

1-1-2006

# Reading, Writing, and Reparations: Systematic Reform of Public Schools as a Matter of Justice

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## Recommended Citation

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# READING, WRITING, AND REPARATIONS: SYSTEMIC REFORM OF PUBLIC SCHOOLS AS A MATTER OF JUSTICE

*Verna L. Williams\**

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## INTRODUCTION

*We wanted so much and had so little . . . We had talents and abilities here that weren't really being realized, and I thought that was a tragic shame, and that's basically what motivated me to want to see some change take place here . . .*

*There wasn't any fear . . . I just decided, 'This is your moment. Seize it.'*<sup>1</sup>

Barbara Rose Johns was 16 years old when she decided to “seize the moment.” One of the over 400 students attending a high school built for just 167, Barbara Rose had determined it was time to act rather than continue complaining about Moton High School’s seemingly limitless deficiencies: classes held in the auditorium and in buses, leaking roof, lack of heat, and drafty tar paper shacks resembling chicken coops that provided extra classrooms.<sup>2</sup> These were the conditions in 1951 for Black<sup>3</sup> high school students in Farmville, Virginia. Disgruntled and no longer placated by the school board’s promises of improving Moton, Barbara Rose organized a strike of the high school, leading other students and parents into history.<sup>4</sup> The direct action, which began with Barbara Rose pounding her shoe in the auditorium and ordering her fellow students out of the school,<sup>5</sup> lead to a lawsuit that was consolidated with *Brown v. Board of Education*.<sup>6</sup> However, instead of seeing the end of Jim Crow in

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1. Sydney Trent, *Stand and Deliver*, WASH. POST MAG., Apr. 4, 2004, at W36.

2. See, e.g., BOB SMITH, *THEY CLOSED THEIR SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA, 1951–1964* 15, 18 (Univ. of N.C. Press 1965); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 459–60* (First Vintage Books 1977) (1975).

3. In this Article, I use the terms “Black” and “African American” to express that “Blacks like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.” Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

4. SMITH, *supra* note 2, at 34–42.

5. *Id.* at 38.

6. 347 U.S. 483 (1954). Barbara Rose and another student, Carrie Stokes, wrote a letter to lawyers for the National Association for the Advancement of Colored People (NAACP) asking for help:

This morning, April 23, 1951, the students refused to attend classes [because of inadequate school facilities]. You know that this is a very serious matter because we are out of school, there are seniors to be graduated and it can't be done by staying at home. Please we beg you to come down at the first of this week . . .

their public schools, Barbara Rose and her community saw the school board pursue a strike of its own—shutting down the entire public school system rather than desegregate from 1959 until 1964.<sup>7</sup> This was just one of Virginia's acts of massive resistance<sup>8</sup> in the wake of *Brown*.

Some forty years later, the General Assembly of Virginia took steps to remedy this wrong, passing a bill to establish the Brown v. Board of Education Scholarship Program and Fund (the “Brown Fund Act”).<sup>9</sup> The impetus behind the bill was Ken Woodley, the editor of the *Farmville Herald*. Woodley explained that the newspaper “was a loud voice for massive resistance, and I’ve always felt that we needed to be a very, very loud voice for what needed to be done today.”<sup>10</sup> The measure authorizes awarding scholarships to eligible persons who were denied an education during massive resistance.<sup>11</sup> This provision passed with almost unanimous support from lawmakers. Of the four members of the House of Delegates who opposed the measure, only one, R. Lee Ware, a Republican from Powhatan County publicly explained his opposition, stating that “[t]he House has expressed its regrets, . . . [He] not[ed that] it’s ‘not possible’ for the House to go beyond regret. He also said the scholarship fund could open the door to other groups seeking reparations for past harm. ‘It’s not possible for one generation to compensate for the past.’”<sup>12</sup> Three former governors supported this program, noting “it is singularly appropriate to give educational opportunity and the promise of prosperity and enrichment it offers to

We will provide a place for you to stay.

We will go into detail when you arrive.

KLUGER, *supra* note 2, at 471. NAACP attorney Spottswood Robinson filed the lawsuit, *Davis v. County School Board of Prince Edward County*, on May 23, 1951. *Id.* at 478.

7. See *infra* notes 264–285 and accompanying text.

8. As described more fully herein, Virginia embarked on a systemic campaign to repudiate the Court’s decision in *Brown*. This effort, massive resistance, encompassed the enactment of laws designed to maintain segregation. The period officially ended in 1959 when the state Supreme Court struck down many of the key laws. Prince Edward County’s own massive resistance went into effect at that point, continuing until 1964. See *infra* notes 293–297 and accompanying text.

9. VA. CODE ANN. § 23–38.21 (2004).

10. *Morning Edition: Virginia State Officials Begin Making Amends for the Closing of Schools in 1954 After Supreme Court Ended School Segregation* (NPR news radio broadcast June 24, 2005) (transcript on file with author).

11. The scholarships are limited to those persons who lived in jurisdictions that closed their schools between 1954 until 1964 and thus were “unable during such years to . . . begin, continue, or complete his education in the public schools . . . ineligible to attend a private academy . . . established to circumvent desegregation, or . . . pursue postsecondary education opportunities or training . . . or [were] required to relocate within or outside of the Commonwealth to begin, continue or complete his [K–12] education.” VA. CODE ANN. § 30–231.2:F (2005).

12. Christina Bellantoni, *\$1.1 Million OK’d to Fight Gangs*, WASH. TIMES, June 17, 2004, at B1.

those families and individuals who were denied it by an egregious public policy.”<sup>13</sup>

This step by the General Assembly marking the fiftieth anniversary of the *Brown* decision is noteworthy, as it makes Virginia the only state to provide such relief to persons harmed by its intransigence in the face of the Court’s mandate.<sup>14</sup> Moreover, by seeking to compensate the persons injured by the state’s discriminatory actions, the General Assembly joined state legislatures in Florida,<sup>15</sup> Oklahoma,<sup>16</sup> and California<sup>17</sup> in enacting measures designed to compensate for past state-sponsored harms visited upon African Americans—in other words, granting reparations.

*Black’s Law Dictionary* defines reparations as “[t]he act of making amends for a wrong” and “compensation for an injury or wrong.”<sup>18</sup> In this

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13. Jeff E. Schapiro, *Governors Regret Past ‘Egregious’ VA Policy*, RICH. TIMES DISPATCH, Feb. 14, 2004, at A8. Governor Mark R. Warner and former governors Charles Robb, Gerald Baliles, and Linwood Holton supported the measure. See *id.* Former Governor Douglas L. Wilder, the first African American to hold that office, declined to support the provision because “Warner’s proposed budget . . . did not include funds for the scholarship.” Jeff E. Schapiro, *Warner Asks for Education Funding*, RICH. TIMES DISPATCH, Feb. 26, 2004, at A8.

14. Commemoration of *Brown* typically did not focus on remedying the harms of the segregation that the decision invalidated. See, e.g., CAL. ED. CODE § 33603(a) (West 2004) (establishing the Brown v. Board of Education Advisory Commission to develop “community and educational awareness programs to commemorate the 50th anniversary” of *Brown*). It also should be noted that, to the extent that remedies are in order, see *infra* notes 149–254 and accompanying text, they should not be limited to southern states. Many northern school districts maintained dual educational systems well into the twentieth century. See, e.g., Davison M. Douglas, *The Struggle for School Desegregation in Cincinnati before 1954*, 71 U. CIN. L. REV. 979, 980 nn.2–3 (2003) (observing that northern segregation frequently resulted not only from housing patterns, but also because of deliberate state actions to keep the races separate in schools); Christine H. Rossell, *The Convergence of Black and White Attitudes on School Desegregation Issues During the Four Decade Evolution of the Plans*, 36 WM. & MARY L. REV. 613 (1994) (examining the evolving standard for remedying school desegregation in northern and southern schools). Indeed, the first legal challenge to racial segregation in public schools was brought in Massachusetts. See *Roberts v. City of Boston*, 5 Cush. (Mass.) 198 (1849).

15. FLA. STAT. ANN. § 1009.55 (West 2004) (creating the Rosewood Family Scholarship Program in commemoration of Black victims in riots precipitated by a White woman’s false rape charge); see also Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 293–302 (2003) (describing the incident).

16. OKLA. STAT. ANN. TIT. 74, §§ 8201.1–2 (West 2002) (establishing a Tulsa Race Riot Memorial and Revolving Fund to commemorate violent attacks on Black citizens following a White woman’s allegations of assault by a Black man). See Ogletree, *supra* note 15, at 293–302 (describing underlying incident).

17. CAL. INS. CODE §§ 18310, 13812–13 (West 2005) (requiring insurance corporations doing business in the state to disclose information concerning policies issued to slaveholders).

18. BLACK’S LAW DICTIONARY 1301 (7th ed. 1999).

sense, reparations typically involve claims of wrongdoing by a state against individuals or groups.<sup>19</sup> Because reparations usually are invoked to redress state wrongdoing, they typically go beyond being compensatory in nature because “individuals expect protection from the state . . . . For the government itself to cause harm adds an element of outrage generally not present in purely private wrongdoing.”<sup>20</sup> Thus reparations are also about restorative<sup>21</sup> justice: “the act of making good or giving equivalent for any loss, damage or injury,” including remedying unjust enrichment.<sup>22</sup> As a measure designed to remedy state wrongdoing, at first glance the Brown Fund Act falls squarely within the reparations framework<sup>23</sup> because it seeks to make amends to the many students whom the state denied an education, but who likely would be unable to prevail in a traditional lawsuit some forty years later. Yet, the word “reparations” was not associated with the Brown Fund Act; at least not on the part of its sponsors, current or former governors, or many of its other proponents.

Indeed, some of the Act’s supporters went so far as to opine that this provision was not reparative in nature. For example, one newspaper noted that “[t]hose who were harmed when Virginia officials closed their schools are real, flesh and blood people. These innocent victims of prejudice are not symbols of historic grievances like slavery, and the money is not reparations. It is a long-delayed admission that society failed those children and an effort to right a painful wrong.”<sup>24</sup>

Given the controversy the term provokes, it is hardly surprising that the Virginia General Assembly refrained from calling the Brown Fund Act reparations.<sup>25</sup> Consider the following responses to one reader of a Delaware newspaper who suggested that reparations might be in order for slavery:

19. See, e.g., J. ANGELO CORLETT, *RACE, RACISM, AND REPARATIONS* 149 (Cornell Univ. 2003) (observing that “[t]hose receiving reparations are typically groups, though there seems to be no moral or logical preclusion to individuals receiving them”).

20. DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 50 (Oxford University Press 1999).

21. See *id.* at 55.

22. CORLETT, *supra* note 19, at 149 (quoting JOEL FEINBERG, *DOING AND DESERVING* 74–75 (Princeton 1970)).

23. See, e.g., Eric Posner & Adrian Vermuele, *Essay: Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 691 (2003) (defining reparations generally as payments for past state wrongs based on principles of corrective justice).

24. *Amends in Prince Edward*, RALEIGH NEWS & OBSERVER, June 24, 2004, at A10. See also Barton Hinkle, *Bill Would Provide Just Recompense in Education*, RICH. TIMES DISPATCH, June 20, 2004, at A-9 (opining that the bill correctly avoids a focus on slavery).

25. See, e.g., Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 DEPAUL L. REV. 1181 (2004) (characterizing the debate about reparations as being part of the nation’s “culture wars”). Brophy notes that Americans are deeply divided over the issue of reparations: researchers from Harvard University and the University of Chicago found that only 5 percent of Whites supported reparations, compared to 67 percent of Blacks. *Id.* at 1183–84. Brophy posits that divisions concerning reparations are based on a sense that “something very important is at stake—it is how we view ourselves and our place in the

The crying will never stop from these people about how bad they have it; and how they should be given a free ride . . . . The list goes on and on it never stops from these people. Why don't you get a life, [sic] you have it better today than most races have and you are still crying the blues.<sup>26</sup>

And:

My mind whorled and my fingers twitched when I read [the] stirring letter "Reparations are due for American slavery." Obviously [the writer] is a well-educated man who holds a position of influence. However, he needs to be reminded of a few things. Had it not been for the unfortunate stigma in our history regarding slavery and reparations for it, he might well find himself in Africa barefoot and still a slave.<sup>27</sup>

Without question, these views are extreme; however, they reflect commonly cited rationales for opposing reparations. Much of the resistance stems from the notion that reparations are sought generally for slavery; that is, advocates seek to compensate present day African Americans for the unpaid labor of their ancestors.<sup>28</sup> From this premise flows a plethora of objections. Among them are the following: the difficulty in ascertaining the potential beneficiaries, i.e., how to determine whose ancestors actually were slaves, as well as the difficulty in identifying the wrongdoers;<sup>29</sup> articulating and quantifying the harm of being a descendant of slaves;<sup>30</sup> and justifying such payments to present day persons for harms occurring in the past.<sup>31</sup> Still others object based on the belief that

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world . . . how we view the United States's [sic] history—is it a narrative of the United States as a place of opportunity or oppression?" *Id.* at 1183.

26. John R. Kriskie, *Our Readers' Views*, THE NEWS J., June 20, 2004, at 12A.

27. Patricia Robinson, *Our Readers' Views*, THE NEWS J., June 10, 2004, at 18A.

28. See, e.g., BORIS BITTKER, THE CASE FOR BLACK REPARATIONS 9–10 (Beacon Press 2003) (1973) (observing that the "preoccupation with slavery" has weakened reparations claims). See also Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 630–631 (1993) (explaining that reparations claims based on slavery offend traditional perceptions of justice because "liability and right to compensation are based on race rather than the commission of an injurious act").

29. See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 374 (1987) (observing that "specific identification of wrongdoers and victims is a common objection to reparations"); see also BITTKER, *supra* note 28, at 142, n.10 (quoting noted civil rights activist Bayard Rustin: "If my great-grandfather picked cotton for 50 years, then he may deserve some money, but he's dead and nobody owes me anything") (citation omitted).

30. See Matsuda, *supra* note 29, at 374.

31. See *id.*

slavery actually may have been beneficial for Blacks.<sup>32</sup> Even assuming that slavery is the sole or primary basis for reparations, others assert that any debt owed African Americans has been satisfied through the Civil War, the Reconstruction Amendments, various Civil Rights Acts, affirmative action, and welfare, among a myriad of other governmental policies deemed to provide “preferences” for Blacks.<sup>33</sup> Thus, African Americans should stop focusing on the past, blaming slavery for their failure to succeed in society and, instead, acknowledge and address their own shortcomings that preclude entry into mainstream America.<sup>34</sup> A related issue opponents have raised is that other groups have suffered discrimination and have not received reparations; therefore, government payments to African Americans will open the floodgates to endless, equally inchoate claims for justice.<sup>35</sup> With these questions, as well as the strong sentiments stirred up by even the mention of reparations, it is no small wonder that Virginia lawmakers

32. See, e.g., DAVID HOROWITZ, *UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY*, 129–30 (2002) (noting that the “average income of a black person in America is twenty to fifty times the income of the contemporary inhabitants of the West African nations from which the slaves were taken”). This argument ignores the impact that slavery and colonialism have had on Africa. See, e.g., Howard W. French, *The Atlantic Slave Trade: On Both Sides, Reasons for Remorse*, in *WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE*, 355–56 (Roy L. Brooks, ed., 1999).

33. See HOROWITZ, *supra* note 32, at 122–25; John C. McWhorter, *Against Reparations*, in *SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS*, 180 (Raymond A. Winbush, ed., 2003) [hereinafter *SHOULD AMERICA PAY?*].

