's preference for race-neutral alternative remedies.[244] However, because such programs avoid one of the Court's central concerns under this analysis—the burden placed on third parties—the Court should offset some of the weight of this and other factors. I consider the balance between these two factors below.

A constitutional assessment of programs like Brooks' Atonement Fund will arguably depend on the balance between these two factors. Affirmative action programs rejected by the Court, under its strict scrutiny analysis, juxtapose beneficiaries and non-beneficiaries in a competitive bid for employment or educational opportunities.[245] Given a competitive process, affirmative action programs have been viewed by the Court as providing a preferential advantage to persons seeking state or federal opportunities based on race.[246] Unlike those programs that impermissibly include race in determining which applicant's will succeed in an ostensibly merit based contest—burdening non-beneficiaries in the governments' efforts to remedy past discrimination—financial support based reparations programs make resources available at no cost to individual non-beneficiaries.[247] The absence of such burdens on non-beneficiaries greatly reduces the arguable harm caused by support based reparations programs and the corresponding threshold the Court should use in determining their constitutionality.[248] Even so, a consideration of race neutral alternatives remains the most vulnerable point for these programs.

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236 *United States v. Paradise*, 107 S.Ct. 1053, 1066 (1987).
237 Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. app. §§ 1989b to b-9 (1988)).
238 *Supra* Part IV.
239 *United States v. Paradise*, 107 S.Ct. 1053, 1066 (1987).
240 Roy L. Brooks, *Atonement and Forgiveness*: *A New Model for Black Reparations* 159-162 (2004).
241 Grutter v. Bollinger, 539 U.S. 306, 334 (2003).
242 Roy L. Brooks, *Atonement and Forgiveness*: *A New Model for Black Reparations* 159 (2004).
243 *Supra* Part IV.
244 Grutter v. Bollinger, 539 U.S. 306, 339-340 (2003).
245 *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 508-510 (1989); *Richmond v. J.A. Croson Co.,* 488 U.S. 469,506 (1989).
246 *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 507-510 (1989).
247 *United States v. Paradise*, 107 S.Ct. 1053, 1066 (1987).
248 *United States v. Paradise*, 107 S.Ct. 1053, 1066 (1987).

To overcome this concern, legislative findings should discuss the effects of past governmental discrimination on the wealth of African Americans past and present.[249] Richard America and other scholars have documented the intergenerational impact of racial discrimination and slavery on the wealth of African Americans today.[250] Congressional and state legislative findings that build on this research can establish the relationship between financial resources and educational and economic opportunities. A reparations program intended to enhance the financial resources of individual African Americans as a remedy for past governmental deprivations adeptly fits such legislative findings. Race neutral alternatives to accomplish such a task seem few based on the nature of the harm established by legislative findings.[251] While financial support from the federal and state governments based solely on need could be viewed as a race neutral alternative to race based reparation support programs, it would fail to redress past racial discrimination against African Americans. Wealth and educational disparity experienced by African Americans are not limited to the poor.[252] From reconstruction to the present, African Americans have lacked the educational opportunities and financial resources of their white counterparts.[253] Past discrimination by the federal and state governments played no small part in significantly limiting the financial resources and educational opportunities of more than five generations of African Americans. Under Brooks' proposal, the Atonement fund would enhance the resources available to African Americans to secure greater economic and educational opportunities.[254] While, need based financial assistance allocated irrespective of race and America's history of discrimination would create greater opportunities for America's poor, it would not constitute reparations for slavery or segregation. In short, race neutral financial support programs do not represent an effective alternative to remedy past governmental discrimination. In the absence of effective alternatives, the Court should find that programs like Brooks' satisfy this factor.[255] Financial support based reparations programs for slavery and segregation consistent with the foregoing description are likely constitutional as they should survive the Court's strict scrutiny analysis.

Individual Compensation Based Reparations

The final reparations program type I examine is the individual compensation model. The most straightforward approach to reparations and the most well known is a simple compensation plan. Many international and domestic reparations plans utilize individual compensation as part of a more comprehensive program; it rarely represents an exclusive means of reparations. Few commentators endorse individual compensation *per se* as reparations for America's history of slavery and segregation. Nonetheless, it represents one of the options before federal and state legislators seeking to redress the historic mistreatment of African Americans.

Mechanisms for individual compensation vary. Annual payments to beneficiaries, a onetime payout, and tax credits all represent means of distributing individual compensation. Ogletree and Westley each contemplate some form of means testing to qualify for individual

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249 *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 506 (1989).

250 Richard America, The Theory of Restitution in *Redress for Historical Injustices in the United States: On Reparations for Slavery, Jim Crow, and Their Legacies* 160-170 (eds. Michael T. Martin and Marilyn Yaquinto, 2007).

251 A means test could be included similar to that used by Brooks as criteria to qualify for business investment support.

252 Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. Third World L.J. 429, 439 (1998).

253 Joe Feagin, *Racist America: Roots, Current Realities and Future Reparations* 61-66 (2000).

254 Roy L. Brooks, *Atonement and Forgiveness*: A New Model for Black Reparations 159-162 (2004).

255 *Grutter v. Bollinger*, 539 U.S. 306 at 339 (2003) "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative" (citing *Wygant v. Jackson Bd. Of Educ*., 476 U.S. 267 (1986).

compensation and thereby limit the beneficiaries of the program.[256] The most basic scheme, however, would be a one-time cash payment to persons meeting program qualifications.[257] Most commentators limit qualifications to individuals claiming an enslaved African ancestor.[258] This issue, however, requires much greater consideration for reparations that redress the one hundred year history of Jim Crow segregation. African Americans without enslaved ancestors who lived in the United States through the Jim Crow era clearly suffered the effects of governmental race discrimination in employment, education, and loan financing. Their exclusion from a reparations program designed to remedy that same discrimination as well as harms caused by governmental involvement in slavery seems improper. More scholarly attention to this question is certainly required. For purposes of this article, however, I consider the constitutionality of three possible compensation programs that draw beneficiaries from three distinct groups; namely, the black descendants of enslaved African Americans, blacks who immigrated to America, and the non-black descendants of enslaved Africans in America.

A race neutral individual compensation program could allow participation by any citizens with one or more enslaved African ancestors in the United States. Under this type of program persons who identify themselves as white, Asian, Hispanic, etc. could all participate with African Americans. On a race neutral basis, beneficiaries would receive a one-time payout of some legislatively determined amount as compensation or a symbolic gesture of the government's intention to make amends for past discrimination. This type of program avoids equal protection concerns. It distributes government benefits irrespective of race and avoids the Court's strict scrutiny analysis. Because this program would exclude the descendants of black immigrants who suffered government discrimination in antebellum America and their descendants who lived through a century of segregation it fails to redress a great deal of governmental discrimination experienced by blacks. In contrast, it would provide compensation to whites and others who avoided such mistreatment. While free from equal protection concerns, this program would ignore a large group of beneficiaries; making it under inclusive of blacks bearing the brunt of Jim Crow discrimination and over inclusive of members of other groups who may have suffered few of the economic and educational harms that befell their black counterparts. Nonetheless, it is a presumptively constitutional reparations program for slavery, although it fails to address Jim Crow Era discrimination.

I consider two more compensation programs that differ based on the status of black immigrants as potential beneficiaries. The first would be made up of descendants of enslaved African Americans who racially identify themselves as black or African American.[259] The second would combine features of the first program with the features of the race neutral program discussed above. Under it, persons who racially identify themselves as black or African American could qualify in either of two ways; as descendants of enslaved African Americans or as persons who can establish familial residence before 1934[260]—twenty or more years before the Brown v. the Board of Education decision.[261] Because the equal protection analysis for both race based programs is substantially similar, I consider them together.

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256 Brooks also includes means testing as a precondition for business investment support from the Atonement fund.

257 Robert S. Browne, The Economic Basis For Reparations to Black America in *Redress for Historical Injustices in the United States: On Reparations for Slavery, Jim Crow, and Their Legacies* 238-248 (eds. Michael T. Martin and Marilyn Yaquinto, 2007).