34. See HOROWITZ, *supra* note 32, at 126–28 (questioning the link between slavery and past discrimination to current poverty among Blacks). Horowitz states “it is an unanswered question as to whether those blacks who are still poor are suffering from the legacies of oppression or from personal dysfunctions which have little to do with ‘social injustice’ or race.” *Id.*; cf. Armstrong Williams, *Presumed Victims*, in *SHOULD AMERICA PAY?*, 165 (arguing that reparations stereotypes Blacks as victims and creates a disincentive for Blacks to help themselves); Shelby Steele, . . . *Or a Childish Illusion of Justice? Reparations Enshrine Victimhood, Dishonoring our Ancestors* in *SHOULD AMERICA PAY?*, 197 (arguing that reparations perpetuate Black victimhood).

35. Indeed, some have suggested that to provide reparations for Blacks might “have the perverse effect of arousing resentment in other groups and so may lead to further social unrest.” Graham Hughes, *Reparations for Blacks?*, 43 N.Y.U. L. REV. 1063, 1065 (1968). It should be noted, however, that the federal government has compensated other groups for harms incurred because of past governmental wrongdoing. See, e.g., Matsuda, *supra* note 29, at 373 n.213 (noting that “Native Americans, pioneers in pressing reparations claims, have successfully obtained compensation for treaty violations”). The federal government also compensated Japanese Americans for the internment policy carried out during the Second World War Civil Liberties Act of 1988, Pub.L. No. 100–383, 102 Stat. 903 (1988). This Article presents another theory for seeking redress for historic injustices against Blacks that also may apply to other subordinated groups. See also Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?* 40 B.C. L. REV. 429, 436 (1998) (opining that “the way to avoid the ‘everyone’s been harmed’ hierarchy of oppressions game is to coalesce as communities affirming real equality around development of a legal norm in the United States that mandates reparations to groups victimized by racism that is not group specific”).



steered clear of even suggesting that the Brown Fund Act had any reparative aspects at all.

Notwithstanding the resistance of the Virginia General Assembly to assigning a reparative label to the Brown Fund Act, the statute provides a useful prism for examining how reparations for the state wrongdoing might require substantive reform of public education in this instance. The Act is significant as legislative action from the heart of the former Confederacy that essentially seeks to atone for one of the most disgraceful episodes in the nation's history. In addition, the Brown Fund Act's focus on educational opportunities denied is meaningful, given the paramount role state-sponsored discrimination in education has played in the subordination of Blacks in Virginia, specifically, and the nation, more generally.

For all its promise, however, the Brown Fund Act is constrained as a remedy. Anticipating the likely objections to a more expansive remedy, the Act makes scholarships available in a race-neutral manner only to those persons who were denied educational opportunities between the years 1954 and 1964. In this sense, the Brown Fund Act embraces a colorblind approach that focuses on redressing a decontextualized violation, rather than providing a remedy that fully addresses the harm of the victims.<sup>36</sup> In this instance, by failing to acknowledge that the school shutdowns were aimed specifically at Black students,<sup>37</sup> and by failing to extend the scholarships to the children of the former students<sup>38</sup> at the very least, the Brown Fund Act fails to remedy meaningfully the scope of the injury caused by the state's actions. Put another way, if the "mere" segregating of students because of race was enough to create harm to the hearts and minds of children, as the Supreme Court noted in *Brown*,<sup>39</sup> the injury to Black children who saw state officials close schoolhouse doors rather than admit them to classrooms with White children would reverberate in ways that cutting a check fifty years later is not likely to assuage. In this regard, the Act, while a step in the right direction, nonetheless represents an important missed opportunity: the opportunity to effect reconciliation,<sup>40</sup> to

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36. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054, 1069–70 (1977).

37. See *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 230 (1964).

38. See A. Barton Hinkle, *Bill Would Provide Just recompense in Education*, RICH. TIMES DISPATCH, January 20, 2004, at A-9 (arguing that the bill should be so expanded because "where the ripples of injustice can still be seen, the ripples of justice should try to follow").

39. 347 U.S. at 494.

40. See, e.g., Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903 (2002). Banks argues that the central focus of the reparations movement should be reconciliation because "anti-black racism is a *collective inheritance* that negatively impacts the entire society." *Id.* at 912 (emphasis in original). In

mend the broken trust resulting from the government abusing its authority by denying full equality to Blacks every step of the way, to be transformative. Put differently, Virginia lawmakers should have taken this legislative opportunity to repair<sup>41</sup> the institution of public education.

Building upon the extensive work of critical race scholars,<sup>42</sup> this Article applies the “reparations as repair” framework to analyze the Brown Fund Act and explore its potential to effect meaningful change by providing a true remedy for the state’s past discrimination against Blacks in public education. In this context, “reparations as repair” is particularly apt because it:

encompasses both acts of repairing damage to the material conditions of racial group life—distributing money to those in need and transferring land ownership to those dispossessed, building schools, churches, community centers and medical clinics, creating tax incentives and loan programs for businesses owned by inner city residents—and acts of restoring injured human psyches—enabling those harmed to live with, but not in, history. Reparations as collective actions, foster the mending of tears in the social fabric, the repairing of breaches in the polity.<sup>43</sup>

This Article applies these principles to analyze Virginia’s effort to remedy massive resistance and posits that, under reparations theory, a broader remedy is necessary to redress the scope of the state’s wrongdoing. To do this, Part I briefly examines reparations theory, which provides the tools to identify the proper scope of the injury to be addressed, and, in turn, informs the proper choice of remedy. With this background, Part II discusses the Brown Fund Act and the massive resistance it seeks to remedy. In this connection, the Article demonstrates that the school shutdowns were part of a statewide decision to defy *Brown* and maintain its tradition of segregation. Part III places that discrimination in historic context, examining Virginia’s long history of denying educational opportunities to African Americans. This section demonstrates that the state’s

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this regard, reparative efforts should require the nation to reckon not just with the history of slavery, but to strive to comprehend the economic, social, and psychological consequences of slavery, and the legalized racial apartheid that followed emancipation. *Id.* at 909.

41. See Eric Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 518–19 (1998) (positing that reparations should repair the breaches of trust resulting from state sponsored subordination).

42. Reparations theory, as discussed below, builds upon the seminal work of such scholars as Derrick Bell, Alan Freeman, Charles Lawrence, and Mari Matsuda, and provides the analytical framework for creating such a remedy. Critical race scholars long have argued for race-conscious remedies that recognize the ingrained nature of racism in legal and social norms, in contrast to existing legal doctrine which theorists posit has perpetuated systemic racial subordination. See *infra* notes 45–52.

43. Yamamoto, *supra* note 41, at 519.

intransigence in the face of the *Brown* decision was but one incident in a centuries-old chain of state-imposed constraints on education for Blacks. Starting with proscriptions against literacy for slaves, and moving to legislation designed to disfranchise Blacks after emancipation, among other means, Virginia used and abused public education to maintain an oppressive social order in which African Americans would perpetually be at the bottom. As a result, Part IV concludes that the Brown Fund Act falls far short of remedying the scope of the state's wrongdoing. In the face of, quite literally, centuries of government abuse of its authority to purposefully exclude its citizens, reparations—that is, a remedy designed to rectify a profound injustice that reverberates today—are necessary. This Part then briefly touches upon the varied forms reparative remedies might take to mend the breach.

### I. REPARATIONS THEORY: PERFORMING CRITICAL RACE THEORY AND PRAXIS

Reparations theory follows the trajectory critical race scholars set forth well over twenty years ago,<sup>44</sup> embodying not only its key precepts, but also, importantly, its emphasis on combining theory with praxis, or the practical application of the theory to legislative, litigation, and policy strategies. Specifically, building on critical race theory's ("CRT") rejection of the color-blind interpretation of the Constitution,<sup>45</sup> race is essential to reparations theory. In this connection, race and racism are not viewed atomistically; rather, reparations theory places the ongoing subordination of groups into a historical context to demonstrate the consistent salience of race in the legal system and society.<sup>46</sup> Similarly, reparations theory, like CRT, recognizes the systemic nature of race in the legal system and society<sup>47</sup> and urges systemic remedies that take a variety of forms.<sup>48</sup> Finally, in keeping with CRT's emphasis on addressing the myriad forms subordination takes, rather than focusing on the binary of Black-White race

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44. A full exploration of the history of CRT is beyond the scope of this Article.

45. See, e.g., Freeman, *supra* note 36, at 1065; Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

46. See *infra* notes 51–63 and accompanying text.

47. See generally Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 6 (1977); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356 (1988).

48. See *infra* notes 62–63, 326–334 and accompanying text.

relations,<sup>49</sup> reparations theory recognizes and draws upon the experiences of other groups to support their efforts to achieve redress.<sup>50</sup> I will discuss each in turn to provide a foundation for expanding our understanding of the state wrong that must be remedied.

### A. Contextualizing Race and Racism

One of the key principles of CRT is the significance of social and historical context to exposing the prevalence of race and racism in society and, concomitantly, the fact that racism is not merely a series of individual acts.<sup>51</sup> Building upon these premises, Mari Matsuda argues for reparations as a means of overtly focusing critical theory on the experiences of oppressed persons of color.<sup>52</sup> She describes reparations as a “critical legalism, moving us away from repression and toward community.”<sup>53</sup> Matsuda argues that an examination of the victims’ perspective elucidates “new connections between victims and perpetrators.”<sup>54</sup> This insight addresses the concern that reparations lack privity between perpetrators and victims.<sup>55</sup> Matsuda argues that victims are connected as members of an oppressed group, who experience oppression precisely because of their membership in that group.<sup>56</sup> Similarly, perpetrators constitute a group even though “some are direct descendants of perpetrators while others are merely guilty by association.”<sup>57</sup> Specifically, Whites, as a group, have benefited from the oppression of people of color because the existing social order reinforces and entrenches White privilege and “the assumption that non-whites are different and appropriately treated as different.”<sup>58</sup>

Matsuda also posits that the oppressed point of view sheds new light on the connection between the wrongful actions and the harms suffered. Rather than being stale, one-time occurrences in the distant past that seem remote at best, the injuries in this context are “continuing stigma

49. See, e.g., *Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium*, in CROSSROADS, DIRECTORS, AND A NEW CRITICAL RACE THEORY 2 (Francisco Valdes et al. eds., 2002).

50. See *infra* notes 56, 81–83 and accompanying text.

51. See, e.g., Freeman *supra* note 36, at 1070; Lawrence *supra* note 47, at 321, 328.

52. Matsuda, *supra* note 29, at 323 (critiquing Critical Legal Studies and positing an alternative analytical framework to properly account for race, as described more fully herein).

53. *Id.* at 397.

54. *Id.* at 374.

55. See *supra* note 51.

56. Matsuda, *supra* note 29, at 375–376 (observing, for example that “[t]he wealthy black person still comes up against the color line. The educated Japanese still comes up against the assumption of Asian inferiority”).

57. *Id.* at 375.

58. *Id.* at 376.

and economic harm.”<sup>59</sup> Matsuda argues that the egregious nature of group harms further supports applying a proximate cause analysis to bridge “the wider gulfs of time and space to connect act and injury.”<sup>60</sup> Doing so is particularly appropriate since the acts of racism that are the subject of reparations claims typically “involve powerless victims . . . [and] the gross imbalance of moral claim between the innocent and guilty to which the law is peculiarly sensitive.”<sup>61</sup> Finally, with respect to relief, a view from “the bottom” requires that the oppressed be involved both in determining those entitled to relief and the forms the relief should take, out of respect for their “rights to personhood and self-determination.”<sup>62</sup> In this regard, reparations serve the societal benefits of providing a balm for the victims, in the form of recognizing their dignity and personhood, but also in terms of realizing “[t]he promise of liberty for those on the bottom, [which] has meant freedom from public and private racism.”<sup>63</sup>

### B. Promoting Systemic Change

Eric Yamamoto posits a conceptual framework for reparations as a means of repairing institutions and relationships damaged by the injustices of slavery and Jim Crow laws.<sup>64</sup> Remedies fashioned under this construct address the moral, ethical, and political damage done to Blacks and the need to restructure normative institutions and relationships,<sup>65</sup> including “the institutions and relationships that gave rise to the underlying justice grievance.”<sup>66</sup> To accomplish this goal, payments to individual claimants, as provided by the Brown Fund Act, can play a role, but cannot be the entire focus.<sup>67</sup> Rather, the redress must “encompass both acts of repairing damage to the material conditions of racial group life . . . and acts of restoring injured human psyches—enabling those harmed to live with, but not in, history . . . [to] foster the mending of tears in the social fabric, the repairing of breaches in the polity.”<sup>68</sup> Such remedies include redistributing money to those in need, as well as building schools and medical centers in communities, and promoting financial programs for inner city business owners.<sup>69</sup>

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59. *Id.* at 381.

60. *Id.* at 383.

61. *Id.*

62. *Id.* at 387.

63. *Id.* at 390.

64. Yamamoto *supra* note 41, at 517.

65. *Id.*

66. *Id.* at 518.

67. *Id.*

68. *Id.* at 519.

69. *Id.*

Robert Westley proposes systemic change through legislative recognition and enforcement of a norm of reparations.<sup>70</sup> Specifically, based on his examination of other models of reparations,<sup>71</sup> Westley argues that there is a moral principle that:

when a State or government has through its official organs—its laws and customs—despoiled and victimized and murdered a group of its own inhabitants and citizens on the basis of group membership, that State or its successor in interest has an unquestionable moral obligation to compensate that group materially on the same basis.<sup>72</sup>

Westley would apply this principle “to any group that could show the requisite degree of harm from racism, linked to an international standard of human rights.”<sup>73</sup> Westley further identifies legislatures as appropriate sites for enforcing this norm because of the constraints of existing case law discussed above<sup>74</sup> and because early civil rights victories have engendered a “misplaced sense of reliance on litigation and federal courts,” which have become increasingly hostile to such claims.<sup>75</sup> In contrast, legislatures

provide a friendlier forum . . . for racial remedies, even during periods of backlash, because of their ability to enact comprehensive solutions to diffuse social ills, such as racial discrimination, and the inherent susceptibility of legislators not only to constituent pressure but also to trading votes. Moreover, historically, it has been legislatures, not courts, that have in fact initiated the most comprehensive remedies to racial subordination.<sup>76</sup>

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70. Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations*, 19 B.C. THIRD WORLD L.J. 429 (1998).

71. See *id.* at 429 (examining the Civil Liberties Act of 1988 and *Wiedergutmachung*, German legislation, compensating European Jewish survivors of the Holocaust for losses of property, liberty, citizenship, and personhood).

72. *Id.* at 456.

73. *Id.* at 436.

74. See Matsuda, *supra* note 59 and accompanying text.

75. Westley, *supra* note 70, at 435–36.

76. *Id.* But see DERRICK BELL, *The Racial Barrier to Reparations*, in AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE, 126–27 (1987) (observing that legislative efforts to remedy past wrongs have been deeply compromised in the political process, frequently “result[ing] in greater injustice”). As discussed below, the present political climate may make reparations more palatable, particularly if advocacy efforts build upon the inroads the reparations movement is making, as suggested by the Brown Fund Act, as well as the other legislative measures mentioned previously. See *supra* notes 14–17 and accompanying text.

Thus, Westley recommends that Congress and state legislatures be the primary targets for enforcing the norm of reparations.

In terms of remedies for state-inflicted harms to African Americans, Westley argues for economic redress to improve substantively the lives of these injured parties. According to Westley, such monetary compensation must:

reflect not only the extent of unjust Black suffering, but also the need for Black economic independence from societal discrimination . . . freedom for Black people today means economic freedom and security, [which] can be assured in the form of monetary compensation, along with free provision of goods and services to Black communities across the nation. The guiding principle of reparations must be self-determination in every sphere of life in which Blacks are currently dependent.<sup>77</sup>

By forging strategies to effect material change to the lives of subordinated people, Westley and Yamamoto demonstrate the deep roots reparations theory has in CRT. The emphasis on achieving material benefits for the oppressed echoes CRT's quest for "antibordinationist social transformation."<sup>78</sup> In this sense, reparations theory represents a conscious effort to merge theory with praxis<sup>79</sup> to effect radical change to the social order.

### *C. Extending Beyond a Binary Approach to Race*

Almost from the beginning, reparations theory has looked beyond the traditional binary approach to race, in part because theorizing about redress for societal harms was invigorated<sup>80</sup> by enactment of the Civil Lib-

77. Westley, *supra* note 70, at 470.

78. Valdes et al., *supra* note 49, at 3.

79. See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 832-33 (1996) (arguing that scholars and activist lawyers should collaborate and recommending that academics direct their attention to providing some accessible answers and strategies for combating subordination).

80. Advocacy and theorizing about reparations have a long history. See Verdun, *supra* note 28, at 600 (identifying five waves of reparations activism dating as far back as the Reconstruction era). Legal theorizing about reparations emerged toward the end of the Civil Rights movement, following exhortations for redress by Martin Luther King and activist James Foreman. Foreman delivered the Black Manifesto which "demanded \$500 million from churches and synagogues." *Id.* at 600. Scholars from this period found strong moral reasons to support reparations. For example, in 1968, Graham Hughes argued that reparations were required as a matter of morality and justice and called for legislative measures to address the economic and educational deficits confronting Blacks. Hughes,

erties Act of 1988, compensating Japanese Americans for their internment during the Second World War.<sup>81</sup> Consistent with CRT precepts of anti-essentialism, scholars identified lessons to be learned from this experience that could be adapted to the struggles of other groups. Thus, for example, Eric Yamamoto cautions that groups be mindful that reparations do not devolve into a payoff that “assuag[es] white American guilt without guaranteeing changes in mainstream attitudes and the restructuring of institutions.”<sup>82</sup> Similarly, he warns of the possibility that reparations may be achieved for the illusory benefit of inclusion at the expense of other oppressed groups.<sup>83</sup> In other words, Yamamoto urges reparations advocates to make certain that the quest for reparations and racial justice does not result in further entrenching of injustice against other groups.<sup>84</sup>

Similarly, reparations theory looks beyond traditional domestic anti-discrimination law for strategies and support. For example, Yamamoto, Susan Serrano, and Michelle Natividad Rodriguez have argued for using an international human rights framework to frame reparations claims in order to focus the world’s attention on the United States and its response to claims for restorative justice.<sup>85</sup> Building upon Bell’s interest-convergence theory, these scholars suggest that the war on terror and the government’s professed desire to export democracy may make redress politically viable and, indeed, necessary: “the United States may lack the unfettered moral authority and international standing to sustain a pre-emptive worldwide war on terror unless it fully and fairly redresses the continuing harms of its own long-term government-sponsored terrorizing of a significant segment of its populace.”<sup>86</sup> These scholars argue that framing reparations claims in terms of human rights law has the potential to “place American racial justice on trial,”<sup>87</sup> which, in turn, will place necessary political pressure on the United States to remedy past wrongs. Additionally, because international human rights law avoids many of the well-known pitfalls of the traditional legal framework, this body of law may provide a greater opportunity for success.<sup>88</sup>

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*supra* note 35, at 1064–66, 1071. This theory of reparations recognized the broad institutional effects of racial discrimination and emphasized improved economic outcomes for Blacks. In a somewhat similar vein, in 1973, Boris Bittker posited a legal claim based on state wrongdoings occurring after slavery—namely, systemic discrimination effected through “statutes, ordinances, and other official actions,” in order to achieve redress for segregation in schools. BITTKER, *supra* note 28, at 26.

81. Matsuda, *supra* note 29, at 362.

82. *Id.*

83. *Id.*

84. *Id.*

85. See Colloquium, *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1317 (2003).

86. *Id.* at 1294.

87. *Id.* at 1314.

88. *Id.* at 1317.



When viewed in connection with its scholarly antecedents, the reparations movement must be seen as an overt effort to reverse the hegemonic use of the law to legitimate and reinforce race-based subordination.<sup>89</sup> In this sense, “reparations talk”<sup>90</sup> is a means of public education,<sup>91</sup> not only about “the contributions Blacks have made without compensation or too little compensation;”<sup>92</sup> but also about the nature of discrimination; an important discussion, since the Supreme Court’s decisions on affirmative action, with the possible exception of *Grutter v. Bollinger*,<sup>93</sup> have contributed to the subversion of that term.<sup>94</sup> Thus, reparations is a vehicle for removing the veil from systemic state-sponsored subordination of Blacks and state collusion in private acts that have furthered the subjugation of African Americans.<sup>95</sup> Additionally, the reparations movement seeks to involve the community at large—the courts, legislatures, and the public—in order to fashion a variety of remedies, including redistribution of wealth, and reckoning with and deconstructing the systemic enforcement of White privilege to improve the material conditions of African Americans and realize the promise of equality embodied in the Constitution.

As the following sections will explain, the Brown Fund Act, unfortunately, departs from these principles. Instead, it reflects the constrained conception of race and the law that CRT and reparations scholars have identified as inaccurate and wholly inadequate to reverse centuries of racial subordination. Accordingly, while this significant measure takes an important step toward rectifying a terrible wrong, much more is necessary to remedy the harm visited upon Blacks in Virginia and, in so doing, provide the meaningful change the reparations requires. The historical discussion that follows demonstrates, in keeping with CRT and reparations theory, that the legislature should have expanded its vision of the scope of the harm and of the remedy, which this Article does. In this sense, what follows is within the tradition of the newest wave of reparations literature; explaining how the past is relevant to current conditions of subordination and how that past justifies taking forward-looking steps to correct this situation.

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89. See Freeman, *supra* note 36.

90. See Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81 (2004).

91. I am grateful to Eric Miller for this insight.

92. Brophy, *supra* note 90, at 108.

93. 539 U.S. 306, 342 (2003)(holding that the University of Michigan affirmative action plan does not violate equal protection, but suggesting that it must have a “logical end point”)

94. See Freeman, *supra* note 36, at 1102–18.

95. See Brophy, *supra* note 90, at 108.

## II. ASSESSING THE BROWN FUND ACT AS A REPARATIVE MEASURE

The Brown Fund Act is intended to provide some measure of redress for the persons harmed by the school shutdowns. The scope of the remedy is limited, available only to persons currently “domiciled in Virginia”<sup>96</sup> who:

resided in a jurisdiction in Virginia between 1954 and 1964 in which the public schools were closed to avoid desegregation and who (1) was unable during such years to (a) begin, continue, or complete his education in the public schools of the Commonwealth, (b) attend a private academy or foundation, whether in state or out of state, established to circumvent desegregation, or (c) pursue postsecondary education opportunities or training because of the inability to obtain a high school diploma; or (ii) was required to relocate within or outside the Commonwealth to begin, continue, or complete his K-12 education during such years because of public school closings to avoid desegregation.<sup>97</sup>

The Brown Fund Act makes tuition assistance available for pursuing a General Education Development program, a two-year program at the community college level, or a four- or five- year undergraduate degree program.<sup>98</sup> The statute establishes a committee charged with developing criteria for the scholarships, reviewing applications and, ultimately, deciding upon the recipients.<sup>99</sup> Resources for the scholarships are to be appropriated by the General Assembly and may be supplemented by “gifts, donations, bequests, or other funds.”<sup>100</sup> The initial appropriation for the scholarships was only \$50,000,<sup>101</sup> about one-fourth of what was necessary.<sup>102</sup> However, after a private donor gave \$1 million, lawmakers

96. VA. CODE ANN. § 23-38.53:22C (2004).

97. § 23-38.53:22D.

98. § 23-38.53:22A.

99. § 30-226B. The committee must consist of a mix of “legislative” and “nonlegislative” members, appointed by the Joint Rules Committee of the General Assembly and the Governor, respectively. *Id.*

100. § 23-38.53:24.

101. Kathryn Orth, *Warner: Students Will Be Helped Governor Vows to Get Funds for Those Hurt by Massive Resistance*, RICH. TIMES DISPATCH, May 15, 2004, at A1.

102. The General Assembly’s failure to fully fund the scholarship was met with derision and outrage. Ken Woodley, editor of Prince Edward County’s *Farmville Herald* and catalyst for the Brown Fund Act, criticized lawmakers, arguing that the proposed appropriation of \$2 million was not enough: “Take the \$2 million and fund it in today’s dollars: about \$11.75 million, with 3 percent annual interest and another \$7 million, because the unspent appropriation from 1959–1964 has been earning the Commonwealth a dividend for decades.” Ken Woodley, *Go Beyond ‘Seed Money’: The Harvest is Due*, RICH. TIMES DISPATCH, March 6, 2004, at A13.

increased the amount to match the private grant.<sup>103</sup> The Brown Fund Act expires in 2008.<sup>104</sup>

The Brown Fund Act focuses on Virginia's massive resistance; that is, the state's intransigence in the face of the Supreme Court's order to desegregate after *Brown v. Board of Education*. After the Court issued its mandate, the General Assembly, the Governor, and other state officials vowed to maintain segregated schools. Through a myriad of massive resistance laws, the Governor and state officials wrested authority from local school officials to close or defund schools that allowed Black students to enroll. Pursuant to the statutes enacted during this period, the Governor closed schools in Norfolk, Charlottesville, and Front Royal,<sup>105</sup> after district courts had ordered desegregation. Prince Edward County officials decided to close schools even after the state supreme court invalidated the massive resistance laws, keeping the doors to public education closed for five years. In so doing, this locality, one of the most resistant defendants in the *Brown* litigation, earned the attention of the world during its strike, but surprisingly little attention since that time. Because the misdeeds of Prince Edward County are at the center of the Brown Fund Act, the next section examines these actions more closely to assess the efficacy of the Brown Fund Act's remedy.

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103. See *A Debt to the Victims of Massive Resistance*, ROANOKE TIMES & WORLD NEWS, June 7, 2004, at B6. The legislature's apparent lack of commitment to appropriating the necessary funds to the Fund underscores the concern raised by Bell, *supra* note 42, and raises questions about focusing efforts for reparations on legislatures. It should be noted, however, that the political pressure exerted from a private donor played a significant role in the General Assembly correcting its course, which suggests that it is possible to build a constituency—in this case, a constituency of one wealthy donor—to effect change. The question then becomes how to best make the case for reparations. This Article suggests one way of doing so.

104. 2004 Va. Acts Ch. 935 § 2.

105. Front Royal, the county seat of Warren County, started the school shutdowns, with then-Governor Lindsay Almond ordering the closure of Warren County High School. See Edward A. Mearns, Jr., *Virginia: A Report to the United States Commission on Civil Rights*, in CIVIL RIGHTS U.S.A.: PUBLIC SCHOOLS, SOUTHERN STATES 193 (Greenwood Press 1968) (1962). The command came after the county lost its legal battle to prevent 24 Black students from enrolling in the high school. After a federal court ordered that students be admitted by September 15, 1958, the governor ordered that the school be closed, pursuant to the state's law proscribing integration in schools. See *infra* notes 290–292 and accompanying text. Arkansas Governor Orval Faubus ordered the closing of the high schools in Little Rock on the same day. BENJAMIN MUSE, VIRGINIA'S MASSIVE RESISTANCE 69 (Indiana Univ. Press 1961). Shortly thereafter, Governor Almond issued similar orders in other locales facing federal orders to desegregate. By the end of September of 1958, almost 13,000 of Virginia's children no longer attended public school. *Id.* at 75. Warren County High School reopened five months later, following additional unsuccessful legal maneuvering by the state. Mearns, *supra* at 194. When the school reopened, only the 24 Black students who had originally sought admittance actually attended.

## A. Prince Edward County: Beyond Massive Resistance

Prince Edward County is located in the southeastern portion of Virginia, a section known as the “Black Belt” because of the heavy concentration of African Americans living there; historically, it has been the site of significant occurrences.<sup>106</sup> For example, in 1831, Nat Turner attempted his ill-fated rebellion in that part of the state,<sup>107</sup> sparking enactment of laws prohibiting education for slaves, according to some commentators.<sup>108</sup> Additionally, in 1888, Black Belt voters elected the first African American to represent the state in the United States Congress, John W. Langston.<sup>109</sup> The fact that Blacks were a significant part of the population was the source of tension, as evidenced in actions the General Assembly took in subsequent years to limit the potential political influence of African Americans.<sup>110</sup>

With Blacks and Whites co-existing uneasily, the school strike led by young Barbara Rose Johns<sup>111</sup> and the national litigation in which the County was one of the defendants likely inflamed the situation. Thus, when the United States Supreme Court declared segregation unconstitutional, Prince Edward County regrouped and sought other ways to maintain its way of life. Two years after the Supreme Court’s decision, county school board members “resolved that they would not operate public schools ‘wherein white and colored children were taught together.’”<sup>112</sup> Ultimately, the county board of supervisors “refused to levy an[y] school taxes for the 1959–1960 school year, explaining that they were ‘confronted with a court decree which requires the admission of white and colored children to all schools of the county without regard to race or color.’ As a result, the county’s public schools did not reopen in the fall of 1959.”<sup>113</sup> The Board also formed a publicly-funded private foundation to “operate private schools for white children in [the county].”<sup>114</sup> The Board of Supervisors subsequently “passed an ordinance providing tuition grants”<sup>115</sup> funded with public dollars to enable White

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106. See Jamie C. Ruff, *The Racial Scars Linger*, RICH. TIMES DISPATCH, May 16, 2004, at C-6 (observing that “the county’s people of both races had a tradition of tough independence”).

107. MUSE, *supra* note 105, at 7.

108. See *infra* note 151.

109. MUSE, *supra* note 105, at 7.

110. See *infra* notes 168–192 and accompanying text.

111. See *supra* notes 3–7 and accompanying text.

112. *Griffin*, 377 U.S. at 222.

113. *Id.* at 222–23.

114. *Id.* at 223.

115. *Id.*

children to attend the foundation's schools; the vast majority of White students were able to take advantage of this option.<sup>116</sup>

Because of the shutdown, Black parents resorted to other measures to provide some modicum of education to their children. For example, unemployed Black teachers taught classes in church basements, using materials made possible by private donations since all the necessary books and other supplies were locked out of reach.<sup>117</sup> As the teachers found jobs in neighboring jurisdictions, however, even these classes became scarce.<sup>118</sup> Some students did not attend school at all. Consider how one student passed the time during the strike:

Each morning, as she watched her white neighbors board a school bus at the edge of a driveway, [6-year-old] Shirley pretended that she, too, was going to school. She put on a pretty dress . . . and with books in hand, skipped down the hill to wait for the bus. After it picked up the [neighborhood] boys, she plopped beneath a shade tree and transported herself into secret world of daydreams, filled with scenes in which the yellow bus stopped for her too. She read and reread the few books that constituted the family's meager collection. She forced herself to return to the house for lunch and to help with the chores, but in mid-afternoon she resumed her sentinel post at the foot of the hill . . . .

On days when she got carried away with her reading and her daydreaming, she would still be sitting beneath the tree when the bus brought [the boys] back in the afternoon.