258 See generally, *Redress for Historical Injustices in the United States: On Reparations for Slavery, Jim Crow, and Their Legacies* (eds. Michael T. Martin and Marilyn Yaquinto, 2007).

259 Arguably this can be shown through any formal representations within the previous five or more years identifying themselves as African American or black.

260 An alternative framework could be twenty years prior to the passage of the Civil Rights Act of 1964. The earlier time period is favored because it reflects a historical bias toward the earlier and more constrained period of segregation. The twenty year time period is intended to establish a complete generation experience of racial discrimination.

261 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

As discussed above, satisfying strict scrutiny begins with a consideration of the government's interest in establishing a program.[262] Legislative findings of past governmental discrimination represent an essential element of any reparations program subject to an equal protection analysis.[263] To support either of the race specific compensation programs above, the Congress and state legislatures should make findings identifying past discriminatory practices of the government and their long term effects on African Americans.[264] The reparations program should then be identified as redress or a remedy for those past practices. Legislators may model the compensation on the Civil Liberties Act of 1988 which provided a $20,000 payout to Japanese internees and their immediate families.[265] This approach was upheld by the federal courts in *Jacobs v. Barr*.[266] In that case, the Court held that the federal government had a compelling interest in remedying its past mistreatment of Japanese internees based on past racial prejudice.[267] Federal and state government support of slave labor and discrimination against blacks in education and employment opportunities—not to mention access to health care and political participation—provides a comparable basis for individual compensation. The Court has repeatedly affirmed the appropriateness of government efforts to remedy specific acts of past discrimination.[268] If buttressed by robust legislative findings, as described above in the analysis of financial support based programs, the Court should find that a compelling governmental interest exists for race based compensation programs for the victims of past governmental discrimination. Showing that a race based compensation program is narrowly tailored presents a greater challenge.[269]

Tailoring a reparations program in a way that limits beneficiaries based on race certainly raises equal protection concerns under the Court's jurisprudence.[270] It does not, however, necessitate a fatal finding.[271] The Court will examine the burden of the program on non-beneficiaries and the efficacy of race neutral alternatives along with its flexibility and duration. The limitation of certain persons from a class of beneficiaries based on race may still meet the Court's requirements.

A compensation program for the descendants of the enslaved exclusively available to African Americans would limit beneficiaries based on race in a way that would implicate a strict scrutiny analysis by the Court. A program available to descendants of the enslaved regardless of their racial identity should not.[272] This program's focus upon descendants of the enslaved who also experienced governmental discrimination during the Jim Crow Era' ties two historic eras together and requires that beneficiaries have a connection to both types of injustice in order to qualify. Arguably, the program would not arbitrarily exclude non-black slave descendants since black immigrants who may have experienced Jim Crow era segregation would also fall outside the category of beneficiaries. A legislative record establishing antebellum and Jim Crow era

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262 *Supra* Part IV.

263 *United States v. Paradise,* 107 S.Ct. 1053, 1064 (1987); *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 506 (1989).

264 *United States v. Paradise,* 107 S.Ct. 1053, 1064 (1987); *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 506 (1989).

265 Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. app. §§ 1989b to b-9 (1988))

266 959 F.2d 313 (D.C. Cir. 1992).

267 *Jacobs v. Barr*, 959 F.2d 313 (D.C. Cir. 1992).

268 *United States v. Paradise,* 107 S.Ct. 1053, 1064 (1987); *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 506 (1989).

269 *Supra* Part IV.

270 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

271 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

272 As discussed by Brophy, the Court in *Gelduldig v. Aiello* found that pregnancy and gender were not equivalent. Likewise, in *Personnel Administrator v. Feeney,* the Court found that the fact that most veterans were men did not mean that veteran preferences were discriminatory against women. The high incidence of enslaved ancestors among African Americans should not make a remedial programs for the descendants of the enslaved a racial classification.

governmental race discrimination and the lingering effects on African American descendants of the enslaved could potentially support such a constrained program.