When Shirley walked back to her house, as if she too were returning from school, her mother would ask, "Where have you been?" Shirley would answer, "Oh been playing school."<sup>119</sup>

When the schools finally reopened in 1964, many students had fallen behind their peers and, unable to catch up, dropped out.<sup>120</sup> Other Black students left the county altogether to attend school, moving to nearby counties or to places such as Washington, D.C., or New York to

116. "The academy opened on September 10, with 1,475 white students, just 87 fewer than had attended the white public schools the previous year." Donald P. Baker, *Fifty Years Ago In Virginia Integration Came Down To This: After Blacks Walked Out Of Their Segregated School, Whites Shut Down The System For Five Years*, WASH. POST, Mar. 4, 2001, at W8.

117. *Griffin*, 377 U.S. at 223.

118. Baker, *supra* note 116, at W8.

119. *Id.* at W22.

120. A funeral director from the county observed that "Even today, there's some folks who can't read or write and were never able to get a decent job." *Id.* at W24.

live with relatives. Some students had the help of religious organizations, primarily the Quakers, which found host families in places such as Iowa or Massachusetts who would take children into their homes so they could get an education. Some of those students went on to college, attending such institutions as Harvard, Princeton, Howard, Hampton, and Virginia Polytechnic Institute.<sup>121</sup>

Four years into the strike, an integrated option became available to students. Private parties—corporations, philanthropists, and foundations—contributed funds to create the Prince Edward County Free School, headed by Neil V. Sullivan, superintendent of the Long Island, New York, schools. Sullivan was known for his innovative educational practices.<sup>122</sup> He recruited a racially diverse faculty and embarked on creating an integrated school, with the hopes of setting an example for the future.<sup>123</sup> The Free School was open from the fall of 1963 until June of 1964;<sup>124</sup> the majority of its students were African American.

Finally, in 1964, the United States Supreme Court stepped in to order that the schools be reopened. At this point, fully ten years after having decided *Brown*, the Court held in *Griffin v. County School Board of Prince Edward County* that closing the schools violated the Black students' Fourteenth Amendment rights to equal protection. Grounding its ruling in formal equality, the Court held that the county's action had a disparate impact on Black students because White children could attend private schools, but no such alternative was available to Black children until just before the Court's ruling.<sup>125</sup> Key to the Court's holding was the recognition that the disparity was not accidental:

[T]he record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with *state and county assistance*, for one reason, and one reason only: to ensure, through measures taken by the county *and the State*, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school.<sup>126</sup>

Thus, with the federal judiciary's intervention, the shutdown came to an end,<sup>127</sup> for the most part. In a last-ditch effort to preserve the Southern

121. *Id.*

122. See SMITH, *supra* note 2, at 240.

123. See Neil V. Sullivan, *A Case Study in Achieving Equal Educational Opportunity*, 34 J. OF NEGRO EDUC. 319 (1965).

124. Robert L. Green and Louis J. Hofmann, *A Case Study of the Effects of Educational Deprivation on Southern Rural Negro Children*, 34 J. OF NEGRO EDUC. 327 (1965).

125. See *Griffin*, 377 U.S. at 230.

126. *Id.* at 231 (emphasis added).

127. It should be noted that throughout the struggle to open the public schools in Prince Edward County, the federal executive branch agencies provided little assistance. The

way of life, the county supervisors approved grants for Prince Edward Academy that parents received in a secret meeting held in the wee hours of the morning, in anticipation of a federal injunction:

More than 700 parents of academy students, who had been tipped off about the meeting, gathered at the town armory at 2 a.m. There the board doled out 1,250 grants for a total of \$180,000—nearly half the \$375,000 that the supervisors had appropriated for schools for the new term.

....

Once the checks were cut, the academy parents rushed to one of the town's three banks, which opened early "so everyone could deposit them before a new court order could stop them."<sup>128</sup>

When the schools finally reopened, only a handful of White students enrolled;<sup>129</sup> however, today, Prince Edward schools are among the most integrated schools in the nation, with Whites making up about 40 percent of the students, which reflects their numbers in the county's population.<sup>130</sup> Ninety percent of the county's White students attend public schools that are majority Black,<sup>131</sup> in part because efforts by a superintendent who advocated successfully for increased funding, renovated and built new facilities, and expanded curricular offerings, among other

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Eisenhower Administration did not respond to requests to intervene. See SMITH, *supra* note 2, at 236. The Kennedy Administration Justice Department filed an amicus brief in the Davis case, arguing that the state had an obligation to fund integrated schools. President Kennedy also obliquely referred to the crisis in a message to Congress on civil rights in 1963, "urg[ing] a speedy resolution of the legal issues and promis[ing] remedial aid for the students when the schools reopened. He pledged to 'fulfill the constitutional objective of an equal, non-segregated educational opportunity for all children.'" Baker, *supra* note 116, at W23–24.

128. Baker, *supra* note 116, at W24.

129. Jamie C. Ruff, *A Rose for Rising Above: Prince Edward County Students Honor Predecessors' Courage on Anniversary of Brown Ruling*, RICH. TIMES DISPATCH, May 18, 2004, at A1 (stating that in 1964, only 7 White students enrolled, compared to 1,500 Black students).

130. See, e.g., GARY ORFIELD & CHUNGMEI LEE, BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE, 11–12 (Harvard Civil Rights Project, January 2004). Orfield and Lee report that "in what had been the nation's most famously resistant system, the integration level in the county during the 1991–2001 period was far above the national average." *Id.* at 12.

131. Baker, *supra* note 116, at W11.

things.<sup>132</sup> Still, like many school districts, the achievement gap between Black and White students remains wide.<sup>133</sup>

For the county's Black residents, particularly the children affected, the shutdown had a major impact on their lives apart from the obvious denial of the opportunity to attend their local schools. Barbara Rose Johns had to leave the state to protect her well-being.<sup>134</sup> Many Black families were separated:

"My family broke up at that point," Alton C. Stokes, Sr. . . . said of the school closings. Some siblings were sent out of state to Washington, D.C., Boston and Springfield, Mass., to live with relatives and continue school. The youngest of the five siblings, Stokes said he only attended school in Ashland for three months before the schools finally reopened.<sup>135</sup>

Children who remained in the county lost out academically,<sup>136</sup> in ways that continue to haunt them as adults. For example, local resident Sylvia Eanse was a third-grader when the schools closed and was placed in the eighth grade upon their reopening, as if nothing had happened: "[t]he teachers just pushed through, wanted us out . . ." After graduation, Sylvia didn't think she could spell well enough to pass the test to fulfill her goal of becoming a licensed practical nurse. She settled for a factory job.<sup>137</sup> Rebecca Brown also was also a third-grader when the shutdown started, and returned to the third grade in 1964 at the age of thirteen. Brown

struggled with math, science and, spelling, finally dropping out of school at 16 with a sixth-grade education.

"I was shamed to sit in that classroom with tiny little kids," the 53-year-old grandmother said.

After several years of factory work in Baltimore, Brown returned to Farmville in 1987. Today, she works in the dining

132. See Debra Viadero, *At the Crossroads*, EDUC. WEEK, March 24, 1999, at 38, available at <http://www.edweek.org/ew/vol-18/28genera.h18>. Blacks in the county urged the appointment of James M. Anderson in 1972. When he took the position, only 7 percent of the system's students were White. Upon his retirement 25 years later, the White school population had increased to reflect more closely its numbers in the county. *Id.*

133. Mary Leonard, *Scars Remain Years After Battles over Integration*, BOSTON GLOBE, May 9, 2004, at A1.

134. *Id.*

135. Jamie C. Ruff, *A Ruling on Race That is Still Reverberating*, RICH. TIMES DISPATCH, May 17, 2004, at A1.

136. See, e.g., Green and Hofmann, *supra* note 124 (documenting the negative effects the closure of schools in Prince Edward County had on Black children).

137. Baker, *supra* note 116, at W25.



hall at Longwood University in Farmville, making salads and sandwiches for \$5.46 an hour.

[S]he wants to make more money, but “everybody with jobs in Farmville is looking for a high school diploma or GED.”<sup>138</sup>

Others still lacked rudimentary skills and experiences that could benefit their own children. In the words of another child of the shutdown, “I resent even today the fact I never could help my children with algebra or geometry because I never had a school year of it taught to me.”<sup>139</sup> Said another, “It denied me of the relationship with other kids, teachers, principals. Experiences that were normal were only dreams to me.”<sup>140</sup>

The remedy the Brown Fund Act provides may be appropriate for some of the harms articulated above, but there are other harms that this statute clearly does not, nor cannot, address. Primary among them is the loss of trust between the affected young people and the state. As one former student observed, “[the shutdown] was very devastating because it was aimed directly at children. It took my faith away . . . If you can’t trust your town and your state to do the right thing . . .”<sup>141</sup> Additionally, the shutdowns exacerbated the harm that the Supreme Court had identified in *Brown* that was inherent in the State’s decision to segregate—sending the strong message of Black inferiority. This message was only intensified by the state’s refusal to open schools in the face of the Court’s order. As Rita Moseley, who left Prince Edward County to attend school in Blacksburg, Virginia, observed, “[a] lot of us are still hurt . . . Some are scarred for life. A lot are still angry. Some are still bitter . . . to think that this happened because they didn’t want to go to school with us because we were a different color.”<sup>142</sup> The message of inferiority likely was underscored even after the schools reopened, as the Black students who remained in the county picked up where their school careers had ended five years earlier. For instance, Alton Stokes resumed third grade as a 13-year old in 1964 when schools reopened. “‘Mentally, it did something to me,’ he said. ‘It’s hard to accept you’re sitting in class and you’re 13 years old with 7- and 8-year-olds.’”<sup>143</sup>

138. Fredreka Schouten, *50 Years After Landmark Court Decision, Painful Legacy Lingers in VA*, GANNETT NEWS SERVICE, Apr. 27, 2004.

139. A. Barton Hinkle, *Bill Would Provide Just Recompense in Education*, RICH. TIMES DISPATCH, January 20, 2004, at A-9.

140. *Id.*

141. Jamie C. Ruff & Kathryn Orth, *The Racial Scars Linger*, RICH. TIMES DISPATCH, May 16, 2004, at C-6.

142. Paul Nussbaum and Annette John-Hall, *Virginia Tries to Right Decades-Old Wrongs Caused By School Closings*, PHILADELPHIA INQUIRER, May 15, 2004.

143. Ruff, *supra* note 135.

Thus, the school shutdowns in Virginia had significant effects on the Black children who were the targets of the state's action,<sup>144</sup> which challenge the efficacy of the traditional remedy that the Brown Fund Act<sup>145</sup> represents.<sup>146</sup> The remedy appropriately seeks to compensate those persons for whom the doors of public education were closed. However, as the foregoing suggests, the harm extends far beyond the ability of the so-called "crippled generation"<sup>147</sup> to attend public schools. The Act's attempt to remedy the effects of massive resistance raises important questions about the ability of any legal remedy to address the resulting lost educational and employment aspirations or the harm that comes from the knowledge that the state and the community have colluded to exclude persons from a public institution because of their race. When these harms are considered, the Brown Fund Act falls short. This Article suggests that one reason the General Assembly's effort failed in this regard is that its focus was limited to the school shutdowns. More specifically, lawmakers should have examined massive resistance and Prince Edward County's intransigence within a larger historical context to understand fully the nature of the wrong; which, in turn, would have informed more fully their understanding of the nature of the harm, and, as a consequence, the remedy. The next section attempts to do just that.

*B. Putting the Brown Fund Act and Massive Resistance in Context: Virginia's History and Tradition of Discrimination in Education*

[T]he separation provision rests neither upon prejudice, nor caprice, nor upon any other measureless foundation. Rather

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144. Some people resist the notion that the school closings had anything to do with race. For example, one county official remarked as follows, in the context of efforts to designate Moton School as a historic landmark: "'We don't want this to become a race problem,' . . . saying he'd much prefer to see the building demolished. 'People tell me it's a constant reminder, like rubbing salt in a wound.'" See Baker, *supra* note 116, at W11. This view did not prevail; the Moton School is a civil rights museum; it is listed as a "National Historic Landmark". See <http://motonmuseum.com>.

145. It should also be noted that some African American residents of Prince Edward County established their own scholarship fund, the Lest We Forget Foundation, which awards \$1,000 to the children of those affected by the shutdown to attend college. Schouten, *supra* note 138.

146. Indeed, when evaluated in that sense, the Act has several shortcomings. The final version of the law lacks an apology for shutting down the schools that was part of the original bill. Additionally, the measure provides scholarships for completing high school, community college, or college, which many eligible adults may either have attained already in the intervening 40–50 year time span, or which many may feel they no longer want or are able to pursue at this point in their lives. See *infra* text accompanying notes 326–334.

147. SMITH, *supra* note 2, at 249 (noting that an NBC news program first used this term in 1962 to describe the African American students in Prince Edward County).

the proof is that it declares one of the ways of life in Virginia. Separation of white and colored “children” in the public schools of Virginia has for generations been a part of the mores of her people.<sup>148</sup>

### 1. Putting the Machinery of Subordination in Place: Acts of the General Assembly

Virginia’s intransigence in the face of the Supreme Court’s holding in *Brown* is consistent with the state’s longstanding history of constraining educational opportunities for Blacks to assure their subordinate status in the political and social structures of the state. The following highlights key aspects of that history.<sup>149</sup>

Denial of education for Blacks was a part of slavery, with some states proscribing literacy for slaves as early as 1740. The majority of such laws appeared, however, in the first half of the nineteenth century.<sup>150</sup> In Virginia—and likely other states—the literacy prohibition followed an attempted rebellion by Nat Turner, who lived on a plantation in the state’s Black Belt.<sup>151</sup> In addition to being perceived as a physical threat, educated slaves were deemed inimical to the continued economic success of slavery. As historian Carter G. Woodson has explained: “rich planters not only thought it unwise to educate men thus destined to live on a plane with beasts, but considered it more profitable to work a slave to death during seven years and buy another in his stead than to teach and humanize him with a view to increasing his efficiency.”<sup>152</sup> Although a few slave masters ignored these laws because they had valuable slaves capable of “bookkeeping [and] printing,”

148. *Davis v. Prince Edward County Bd. of Educ.*, 103 F. Supp. 337, 339 (E.D. Va. 1952).

149. A full rendering of the state’s history is beyond the scope of this Article.

150. Carter G. Woodson, *The Education of African Americans Prior to 1861*, in FOUNDATIONS OF AFRICAN AMERICAN EDUCATION 3 (Julie Kehrwald ed., 1998).

151. In August of 1831, Virginia slave Nat Turner led an “insurrection” that resulted in the deaths of 55 White persons. See *The Confessions of Nat Turner, the Leader of the Late Insurrection in Southampton, Va., as Fully and Voluntarily Made to Thomas R. Gray*, in THE CIVITAS ANTHOLOGY OF AFRICAN AMERICAN SLAVE NARRATIVES 85 (William L. Andrews and Henry Louis Gates, Jr., eds., 1999). The popular discourse attributed Turner’s actions to the fact that he was literate. Some “said at the time that Turner had been provoked to revolt against the established order by reading anti-slavery tracts published in the North.” HORACE MANN BOND, *THE EDUCATION OF THE NEGRO IN THE SOCIAL ORDER* 173–74 (Octagon Books 1966) (1934). Eight years later, the Virginia code proscribed Blacks gathering together for the purpose of learning to read or write. Doing so constituted “unlawful assembly” and was punishable by “whipping” for a Black person; White persons convicted of engaging in such an activity were subject to a fine of \$100 or imprisonment. *Id.* at 175.

152. Woodson, *supra* note 150, at 7.

the majority of the people in the South [believed] that, as intellectual elevation unfits men for servitude and renders it impossible to retain them in this condition, it should be interdicted. In other words, the more you cultivate the minds of slaves, the more unserviceable you make them; you give them a higher relish for those privileges which they cannot attain and turn what you intend for a blessing into a curse. If they are to remain in slavery they should be kept in the lowest state of ignorance and degradation, and the nearer you bring them to the condition of brutes the better chance they have to retain their apathy.<sup>153</sup>

Notwithstanding the legal prohibition on education, some slaves risked being sold away from their families; or worse<sup>154</sup> to learn to read and write because they understood the important role schooling could play in their lives.<sup>155</sup>

With the approach of the Civil War, northerners advocated for educating African Americans as a means of dismantling the Confederacy. Just like the southern planters, they believed that:<sup>156</sup>

an educated ex-slave would be forever 'ruined' for any future slavocracy usage. To facilitate this ruination, the government of Abraham Lincoln immediately arranged to transport hundreds of abolitionist educators, both black and white, from the north to these areas for the purpose of setting up and staffing . . . schools [for Blacks].<sup>157</sup>

After the Civil War and the abolition of slavery, doors to educational opportunities slowly opened for Blacks throughout the South. The Freedmen's Bureau, which Congress established in 1866 to help the newly freed slaves,<sup>158</sup> provided the first public schooling for Blacks, as well

153. *Id.*

154. Penalties for violating the anti-literacy laws included whippings, imprisonment, and fines. *Id.* Masters threatened slaves who wanted to read with the loss of limbs or fingers. *Id.*

155. In fact, historians estimate that about 5 percent of the slave population surreptitiously learned to read before the end of the Civil War. See REMEMBERING SLAVERY: AFRICAN AMERICANS TALK ABOUT THEIR PERSONAL EXPERIENCES OF SLAVERY AND EMANCIPATION 206 (Ira Berlin, et al. eds., 1998).

156. Darryle J. Gatlin, *The Education of African Americans Since 1861*, in FOUNDATIONS OF AFRICAN AMERICAN EDUCATION 13, 15 (1998).

157. *Id.*

158. With passage of the Civil Rights Act of 1866, 42 U.S.C.A. § 1981, Congress created the Freedmen's Bureau, granting it the authority, albeit without any appropriations, to establish public schools for the newly freed slaves, among other things. See, e.g., W.E.B. DuBois, *The Freedman's Bureau*, in DUBOIS ON EDUCATION 102 (Eugene F. Provenzo, Jr. ed., 2002).

as for Whites in the South.<sup>159</sup> In Virginia, public schools also emerged at this time,<sup>160</sup> with the post-bellum Constitution of 1870 requiring the establishment of free schools for all the state's children.<sup>161</sup> This provision was in keeping with the state's pledge not to amend its constitution to limit or eliminate educational opportunities for African Americans as a condition of readmission to the Union.<sup>162</sup> Moreover, Congress had to approve the 1870 Constitution in order to put an end to federal military occupation of Virginia. In keeping with the constitutional guarantee of "equal civil and political rights and privileges" for all the state's citizens, the 1870 Constitution created free public education, without any mention of racial

159. See *id.* at 105; see also Beverly Guy-Sheftall, *DAUGHTERS OF SORROW: ATTITUDES TOWARD BLACK WOMEN, 1880–1920*, 94 (1990).

160. Prior to the Civil War, there was no system of public education in Virginia. See A.E. DICK HOWARD, *COMMENTARIES ON THE CONSTITUTION OF VIRGINIA* 879–81 (1974). Thomas Jefferson tried unsuccessfully to pass legislation that would provide for such a system; however, the closest the state came in the years before the Civil War was establishing a state endowment for education in 1810, and later enacting a tax measure "to be applied to the purposes of education in primary and free schools." *Id.* at 881 (quotation and citation omitted). The lack of public education prior to the end of the Civil War reflected the strong class divisions in the state. Conventional wisdom of the time held that "a man's children should be educated by himself, in proportion to his social status." CHARLES CHILTON PEARSON, *THE READJUSTER MOVEMENT IN VIRGINIA* 4, 4 (1917). The education of children thus was a responsibility of individual families—of fathers, more specifically—in which the state should play no role, lest it might provoke "unrest which could result only in disappointment . . . Only when charity absolutely demanded it should the state intervene." *Id.* at 5.

161. This provision was the work of Blacks and Whites successfully working together during the constitutional convention of 1867–1868. See W.E.B. DuBois, *BLACK RECONSTRUCTION IN AMERICA: 1860–1880*, 657 (Touchstone 1992) (1935). DuBois writes that:

[t]he attempt to establish a public school system was vigorously opposed by the reactionaries, but with the backing of the Negroes, the Constitution provided for a uniform system of public schools to be established not later than 1876. The Constitution did not provide for separate schools, but the laws under it did, and the support of the schools was to be obtained from a corporation tax of \$1 and a small property tax. The first schools were opened in 1870, and by the end of the year, there were 2,900 schools, and 130,000 pupils, and 3,000 teachers. Of these, 706 were Negro schools, and 38,554 pupils. The Negroes were eager for the schools, but the whites were largely indifferent. There was a scarcity of Negro teachers and many white teachers were used.

*Id.* at 658.

162. Act to Admit the State of Virginia to Representation in the Congress of the United States of Jan. 26, 1870, ch. X, 16 Stat. 62, 63 (1870) (stating that "the constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State").

segregation.<sup>163</sup> W.E.B. DuBois explains that the delegates at the constitutional convention “held a long debate on the matter of race separation in schools. The Negroes especially insisted upon mixed schools and the final report made no specific reference to whether the schools were to be mixed or segregated.”<sup>164</sup> Thus, the 1870 Constitution required the General Assembly to “provide . . . a uniform system of public free schools . . . [and] to make such laws as shall not permit parents and guardians to allow their children to grow up in ignorance and vagrancy.”<sup>165</sup> This constitution marked a break from the past indifference toward public education, providing the means to fund schools for all children.

Instead of the old system of public aid doled out to indigents for education, a uniform system of schools, free to all classes, adequately supervised, and liberally supported by specified funds and taxes, was to be established at once, and by 1876 extended equally and fully to all the counties and towns. The burden of taxation should no longer fall upon the poor . . .<sup>166</sup>

The framers of the 1870 constitution thus linked education with the overarching goal of assuring all persons meaningful participation in the civic and political life of the state. This intent was galling to those who resented federal intrusion, causing some to complain that “[h]ad the Radicals [a synonym for Republicans] been allowed to carry out the terms of this constitution, rampant democracy would unquestionably have had full play for years to come, and one can only conjecture the extremes to which it would probably have gone.”<sup>167</sup>

As the Republican majority was successful in making this substantial change, conservative lawmakers took steps to limit the potential for “rampant democracy,” particularly for Black Virginians. For example, in 1871, when the conservatives gained power, lawmakers enacted a measure establishing a state school board, the local members of which would be appointed by the State superintendent, the governor, and the attorney general.<sup>168</sup> This method would ensure that only Whites would lead the

163. DuBois, *supra* note 161, at 542. One delegate even went so far as to propose an amendment that would allow Blacks and Whites to attend the same schools; this proposal “failed to get the support of enough Radicals to be adopted, in spite of the efforts on the part of the Negro delegates.”

164. *Id.*

165. VA. CONST. of 1870, art. VIII, §§ 3, 4 (1870).

166. PEARSON, *supra* note 160, at 18.

167. *Id.* at 19.

168. Peyton McCrary, *Yes, But What Have They Done to Black People Lately? The Role of Historical Evidence in the Virginia School Board Case*, 70 CHI.-KENT L. REV. 1275, 1281 (1995).

state system of schooling.<sup>169</sup> During this time period, lawmakers also enacted a measure calling for segregation in the public schools.<sup>170</sup>

From 1879 until 1883, major changes promising to improve the status of Virginia's Blacks were enacted, when Republicans regained power. This victory was possible because of a new coalition of small farmers and Blacks called the Readjusters, so-named for their pledge to readjust the sizable debt Virginia had accumulated as a result of the Civil War. The Readjusters claimed to be the "party of the poor man,"<sup>171</sup> and as such attracted large numbers of Blacks to their side. This party's success in courting Black voters enabled the Readjusters not only to gain control of the General Assembly in 1879, but also allowed some Blacks to get elected.<sup>172</sup> This political victory set in motion a variety of changes that would reverberate for years to come. For example, the Readjusters did away with the poll tax.<sup>173</sup> While some argued that the poll tax was merely a measure to provide funding for state schools, it had become a means of denying Blacks access to the ballot box.<sup>174</sup> The Readjusters also imposed new taxes to fund public schools, causing some to complain that "the ruin of the denominational schools,"<sup>175</sup> was a likely outcome. Adding to the ire against the Readjusters was their successful establishment of a Normal and Collegiate Institute, a postsecondary school for African Americans, and the dismantling of the whipping post, a punishment that had been used primarily against the former slaves.<sup>176</sup> Additionally, Readjuster governors appointed Blacks to local school boards.

As a result of these initiatives, the dominance of the Readjusters during the last part of the 19th century was credited—or blamed—for the re-emergence of African Americans in state politics.<sup>177</sup> These developments, in turn, triggered a concern, particularly among Whites in the

169. *See id.*

170. *See* 1876–1877 VA. ACTS ch. 38 (providing for the establishment of free public schools as long as "white and colored persons [were] not taught in the same school, but in separate schools under the same general regulations as to management, usefulness, and efficiency"). Segregation was widespread across the nation, not limited to just the South. *See, e.g.,* Gilbert Thomas Stephenson, *Race Distinctions in American Law*, 43 AM. L. REV. 29, (1909) (noting that only 3 states had never required segregation in schooling: Arizona, Rhode Island, and Colorado).

171. RALPH CLIPMAN McDANIEL, *THE VIRGINIA CONSTITUTIONAL CONVENTION OF 1901–1902* 6–7 (1926).

172. *Id.*

173. PEARSON, *supra* note 160, at 144.

174. *Id.* at 146.

175. *Id.* at 145.

176. *Id.* at 147.

177. *See* McDANIEL, *supra* note 171, at 7 (stating that this election meant "the negro had emerged again as a factor to be reckoned with in the politics of the State").

southeastern part of the state, the Black Belt,<sup>178</sup> of “the spectre of negro domination, of ‘Africanization,’ and thereafter the white people of the Black Belt regarded as excusable any means that would assure white supremacy.”<sup>179</sup> As a result, fraud played a significant role in many elections. State officials engaged in a variety of practices to disfranchise Blacks, such as requiring them to wait in extraordinarily long lines to discourage voting or printing ballots in lettering that most Black voters would be unable to decipher.<sup>180</sup> As these misdeeds became more and more commonplace, some lawmakers determined that the “organic law of the State should be changed so as to enable them to do legally what had been accomplished by illegal means.”<sup>181</sup>

Thus, when Conservatives regained power<sup>182</sup> in 1883, they immediately set about reversing the changes put in place by the Readjusters. Among their legislative initiatives was reinstating the system of appointing school board members, by first enacting a law that required the General Assembly to select three private citizens to serve as a “school trustee electoral commission.”<sup>183</sup> By 1887, local commissions consisting of the county judge, commonwealth’s attorney, and school superintendent appointed school board trustees.<sup>184</sup> The intent to exclude African Americans from serving on these boards became clear during the commonwealth’s constitutional convention of 1902. At that time, delegates rejected a proposal that would have required elections for school board members. As one member explained, “there are a number of counties in the State in which we will have Negro trustees if the new constitution were to require [elections].”<sup>185</sup>

In response to growing concerns about Black political empowerment, lawmakers pursued and received voter approval for a constitutional convention in 1901, the primary purpose of which was the disfranchisement of African Americans; the “question around which all [the convention’s] deliberations centered.”<sup>186</sup> With this goal in mind, delegates crafted a variety of provisions designed to strip the vote from Blacks,

178. See *supra* note 106 and accompanying text.

179. McDANEL, *supra* note 171, at 8.

180. *Id.* at 26–30.

181. *Id.* at 33. Indeed, commentators of the time opined that: “It is more courageous and honorable and better for public morals and good government to come out boldly and disfranchise the negro than to make pretence of letting him vote and then cheating him at the polls.” *Id.* (quoting the RICHMOND DISPATCH).

182. McCrary, *supra* note 168, at 1285–86.

183. *Id.* at 1286.

184. *Id.* at 1287.

185. *Id.* at 1289.

186. McDANEL, *supra* note 171, at 24. Delegates to the convention tabled and postponed indefinitely a motion requiring members to “recognize and accept the civil and political equality of all men before the law.” *Id.* at 21–22. Indeed, delegates even considered seeking repeal of the 15th Amendment to the United States Constitution. *Id.* at 36.



without unduly affecting poor, illiterate Whites.<sup>187</sup> Ultimately, the state constitution of 1902 reinstated the poll tax and limited registration to veterans of the Civil War or their sons, and to men who could “read *and* explain the Constitution or, if unable to read, [could] give a satisfactory explanation of any article read to him by the officers of registration.”<sup>188</sup> Delegates intended for the latter provision to be easily manipulated to assure that Whites could vote, irrespective of their educational background.<sup>189</sup> Delegates considered and rejected a mere reading and writing test because some believed that Blacks were learning faster than illiterate Whites.<sup>190</sup>

Attendant to the disfranchisement provisions of the state’s 1902 Constitution was a provision requiring segregation of the races in public schools.<sup>191</sup> This action reflected a growing concern on the part of Whites, that with education, the sizable Black population of the state would gain and exert political power. As one commentator noted, the “planters believed that schooling would raise blacks’ political and economic aspirations and ruin them as agricultural and domestic laborers.”<sup>192</sup> In this regard, the rationale underlying pre-Emancipation bans on education for Blacks took on additional meaning during Reconstruction and beyond. Not only would educated Blacks begin to reject their “proper” places as laborers, but they also would use their newly gained education to wreak havoc on the existing economic and political regime by voting.

Accordingly, educators, the popular media, and public leaders denounced public education for Blacks as a waste of money or as a weapon for Black insurgency against the social order. For example, one professor from the University of Virginia opined that it was “foolish for the state to tax itself for the education of the black citizens it sought to disfran-

187. See *id.* at 36–37 (noting some delegates “would not vote to sacrifice a few white men for the purpose of disfranchising a few more negroes”).

188. *Id.* at 42.

189. *Id.* at 44.

190. *Id.* at 41.

191. VA. CONST. of 1902, art. IX, § 140 (stating that “[w]hite and colored children shall not be taught in the same school”). It should be noted, however, that the statutory provisions banning integrated schools were, in fact, being enforced even prior to the ratification of the 1902 Constitution. See, e.g., *Eubank v. Boughton*, 36 S.E. 529 (Va. 1900). At issue in that case was whether a circuit court properly had issued a writ of mandamus to compel King and Queen County officials to admit a White child to the “public free school for white children.” *Id.* at 530. School officials erroneously believed that the child was Black, and as a result, denied his admission to school because “to permit him to attend the school for white children would not only materially interfere with its prosperity and efficiency, but . . . would destroy it.” *Id.* When presented with unspecified evidence, the circuit court concluded that the child did not have “one-fourth of negro blood in him, and [was] therefore a white person,” under state law. *Id.*

192. JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH: 1860–1935* 40 (1988).

chise.”<sup>193</sup> Paul B. Barringer, faculty chairman of that institution, went further:

[A]ddressing the tenth annual meeting of the Southern Educational Association in 1900, [he] charged that black southerners had used their education “as a weapon of political offense” against white southerners. [Barringer also said that] “[a]ny education will be used by the Negro politically; for politics, once successful, is not an instinctive form of warfare . . .” Barringer argued that “whites should cease to support free schools for the blacks” because “the schools tended to make some Negroes idle and vicious” and “others able to compete with whites.”<sup>194</sup>

Newspapers of the day supported these views and helped disseminate them beyond the specialized audience of educators. For example, “[t]he Richmond Dispatch editorialized that black education had been a failure and a blunder . . . a needless expense that made hotbeds of arrogance and aggression out of black schools. . . . Many families distinctly prefer nurses and cooks who cannot read and write.”<sup>195</sup> Echoing the theme that education made Blacks seek to go beyond their “proper places” in society, the *Farmville Herald*, which is located in Prince Edward County, and would later play a prominent role in the shutdown of public schools in the post *Brown* era,<sup>196</sup> opined: “When they learn to spell dog and cat they throw away the hoe.”<sup>197</sup>

Ratification of the state’s 1902 Constitution and its disfranchisement of Blacks, coupled with the constitutional and statutory mandate<sup>198</sup> to separate the races in schooling, put in place the necessary structure for assuring that the educational opportunities available to Blacks would be severely limited; which, in turn would cement their subordinate status in the state’s political and economic life.