As above, the proposed program does not burden non-beneficiaries. The program neither harms nor limits the opportunities of non-beneficiaries to compete in American society. Race neutral alternatives arguably fail to address the unique harm suffered by program beneficiaries who represent a subset of blacks in the United States. Because the program excludes some blacks, however, the Court should view the program as narrowly constrained to meet legislative interests in providing redress to African Americans facing the effects of centuries of past discrimination against their fore-bearers.

Race based exclusions should be viewed as an appropriate legislative effort to target a particular harm for remediation rather than constitutionally impermissible racial discrimination.[273] Judicial review of the next program, including black immigrants, as beneficiaries may be viewed less favorably by the Court. The availability of reparations to black immigrants along with the descendants of the enslaved may disrupt the nexus of harm that would support reparations for blacks financially affected by government discrimination over the course of two centuries. Justification for the second program may necessitate findings that indicate that slavery and segregation each warrant redress.[274] Legislatures could stagger the financial award to distinguish persons affected by either slavery or segregation or both. This mechanism may demonstrate to the Court the legislative interest in basing awards on the likely effects of past discriminatory practices on program beneficiaries. While the program would still not burden non-beneficiaries, the Court may find that effective race neutral alternatives were not considered.[275] This factor alone should not end the analysis but weighs against a constitutional finding for the second race specific program.

By providing a single award, both programs clearly meet the Court's preference for a limited duration for race specific programs.[276] In contrast, they include little flexibility in their beneficiaries or operation. Despite the rigid structures, the programs still display characteristics of narrowly tailored program that should be upheld by the Court.[277] Each contains the same rigid structure as the Civil Liberties Act of 1988. [278] When considered in conjunction with the lack of harm the programs cause to non-beneficiaries and their requirement that beneficiaries be connected to past governmental discrimination both programs have the potential to be upheld.[279] Because it constrains program beneficiaries more narrowly, the first program is better poised to survive the Court's analysis and is likely constitutional. The second program may likewise be upheld if legislative findings support the two different categories of beneficiaries. Absent such findings, the program is likely unconstitutional as the Court may not be satisfied that the program was sufficiently constrained to satisfy the demands of the Equal Protection Clause.[280] A staggered approach differentiating the awards to black immigrants affected by governmental discrimination from those to descendants of the enslaved may demonstrate to the Court a sufficiently constrained mechanism for remedying the effects of past governmental discrimination.

CONCLUSION

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273 *United States v. Paradise,* 107 S.Ct. 1053, 1064 (1987).
274 *United States v. Paradise,* 107 S.Ct. 1053, 1064 (1987).
275 *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 507-510 (1989).
276 *United States v. Paradise*, 107 S.Ct. 1053, 1066 (1987).
277 *Supra* Part IV.
278 Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 U.S.C. app. §§ 1989b to b-9 (1988)).
279 *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).
280 *Supra* Part IV.

Reparations programs that avoid governmental disruption of the educational and economic/commercial spheres of society will avoid the Court's oft expressed concerns with ongoing hiring, promotion, admissions, and contracting decisions that take account of race. A reparations program that focuses more narrowly on victims of past governmental discrimination, however, may not comport with the goals of some reparations commentators who envision reparations as a reformation of the American polis. A more modest program focused on the victims of federal and state racial discrimination will, however, remedy decades of racial discrimination against blacks. In that regard, a basic financial award to victims of governmental discrimination in employment, housing, political participation, and education may best fit the Courts' equal protection demands. Money represents a fungible resource that approximates the educational, economic, and political losses of this diverse group. While I personally disfavor this approach it may be the most politically feasible and legally defensible under Court jurisprudence. Nothing, however, would prevent such a program from allowing beneficiaries to direct their payments into a trust fund made available to the descendants of beneficiaries for their use. As an example of this, consider a reparations program for all military personnel who served in the segregated armed services. Congress could readily investigate and find that the military discriminated against blacks in benefits, salary, opportunities, promotions, health care, and assignments. As reparations, congress would then provide a financial payment to these servicemen to remedy and recognize the wrongs inflicted upon them and the resulting harms. Such a program could be narrowly tailored to go directly to surviving servicemen or their surviving dependents. This program would be narrowly tailored and represent a compelling state interest held by congress to remedy past discrimination.

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