## 2. Putting the Machinery to Work

By establishing an educational system that afforded Blacks a rudimentary education, the commonwealth was able to fulfill the requirements for readmission to the Union, as well as its duty under the state constitution to

193. *Id.* at 96.

194. *Id.*

195. *Id.* at 97 (internal quotation marks omitted).

196. *See supra* note 10 and accompanying text.

197. ANDERSON, *supra* note 192, at 97.

198. 1902 VA. ACTS ch. 509 (establishing free public schools to “all person between the ages of seven and twenty years . . . provided, that white and colored persons shall not be taught in the same school, but shall be taught in separate schools, under the same general regulations as to management, usefulness, and efficiency”).

provide an “efficient” education to all the state’s children. However, from the beginning, it was clear that the state’s Black children would have far fewer opportunities than would their White counterparts. Indeed, the new obligation to educate all children, coupled with the lack of accountability resulting from the disenfranchisement provisions, made inequalities “inevitable.”<sup>199</sup>

The inequalities in educational opportunities reflected the prevailing social ideology that young Blacks deserved only the most basic education to prepare them for adulthood. Southern educational leaders and northern philanthropists convened gatherings to articulate a philosophy and policy of educating the newly-freed Blacks that later justified limited educational offerings. For example, at the first such conference at Capon Springs, the principal of the Hampton Institute observed that “slavery had been a ‘civilizing’ influence on the ‘barbarous Negroes’ and recommended Hampton’s model of industrial education as a system that would complete the ‘education’ begun under slavery.”<sup>200</sup> According to other leaders of the time, education was necessary to make certain Blacks would not “drag . . . down” southern Whites,<sup>201</sup> but only to a degree that would enable them to promote the economic stability of the region. In this regard, “the free black laboring class ‘must be taught to work, to submit to authority, to respect their superiors . . . the saw and plane and the anvil must take the place of geography.’”<sup>202</sup> These educators believed industrial education, which focused on acquisition of practical, rather than academic, skills was most suitable for Blacks.<sup>203</sup> Such a program would create a supply of laborers who willingly would rebuild the Southern economy, and at the

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199. See HORACE MANN BOND, *THE EDUCATION OF THE NEGRO IN THE AMERICAN SOCIAL ORDER* 92 (Octagon Books 1966) (1934). Bond observes that:

[d]espite the pledges of conservative chiefs to Negroes that their educational rights should not be violated by the restored regime, it was inevitable that the divestiture of the Negro of any real political power should soon be followed by a diversion of school funds from Negro to white children. There were more children to be educated but less money available for their education; and if a choice had to be made between providing a wretched system for both races and providing a fairly good system for the white children as compared to a wretched system for Negro children, a student of human nature can understand what was actually done.

*Id.*

200. ANDERSON, *supra* note 192, at 84.

201. *Id.* at 85 (quoting Charles W. Dabney, former president of the University of Tennessee).

202. *Id.* (quoting George T. Winston, former president of North Carolina’s College of Agriculture and Mechanic Arts).

203. See, e.g., Verna L. Williams, *Reform or Retrenchment? Single Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 42–45 (examining arguments supporting industrial education as a means of preparing Blacks for subservient social roles).

same time remain, in the minds of these educators, “submissive [and] nonpolitical.”<sup>204</sup> This class of workers also would help “protect the South’s economy against the onslaught of unionized labor,”<sup>205</sup> according to the northern philanthropists.<sup>206</sup> It should be noted, however, that despite the commonality of views among the southern planters and northern philanthropists, many Southerners distrusted providing any form of education for Blacks, particularly where significant concentrations of African Americans were located, precisely because they feared that education would mean increased political activity, and therefore, diminished power for Whites.<sup>207</sup>

#### a. Disparities in Funding and Resources

Driven by the belief that Black subordination was not only natural but also necessary for the economic and social stability of the South, Virginia, just as other states, developed a myriad of techniques to constrain the ability of Blacks to become educated, which were reinforced by the legal disfranchisement of Blacks who could hold no one politically accountable. For example, states commonly apportioned tax revenues levied from Blacks and Whites inequitably, which meant that White schools got a disproportionately large share of the resources. The United States Supreme Court upheld this practice in *Cumming v. Board of Education*<sup>208</sup> in 1899. In that case, Black parents challenged the decision of the Richmond County, Georgia, school board to close the lone public high school for African Americans, while allowing a public school for White girls to remain open.<sup>209</sup> The school board argued that closing Ware High School was necessary because it could not support both that school, which served 60 students, and the Black elementary school, which served 300.<sup>210</sup> Writing

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204. ANDERSON, *supra* note 192, at 89. It should also be noted that, for similar reasons, these educational leaders supported “southern efforts to disfranchise black voters, as long as such efforts stopped short of attempts to repeal the Fifteenth Amendment.” *Id.* at 94.

205. *Id.* at 90.

206. For example, William H. Baldwin, Jr., a leading educational philanthropist and railroad entrepreneur, “believed that the industrial nations would ultimately engage in economic warfare and the prospects of an American victory depended significantly on the nation’s ability to assemble quickly a nonunionized, cheap, efficient laboring class.” *Id.* Other proponents of this view included George Foster Peabody, and John D. Rockefeller, Jr. *Id.* at 86.

207. See *supra* notes 167–169 and accompanying text. See also ANDERSON, *supra* note 192, at 99 (observing that Southern Whites “knew that blacks as a class had never submitted willingly to racist oppression or acknowledged the legitimacy of Whites to rule over them. Most . . . therefore, were naturally suspicious of the philanthropists’ claim that blacks could be formally schooled to accept subordinate social and economic roles”).

208. 175 U.S. 528 (1899).

209. *Id.* at 542–44.

210. *Id.* at 544.

for the majority, Justice Harlan concluded that the board had acted “in the interest of the greater number of colored children, leaving the smaller number to obtain a high-school education in existing private institutions.”<sup>211</sup> Satisfied that the county board had acted purely for “economic” reasons and not out of animus toward the Black students,<sup>212</sup> the Court held that the school board had not violated the Fourteenth Amendment.<sup>213</sup> It further concluded that:

[w]hile all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. We have here no such case to be determined . . . .<sup>214</sup>

If states could decide to tax Blacks and Whites alike but refuse to allocate the resources obtained from its citizens equally, in this case eliminating the sole opportunity for African Americans to attain secondary education, they certainly had the discretion to disburse the tax dollars unequally in less obvious ways.

In Virginia, this avenue of limiting educational opportunity manifested itself through a statute that required segregating the list of state taxpayers by race. That list, in turn, was used to appropriate monies to the

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211. *Id.* The Court also was troubled by the fact that the plaintiffs had sought an injunction closing the White school, noting:

“if that were done, the result would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities for the education furnished in high schools. The colored school children of the county would not be advanced in the matter of their education by a decree compelling the defendant board to cease giving support to a high school for white children.”

*Id.*

212. *Id.*

213. *Id.* at 545 (concluding that “[u]nder the circumstances disclosed, we cannot say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the state . . . of the equal protection of the laws or of any privileges belonging to them as citizens of the United States”). The court below took the plaintiffs to task for failing to articulate “which paragraph of the [F]ourteenth [A]mendment” the school board had violated. *Board of Education v. Cumming*, 29 S.E. 488, 490 (Ga. 1898).

214. 175 U.S. at 545.

schools in proportion to the amounts that Whites and Blacks paid.<sup>215</sup> Property taxes and poll taxes were the primary sources of income for schools. The fact that Blacks typically owned less valuable property<sup>216</sup> or lacked the money to pay poll taxes<sup>217</sup> ensured that coffers for Black schools always would hold less than those for White schools. Even state-wide tax hikes did not redound to the benefit of Blacks: from “1900 until 1920, every southern state sharply increased its tax appropriations for building schoolhouses, but virtually none of this money went for Black schools . . . Southern public school authorities diverted school taxes largely to the development of white public education.”<sup>218</sup>

Over time, funding disparities between Black and White schools grew.<sup>219</sup> For example, by 1922, the state of Virginia spent \$12 million to educate Whites, compared to \$1 million to educate Blacks.<sup>220</sup> The disparity in school funding for Blacks in the state provided an impetus for their migration north.<sup>221</sup> “The 1920 census showed more than a fifth of the colored population living outside its state of birth,”<sup>222</sup> with Virginia

215. See, e.g., *Coles' Heirs v. Jamerson*, 71 S.E. 618, 619 (Va. 1911). In that case, litigants challenged the tax assessment of a Black decedent's property, *inter alia*, on the basis that the state had erroneously listed the taxpayer as White. The court observed that the “requirement of section 464 [of the 1904 Virginia Code], with respect to separate lists for white and colored tax payers, was intended as a basis for the apportionment of the school tax fund between the white and colored races in proportion to the amount of taxes contributed by them respectively.” *Id.* The fact that the state had erred in classifying the taxpayer did not invalidate the assessment. *Id.*

216. Cf. *Puitt v. Commissioners of Gaston County*, 94 N.C. 709, 715–16 (1886) (holding as violative of the state constitution a provision that imposed a tax for educational purposes on Whites only). The court so held, in part, because “the vast bulk of property, yielding the fruits of taxation, belongs to the white people of the State, and very little is held by the emancipated race . . . [as a result, the] act . . . does necessarily discriminate ‘in favor of the one and to the prejudice of the other race.’”

217. Cf. *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (invalidating the poll tax as a violation of the Equal Protection Clause).

218. ANDERSON, *supra* note 192, at 156.

219. See, e.g., Chas. H. Thompson, *Court Action the Only Reasonable Alternative to Remedy Immediate Abuses of the Negro Separate School*, 4 J. OF NEGRO EDUC. 419 (1935) (observing that “[i]n 1900, the disparity in the per capita expenditures upon the two racial groups was only 60 per cent in favor of the whites, but in 1930 this disparity had increased to 253 per cent”) (emphasis in original).

220. *Studies of Negro Education*, 1 J. OF SOC. FORCES 585, 588 (1922) (citing the work of University of North Carolina researcher Y. Maeshima). The study noted that, in states where Blacks were a significant percentage of the population (i.e., 30 percent or more), they received disproportionately less money for education. Thus, although Blacks were 30 percent of the state's population, they received only 11 percent of the state's dollars for education.

221. See T.J. Wooffter, Jr., *The Negro on Strike*, 2 J. SOC. FORCES 84, 86 (1923–24) (attributing the lack of educational opportunities throughout the South to Black migration to northern cities).

222. *Id.* at 87.

ranking first among its sister states.<sup>223</sup> This exodus had a significant impact on the Southern economy and beyond; one commentator noted that the Black migration meant “losses of millions of dollars in Southern agriculture and a grave condition for the productivity of the country as a whole.”<sup>224</sup> This situation provided the South with the incentive to build schools<sup>225</sup> for Blacks<sup>226</sup> “as fast as their means [would] allow.”<sup>227</sup>

*b. Self-Help: “Double Taxation” of Black Communities*

Of course, while the potential loss of field labor moved some Southern authorities to build additional schools, that motivation had limits in terms of the amount and quality of schooling that would be made available. Therefore, other alternatives to provide Blacks with educational opportunities were necessary. By the early 20<sup>th</sup> century a major initiative promised some relief. Specifically, southern Blacks, with philanthropist Julius Rosenwald, poured private dollars and efforts into providing what the state refused—funding for decent school facilities—which resulted in new schools and in what one historian has termed “double taxation.”<sup>228</sup>

The Rosenwald construction program began as an attempt to assist the ongoing efforts of Clinton J. Calloway, an instructor of the Tuskegee Institute, to organize Black communities to construct much needed schools,<sup>229</sup> starting with

a small farming community about thirty-five miles from Tuskegee . . . The existing school was “an old shanty belonging to one of the planters which was used to house the school children and their one teacher.” Calloway assisted in the establishment of a new three-building, eleven-teacher school, built mainly from

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223. See *id.* (noting that 226,000 Blacks had left Virginia, followed by “Mississippi, with 210,000, Georgia with 202,000, Alabama with 190,000, South Carolina with 169,000, North Carolina with 162,000, Tennessee with 147,000, and Louisiana with 115,000”).

224. Woofter, *supra* note 221, at 86.

225. The Labor Department noted in a 1917 study that there was “increased support for a viable system of black schools as a means to ‘keep the Negroes in the South and make them satisfied with their lot.’” ANDERSON, *supra* note 192, at 152.

226. Cf. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (arguing that remedies for injustices to Blacks typically become available when they coincide with the interests of middle and upper class Whites).

227. Woofter, *supra* note 221, at 86.

228. ANDERSON, *supra* note 192, at 156.

229. *Id.* at 156–57.

money and labor donated by [the community's] black residents.<sup>230</sup>

Rosenwald became aware of this effort and contacted Booker T. Washington, the principal of Tuskegee, to fund the construction of new schools that would promote industrial education.<sup>231</sup> Washington proposed a self-help experiment to Rosenwald: the donor should commit to constructing "six schoolhouses" near Tuskegee, provided that Blacks in the community also contribute what they could to the effort. This idea was based on Washington's observation that "many people who cannot give money, would give a half day or a day's work and others would give material in the way of nails, brick, lime, etc."<sup>232</sup> Rosenwald agreed and in 1913 donated funds for the construction schools in six Alabama counties.<sup>233</sup> With the successful construction of those schools, Rosenwald consented one year later to expand the program, donating "\$30,000 to aid in building one hundred small rural schoolhouses."<sup>234</sup> The money would be available to the selected Black communities, provided they satisfied five conditions:

black residents . . . were required to raise enough money to match or exceed the amount requested from the Rosenwald Fund . . . ; the approval and cooperation of the state, county, or township school officers were required; all property, including the land, money, and other voluntary contributions by blacks was to be deeded to the local public school authorities; the school building to be erected had to be approved by Tuskegee's Extension Department; and the efforts in each state were to be coordinated by the state agents of Negro education and the Jeanes Fund supervisors.<sup>235</sup>

In the twenty-one years that the Julius Rosenwald Fund<sup>236</sup> was in force, African Americans contributed almost five million dollars,<sup>237</sup> in cash as well as in the form of labor, materials, and other significant sacrifices. For example, one Rosenwald agent reported the following events at a Georgia fund-raising rally in 1921:

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230. *Id.* at 157.

231. Industrial education emphasized providing Blacks with practical skills. See Williams, *supra* note 203, at 43 (contrasting industrial education from classical education and explaining the political significance of each).

232. ANDERSON, *supra* note 192, at 157–158.

233. *Id.* at 158.

234. *Id.*

235. *Id.*

236. *Id.* at 159 (stating that "Rosenwald incorporated the Julius Rosenwald Fund [in 1917] 'for the well-being of mankind'").

237. *Id.* at 155 (showing that Blacks contributed \$4,725,520 from 1914–1932).



Children without shoes on their feet gave from fifty cents to one dollar and old men and old women, whose costumes represented several years of wear, gave from one to five dollars. The more progressive group gave from ten to twenty-five dollars. When the rally had closed we had the handsome sum of thirteen hundred dollars. Now we were at our rowes end, as we felt that the colored people had done all in the range of human limitation for the school, and yet we lacked more than a thousand dollars with which to qualify the project. Our next big question was "Where shall we get the rest of the money?" Colored men offered to pawn their cows and calves for the money and they did do just this thing. They made notes and gave for security pledges on their future crops, their cows and calves, and other belongings for the money. They raised in this way one thousand dollars, and we started out for a contractor.<sup>238</sup>

This scene recurred in community after community, year after year, even during the Depression.<sup>239</sup> After the Fund's school construction program ended in 1932, Blacks continued to contribute the little money they had, in addition to their labor, and other services, to keep their schools in good condition.<sup>240</sup> By the end of the school construction program, almost 3,500 schools had been constructed, in the majority of the counties in the Southern states.<sup>241</sup> In Virginia, Rosenwald schools were located in 75 percent of the counties<sup>242</sup> at a cost of \$407,969 to Blacks. Whites, in contrast, contributed \$23,128. The Rosenwald Fund, for its part, provided \$279,650.<sup>243</sup>

The Rosenwald school construction program made schools available to Blacks where they might not otherwise have been.<sup>244</sup> However, establishing these schools came at significant cost to many Blacks, whose meager property was already subject to state taxation, irrespective of the fact that they would see few state dollars flow into their communities. As one historian has characterized the program and this chapter of history, the system of "double taxation" was:

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238. *Id.* at 162.

239. *Id.* at 162-73.

240. *Id.* at 176.

241. *Id.* at 179 (stating that by 1926, 3,464 schools had been constructed).

242. *Id.*

243. *Id.* at 155 (citing Statistical Reports on Rural School Construction Program, Box 331, JRFP-FU).

244. Anderson notes that "school attendance rates of black children five to fourteen years of age increased from 36 percent in 1900 to 78 percent in 1940, and the corresponding rate for Whites went from 55 percent in 1900 to 79 percent in 1940." *Id.* at 181.

an accommodation to the oppressive nature of southern society. It made the regular process of excluding black children from the benefits of tax-supported public education easier and more bearable for both whites and blacks. It said much about blacks' desire for education and their willingness to sacrifice for it, but it also said much about their powerlessness, their taxation without representation, and their oppression.<sup>245</sup>

At the same time, it should be noted that the Rosenwald program allowed Blacks to exercise some agency with respect to their children and their futures, a significant accomplishment in the face of the effective state campaign that so constrained their personhood.

*c. Persistent Inequalities of the Dual Educational System*

Notwithstanding the creation of new schools, disparities persisted and expanded throughout the dual educational systems in the state. As discussed above, Black and White schools vividly symbolized the inequities. For example, in a suit challenging school conditions in King George County, the court noted that the White high school had "running water, modern toilet facilities, a central heating plant, a comparatively modern cafeteria and a gymnasium. The Training School [for Black children had] outside toilets, a cafeteria greatly inferior to the one at King George, no gymnasium and no central heating plant."<sup>246</sup> In some localities, the absence of a high school for Blacks meant that children had to be bussed inordinate distances to attend school.<sup>247</sup> Curricular offerings were also a source of inequality. For example, in Arlington, a suburb of Washington, D.C., the Black high school had no courses in Spanish, Civics, typing, physical education, Latin, chemistry, shorthand, or auto mechanics.<sup>248</sup> Each of these subjects was available at the White high school.<sup>249</sup> The salary structure for educators also was segregated, which meant that Black teachers were paid less than their White counterparts, despite being similarly situated in terms of experience and education—and even when

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245. *Id.* at 184–85.

246. *See* Freeman v. Co. Sch. Bd. of Chesterfield County, 82 F. Supp. 167, 170 (E.D. Va. 1948) (describing the facts at issue in a companion case, Smith v. School Board of King George County, 82 F. Supp. 167 (E.D. Va. 1948)).

247. *See, e.g.,* Corbin v. County Sch. Bd. of Pulaski County, 177 F.2d 924, 927 (4th Cir. 1949) (observing that while White children could attend one of three easily accessible high schools, Black children had to be "transported in two buses, each of which with many stops, travels around 60 miles per day. Negro children must thus leave home earlier in the morning, endure a longer ride and arrive home later than the white children").

248. *See* Carter v. Sch. Board of Arlington County, 87 F. Supp. 745, 746–747 (E.D. Va. 1949), *rev'd*, 182 F.2d 531 (4th Cir. 1950).

249. *Id.*

Black teachers had more educational experience.<sup>250</sup> For example, in Chesterfield County, Virginia, during the “1945–1946 [academic year], 52% of colored teachers held degrees compared with 27% of white teachers.”<sup>251</sup> Yet, during that same academic year, every White teacher earned more than his or her Black counterpart.<sup>252</sup>

As time wore on and the litigation mounted, Virginia evinced no hints of receding on its tradition of segregation. Indeed, the state even went so far as to prosecute criminally a Black parent who challenged segregation. Two years before *Brown*, James Dobbins, a father and resident of King William County, was convicted for failing to comply with the compulsory school attendance laws.<sup>253</sup> Dobbins sought to enroll his daughter in a local White high school because the county school board had closed the Black school and reassigned students to another inferior school outside the town limits.<sup>254</sup> The state’s prosecution and conviction of Dobbins occurred around the same time or shortly after Black students went on strike in Prince Edward County, suggesting a hardening of the legal institutions in the face of increased pressure from Blacks to dismantle the segregated school system.

#### *d. Fighting to Maintain the Caste System*

By the time Black parents and students had decided to challenge segregation in Prince Edward County, they were waging a battle against a deeply entrenched system of subordination in which the state had invested significant time and effort. Predictably, when a three-judge district court considered the case in *Davis v. School Board of Prince Edward County*,<sup>255</sup> plaintiffs were unsuccessful. The court based its decision, in large part, on the long history of separating the races in educational institutions, which the United States Supreme Court had upheld against 14th Amendment challenges.<sup>256</sup> Noting that the state constitution mandated segregation, the Virginia Supreme Court observed that:

[t]he school laws chronicle separation as an unbroken usage in Virginia for more than eighty years. The general Assembly of Virginia in its session of 1869–70, in providing for public free

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250. See, e.g., *Freeman*, 82 F.Supp. at 169.

251. *Id.*

252. *Id.*

253. See *Dobbins v. Commonwealth*, 96 S.E.2d 154 (Va. 1957) (reversing the prosecution and conviction).

254. *Id.* at 698.

255. 103 F.Supp. 337 (E.D.Va. 1952).

256. *Gong Lum v. Rice*, 275 U.S. 78 (1927); *Berea Coll. v. Ky.*, 211 U.S. 45 (1908); *Cumming v. County Bd. of Educ. of Richmond County*, 175 U.S. 528 (1899).

schools, stipulated that white and colored persons shall not be taught in the same school . . . . It was repeated at the session 1871–2, and carried into the Code of 1873. As is well known, all this legislation occurred in the period of readjustment following the Civil War when the interests of the Negro in Virginia were scrupulously guarded.<sup>257</sup>

The U.S. Supreme Court's decision in *Brown* meant an end to that tradition.<sup>258</sup> Determined, nonetheless, to maintain this way of life, Virginia erected a framework of massive resistance.

Immediately after the Court's ruling, state leaders expressed their disappointment, with some signaling their intention to defy the mandate from the outset. For example, the U.S. Senator from Virginia, Harry F. Byrd, decried the decision as "the most serious blow . . . struck against the rights of the states . . . [and declared that] Virginia faced a crisis of the first magnitude."<sup>259</sup> Governor Thomas Stanley was more moderate and circumspect about his intentions:

I am confident the people of Virginia will receive the opinion of the Supreme Court calmly and take time to carefully and dispassionately consider the situation before coming to conclusions on steps which should be taken. It had been hoped the provisions of our State Constitution and previous decisions of the court would be upheld, but the court has come to a different conclusion . . . I contemplate no precipitate action, but I shall call together as quickly as practicable representatives of both state and local governments to consider the matter and work toward a plan which will be acceptable to our citizens and in keeping with the edict of the court. Views of leaders of both races will be invited in the course of these studies.<sup>260</sup>

True to his word, one week later the Governor invited NAACP attorney Oliver Hill, and a select, integrated group of journalists, clergy, and educators to discuss *Brown*. However, at this meeting, Governor Stanley asked the Black leaders to "ignore the decision of the Court and to urge Virginia Negroes to accept continued segregation."<sup>261</sup> With the leading White policymakers united against the school decisions, Virginia set out to take whatever steps were necessary to retain its dual educational systems.

Policymakers conferred in and out of state about the next steps in the wake of *Brown*, understanding that complying with the Court's mandate

257. *Davis*, 103 F. Supp. at 339.

258. *Brown*, 341 U.S. at 498.

259. MUSE, *supra* note 105, at 5.

260. ROBBINS L. GATES, THE MAKING OF MASSIVE RESISTANCE: VIRGINIA'S POLITICS OF PUBLIC SCHOOL DESEGREGATION 1954–1956, 28 (1964) (citation omitted).

261. *Id.* at 30.

was not an option. For example, Governor Stanley entered into an agreement with other southern governors to defy the school decisions.<sup>262</sup> Legislators from Virginia's fourth congressional district<sup>263</sup> adopted a resolution expressing their "unalterable opposition to the principle of integration of the races in the schools and . . . pledg[ing their] . . . determined purpose to evolve some legal method whereby political subdivisions of the state may continue to maintain separate facilities for white and Negro students in schools."<sup>264</sup> In Prince Edward County, the Board of Supervisors, urged on by angry citizens, decided not to fund public schools for the 1955–1956 school year.<sup>265</sup> County residents gathered a month later and agreed to raise money to enable White students to attend private schools.<sup>266</sup> State officials put these efforts on hold by assuring the county that "desegregation would not be required for another year."<sup>267</sup>

With the goal of identifying a "legal method" for maintaining segregation, Governor Stanley established the Virginia Commission on Public Education,<sup>268</sup> also known as the Gray Commission,<sup>269</sup> in September of 1954. By November of the next year, this body recommended that the state embark on the following course to circumvent *Brown*: establish a system of tuition grants to enable students to attend private schools rather than integrated public schools; develop criteria for limiting the enrollment of Blacks in White schools; and amend the compulsory attendance law, so that no child would be required to attend an integrated school.<sup>270</sup> The Commission also recommended providing localities with the option

262. *Id.* (observing that West Virginia, Maryland, and Kentucky abstained from the agreement because they felt that "their problems of adjustment were not insurmountable." In remarking on the outcome of the meeting, Governor Stanley stated that it was "very helpful and harmonious . . . no one had any thought of doing anything wrong . . . . Everyone is just trying to find a solution for what they regard as a major problem") (quoting N.Y. TIMES, June 11, 1954).

263. Prince Edward County is located in this district; as discussed above, this area has a significant Black population and a rich history in the state. See *supra* note 106 and accompanying text.

264. GATES, *supra* note 260, at 31.

265. MUSE, *supra* note 105, at 13.

266. *Id.*

267. *Id.* at 14.

268. *Adkins v. Sch. Bd. of Newport News*, 148 F. Supp. 430, 434 (E.D. Va. 1957) (describing the legislative process leading up to enactment of challenged pupil enrollment statutes).

269. The commission was named for its chairman, State Senator Garland Gray, who was part of the fourth district delegation that strongly opposed desegregation. GATES, *supra* note 260, at 35.

270. MUSE, *supra* note 105, at 15.

of complying with the desegregation mandate,<sup>271</sup> to accommodate “the varying conditions throughout the Commonwealth” and “recognize[] the Supreme Court decision by permitting school integration in communities that choose that course, but prevents enforced integration.”<sup>272</sup>

With this report in hand, the General Assembly determined that a special session was necessary to act upon its recommendations.<sup>273</sup> Its purpose was:

to settle the issue of contested power between State and Federal Governments . . . . [U]ntil the question here asserted by the State of Virginia be settled by clear Constitutional amendment, we pledge our firm intention to take all appropriate measures honorably, legally and constitutionally available to us, to resist this illegal encroachment upon our sovereign powers.<sup>274</sup>

Lawmakers also agreed to order “a referendum election for January 9, 1956, on the question of calling a constitutional convention . . . to permit the adoption of the tuition grant plan.”<sup>275</sup> Campaign literature supporting this move proclaimed that “a vote for the convention is a vote against enforced mixed schools.”<sup>276</sup> The referendum succeeded with the support of 68% of voters.<sup>277</sup>

Hostility to the Court’s ruling grew, as the public discourse focused on “interposition;”<sup>278</sup> that is, resisting federal encroachment over states’ rights. Lawmakers adopted a resolution in January 1955, stating, in relevant part:

a question of contested power has arisen: The court asserts, for its part, that the States did, in fact, in 1868, prohibit unto themselves, by means of the Fourteenth Amendment, the power to maintain racially separate public schools, which power certain of the States have exercised daily for more than

271. Notwithstanding the Commission’s inclusion of the “local option,” the legislature clearly opposed providing such flexibility to localities. For example, in 1955, when Arlington County began drafting an integration plan, the “state legislature punished it by taking away the county’s privilege of electing its school board by popular vote.” BENJAMIN MUSE, *TEN YEARS OF PRELUDE* 148 (1964).

272. MUSE, *supra* note 105, at 18.

273. *Adkins*, 148 F. Supp. at 434–35.

274. *Id.*

275. MUSE, *supra* note 105, at 16.

276. *Id.* at 18.

277. *Id.* at 19.

278. The *Richmond News Leader* and reporter James J. Kilpatrick, Jr., were in the forefront of this effort, which referred to a doctrine from the late 18th century, which held that states had the “right to interpose [their] sovereignty between the federal government and [their] people.” *Id.* at 20.

80 years; the State of Virginia, for her part, asserts that she has never surrendered such power. . . .

[B]e it finally resolved that until the question here asserted . . . be settled by clear constitutional amendment, we pledge our firm intention to take all appropriate measures, legally and constitutionally available to us, to resist this illegal encroachment upon our sovereign powers and to urge upon our sister states, whose authorities over their own most cherished power may be next be imperiled, their prompt and deliberate efforts to check this and further encroachment by the Supreme Court, through judicial legislation, upon the reserved powers of the states.<sup>279</sup>

Claiming that “the Washington Court will begin to fine and imprison school officials in Virginia next September unless integration is in operation throughout the State,”<sup>280</sup> Senator Byrd persuaded over 100 southern lawmakers to sign the “Southern Manifesto [which he described as] . . . ‘a part . . . of the plan of massive resistance we’ve been working on and I hope and believe it will be an effective action.’”<sup>281</sup>

In this heated political climate, the General Assembly convened during the special session in August of 1956, during which lawmakers considered measures designed to entrench the dual educational system in clear defiance of the United States Supreme Court. If any questions remained about what the legislature was to accomplish at the end of the session, those were removed after Governor Stanley addressed the gathering:

[T]his is the time for a decisive and clear answer to these questions: (1) Do we accept the attempt of the Supreme Court of the United States, without constitutional or other legal basis, to usurp the rights of the States and dictate the administration of our internal affairs? (2) Do we accept integration? (3) Do we want to permit the destruction of our schools by permitting ‘a little integration’ and witness its subsequent sure and certain insidious spread throughout the Commonwealth? My answer is a positive ‘No.’<sup>282</sup>

By the end of the session, lawmakers had passed twenty-three segregation measures, among them: legislation to cut off state funds to integrated schools; a pupil enrollment provision to discourage Blacks from

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279. *Id.* at 21–22.

280. *Id.* at 27.

281. *Id.*

282. *Adkins*, 148 F. Supp. at 436.

attempting to transfer to White schools; a measure authorizing the Governor to close integrated schools;<sup>283</sup> as well as several provisions aimed at disabling the NAACP and the NAACP Legal Defense and Educational Fund.<sup>284</sup>

The death knell for the legislative machinery of massive resistance came in 1959, when the Virginia Supreme Court struck down many of the laws passed during that special session. The state's attorney general petitioned for a writ of mandamus against the state comptroller to determine the validity of provisions authorizing state payment of tuition grants for private schools.<sup>285</sup> When measured against the state's constitution, the court found that the massive resistance laws fell short. Significantly, the court held that although *Brown* struck down the constitution's requirement for segregated schools, that holding did not also signify an end to the state obligation to "establish and maintain an efficient system of public free schools," as the Attorney General argued.<sup>286</sup> Moreover, the court held that this requirement precluded the state from diverting public money from integrated schools.<sup>287</sup> Finally, the court held that under the state's constitution, the General Assembly lacked the authority to determine whether schools should close or whether they are running "efficiently."<sup>288</sup>

Having decided that case on state constitutional grounds, the court did not examine whether the provisions also violated the federal constitution. However, the court made a point of noting that it "deplore[d] the lack of judicial restraint evinced by [the United States Supreme Court] in trespassing on the sovereign rights of this Commonwealth reserved to it in the Constitution of the United States."<sup>289</sup> Notwithstanding the court's displeasure with *Brown*, statewide massive resistance was dead. The governor in office at the time the court so ruled was Lindsay Almond, who had litigated *Davis* on behalf of the Virginia. After getting word of the court's decision, Almond successfully urged lawmakers to convene yet another special session, in which he proposed and lawmakers enacted more targeted measures

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283. MUSE, *supra* note 105, at 31.

284. See NAACP v. Patty, 159 F. Supp. 503, 522–34 (E.D. Va. 1958) (describing statutes enacted primarily with the purpose of intimidating both organizations). The United States Supreme Court and the state supreme court ultimately declared most provisions of the statutes invalid under either the state or federal Constitution. See NAACP v. Button, 371 U.S. 415, nn.1–2 (1963).

285. Harrison v. Day, 106 S.E.2d 636, 639 (Va. 1959).

286. *Id.* at 642.

287. *Id.* at 646.

288. *Id.* at 646–47. One of the challenged laws defined "efficient" school systems as those "in which no elementary or secondary school consists of a student body in which white and colored children are taught." *Id.* at 639 n.1 (quoting VA. CODE ANN. § 22-188.30 (1956)).

289. *Id.* at 647.



to limit the effects of *Brown*,<sup>290</sup> such as laws repealing the compulsory attendance laws<sup>291</sup> and establishing “a ‘freedom of choice’ program.”<sup>292</sup>

As massive resistance rose and fell throughout the commonwealth, the litigation in Prince Edward County continued. By the time the case had reached the Fourth Circuit Court of Appeals<sup>293</sup> in 1959, even Governor Almond had conceded that this legislative regime of intransigence was over. However, the struggle was far from complete for Prince Edward County. Accordingly, when the circuit court enjoined the county from engaging in discriminatory practices and ordered it to “‘take immediate steps’ toward admitting students without regard to race in the white high school,”<sup>294</sup> the Board of Supervisors “refused to levy any school taxes for the 1959–60 school year,”<sup>295</sup> pursuant to a resolution adopted three years earlier. Having thus picked up the baton for massive resistance, the county kept its public schools closed<sup>296</sup> until the United States Supreme Court stepped in five years later, declaring that the “time for mere deliberate speed has run out.”<sup>297</sup>

### III. RE-EXAMINING THE BROWN FUND ACT: WHAT THE HISTORICAL CONTEXT MEANS FOR THE REMEDY

As the foregoing demonstrates, massive resistance was just one chapter in Virginia’s long history of state-sponsored oppression of Blacks.

290. Muse writes that “Almond was anxious above all to prevent any new legislative excesses.” MUSE, *supra* note 105, at 134. He “dominated the brief special session . . . His bills were passed on time and with near unanimity.” *Id.* at 135. Moreover, the threat of his veto torpedoed such proposals as “hav[ing] the General Assembly itself take full charge of all public school operation . . . mak[ing] it a felony for any public school administrator to enroll a child not assigned to the school by the Pupil Placement Board; and . . . requir[ing] referendum approval by the voters of the community before any closed public school reopened.” *Id.*

291. *Id.* at 134.

292. *Griffin*, 377 U.S. at 221–22.

293. On remand from the Supreme Court, the plaintiffs sought a deadline for compliance; however, the three-judge panel declined to rule on this motion and instead determined that a single judge should preside over the matter. *Allen v. County Sch. Bd. of Prince Edward County*, 266 F.2d 507 (4th Cir. 1959). When plaintiffs later sought to enjoin the County from closing schools and funneling money into private segregated institutions, the court abstained on the question of whether Virginia law required schools to be open. *Allen v. County Sch. Bd. of Prince Edward County*, 198 F. Supp. 497, 503 (E.D.Va. 1961).

294. *Griffin*, 377 U.S. at 222.

295. *Id.*

296. The state supreme court of appeals held that closing schools did not violate the state constitution. *County Sch. Bd. of Prince Edward County v. Griffin*, 133 S.E.2d 565 (Va. 1963).

297. *Griffin*, 377 U.S. at 234.

When understood as such, the state's misdeeds under that regime require a broader remedy than the Brown Fund Act provides. After quickly reviewing the state history, this section explains the shortcomings of the Brown Fund Act and details how the Act might have provided a fuller remedy, consistent with the principles of reparations theory.

Recognizing the potential education held to integrate Blacks into the political and social structure of the state, Virginia policymakers repeatedly limited this gateway to citizenship. Thus, because literacy would cause slaves to rebel, lawmakers outlawed teaching slaves to read.<sup>298</sup> After the Civil War and slavery's demise, Virginia legislators enacted measures to keep the franchise out of reach for African Americans and enshrined racially separate schools in the state's constitution.<sup>299</sup> Lacking the vote, Blacks had no recourse when the state funneled their tax dollars into White schools.<sup>300</sup> Additionally, even when Blacks combined their resources with those of private benefactors, they still confronted disparate and inferior facilities and curricular offerings, among other things.<sup>301</sup> Challenging the oppressive legal framework, Blacks had significant success in the courts, eventually winning in the United States Supreme Court.<sup>302</sup> But even when the highest court declared integration to be the law of the land, the state redoubled its efforts that keep its caste system intact.<sup>303</sup>

The recurrent theme of this history is state abuse of power to the extreme disadvantage of African Americans. With state officials at the highest levels choosing to violate their own pledges to obey the rule of law, it was hardly surprising that other segments of Virginia society followed suit—from the Prince Edward County Board of Supervisors determined to keep massive resistance alive,<sup>304</sup> to the Farmville banks that opened in the wee hours of the morning anticipating the Supreme Court's announcement that the time for deliberate speed had expired.<sup>305</sup> Examined against this backdrop, the Brown Fund Act provides only meager redress. Much more is needed.

### A. *Why the Brown Fund Act Falls Short*

The Brown Fund Act seeks to remedy one wrongdoing—massive resistance—one person at a time. The Act proceeds from the premise that the state committed a particular discrete wrong; namely, closing down

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298. See *supra* notes 151–155 and accompanying text.

299. See *supra* note 257 and accompanying text.

300. See *supra* notes 208–218 and accompanying text.

301. See *supra* notes 246–252 and accompanying text.

302. See *supra* notes 258, 297 and accompanying text.

303. See *supra* notes 255–297 and accompanying text.

304. See *supra* notes 265–297 and accompanying text.

305. See *supra* note 297 and accompanying text.

schools rather than obeying *Brown* over the course of approximately ten years. The persons who could not attend school during those years are clearly identifiable victims of that wrongdoing<sup>306</sup> who will benefit from the Act. The remedy, scholarships, compensates for the state's denial of certain educational opportunities for that time period. In this sense, the Brown Fund Act appears to be appropriately congruent, even considering the history. Specifically, the depth of the state's past intransigence to integration highlights the great significance of the Brown Fund Act. This measure, with or without an explicit apology, represents an admission of wrongdoing of sorts on the part of the state. For those African Americans who, as children, saw their state close school doors rather than let them in, this legislative act likely was "cathartic . . . [restoring] [a] measure of dignity."<sup>307</sup> Providing money to fulfill one's educational goals seems particularly appropriate under these circumstances. In a very real sense, the Brown Fund Act is a remedy whose time had come.

However, as discussed above, even assuming, *arguendo*, that this remedial paradigm is the appropriate framework, the Act still falls short.<sup>308</sup> As a practical matter, with the passage of time, those persons who lost academic ground have found alternative ways to move ahead; consequently, they are unlikely to pursue an education fifty years later. Consider the words of one former student: "It's of no use now. I'm almost 55 . . . I don't need them to give me a piece of paper now. What I needed, they can't give me back."<sup>309</sup> Conversely, some of these victims already may have attained education at the levels for which scholarships are available.

Additionally, however, the Brown Fund Act is a paradigm for the color blind, perpetrator focus to antidiscrimination law that fails to account for the systemic nature of racism.<sup>310</sup> As a result, the Act provides only partial redress, ironically running the risk of perpetuating the harms it seeks to rectify. As the following will make clear, application of key precepts of reparations theory would appropriately expand the reach of the remedy and set the stage for systemic change that will benefit the state as a whole.

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306. Of course, the universe of persons harmed by the school shutdowns extends beyond students. For example, because of the shutdowns, teachers, administrators, and other school staff lost their jobs and related benefits. The Act provides no remedy for those persons. The issue of compensating those persons is a fascinating one that goes beyond the scope of this Article.

307. Yamamoto, *supra* note 41, at 478 (describing the feelings of Japanese former internees upon receiving reparations from the federal government).

308. See *supra* notes 36–41 and accompanying text.

309. Schouten, *supra* note 138.

310. See *supra* notes 51–78 and accompanying text.

### 1. Color-Blindness: a Barrier to Reparations as Repair

The Brown Fund Act is available on a race-neutral basis, no doubt in an effort to pass constitutional muster.<sup>311</sup> However, the color-blind aspect of the Act ignores the race-based nature of massive resistance and, significantly, the lengthy history preceding it. When considered appropriately in context, massive resistance was an overt, purposeful effort to maintain entrenched White supremacy in the commonwealth. In this connection, the State's actions intentionally bore more heavily on Black children.<sup>312</sup> Thus, a race-conscious remedy is not only permissible,<sup>313</sup> but also essential.

Moreover, by removing massive resistance from its historical context, the Brown Fund Act suggests that the state's misdeeds post-*Brown* were anomalous, aberrant events<sup>314</sup> that, thanks to the new scholarship program, will be history. This characterization terribly misapprehends the nature of the state's wrongdoing and, in so doing, gives lawmakers a justification for turning their backs on meaningfully examining the state's oppressive past and redressing the implications of it for the present and the future. In other words, because of the Brown Fund Act, policymakers may be tempted to say "now the system works . . . [such] that it no longer need[s] to vigorously oppose racism."<sup>315</sup>

In a related vein, the failure to acknowledge and address the systemic racist underpinnings of massive resistance likely will undermine the worthy aspirations of the state. As demonstrated above, public education in Virginia long has been corrupted by state mandated inequality, the taint of which persists today. As one commentator has observed nationally:

[t]he vestiges of legally mandated and sanctioned discrimination against blacks persist to this day in ways that make defensible some degree of race consciousness in higher education admissions. Perhaps the clearest example is the persistence of educationally deprived, predominantly minority urban school systems. Another example is the high concentration of minorities in economically and socially bankrupt rural and inner-city neighborhoods, where crime, drug abuse, and social

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311. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down race-based affirmative action plan because the state failed to connect the remedy to past discrimination).

312. *Griffin*, 377 U.S. at 230.

313. See, e.g., *United States v. Fordice*, 505 U.S. 717, 728 (1992) (holding that a race neutral admissions policy does not remedy a dual system of higher education).

314. Cf. Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 *STAN. L. REV.* 819, 835, 837 (1995) (critiquing the color-blind atomistic approach to discrimination as inimical to dismantling White supremacy).

315. Yamamoto, *supra* note 41, at 496.

disintegration destroy incentives for academic achievement far more effectively than beleaguered schools can hope to create them. Another possible vestige is the growing body of evidence suggesting that teachers of all races tend to demand less of black students because of lowered expectations of their academic capabilities.<sup>316</sup>

Many of these vestiges persist in Virginia. For example, fifty years after *Brown*, students remain likely to attend segregated schools: “the typical white student in Fairfax County, Virginia, the nation’s richest county and one of the largest suburban school districts, attended a school with 8.9% black students and 9.9% Latino students in 2000.”<sup>317</sup> According to researchers from the Harvard Civil Rights Project, Prince William County, and Richmond, Virginia are among the most rapidly resegregating districts in the nation.<sup>318</sup> Attendant to persistent segregation or resegregation is poverty: “the share of schools that are high poverty increases as the minority population in a school increases.”<sup>319</sup> With greater poverty, recruiting and retaining good teachers becomes more difficult, which, in turn, has an impact on students’ ability to access a quality education.<sup>320</sup> Other vestiges of the dual system include the achievement gaps between Whites and Blacks. For example, in state achievement tests, Black students consistently perform below their White counterparts.<sup>321</sup> Similarly, in the National Assessment of Educational Progress, Blacks scored below White students.<sup>322</sup>

As a race-blind remedy for massive resistance, the Brown Fund Act is not likely to address problems that have deep roots in the state’s abuse of public education to subordinate African Americans. Instead, the Act runs

316. Cf. Colin S. Diver, *From Equality to Diversity: the Detour from Brown to Grutter*, 2004 U. ILL. L. REV. 691, 713.

317. ERICA FRANKENBERG & CHUNGMEI LEE, RACE IN AMERICAN SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS 14 (Harvard University Civil Rights Project 2002).

318. *Id.* at 6, 8.

319. GARY ORFIELD & CHUNGMEI LEE, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY 16 (Harvard University Civil Rights Project 2005).

320. *Id.* at 17.

321. Data for the 2002 statewide Standards of Learning Tests show, for example, that in third grade, 55 percent of Black students passed English, compared to 79 percent of White students. Similarly, for fifth grade students, 62 percent of Black students passed English: Reading, compared to 85 percent of White students. In the eighth grade the disparity persists, with 51 percent of Black students passing English: Reading, compared to 77 percent of White students. See <http://www.pen.k12.va.us> (follow “Data and Reports” hyperlink; then follow “Test Results”; then follow “2002 Statewide Spring SOL Test Results”).

322. For example, the average mathematics score for fourth grade White students in 2003 was 243 out of a possible 500; for Blacks, the score was 216. White eighth grade students scored an average 288 out of 500; Black students scored 252. See <http://nces.ed.gov/nationsreportcard> (follow “NAEP Data Explorer” hyperlink).

the risk of being perceived as a payoff for its wrongdoing, thus rendering the State “off the hook” for taking meaningful actions to redress on-going subordination of Blacks.

## 2. Systemic Change

Similarly, as a one-time payout, destined to sunset in 2008, the Brown Fund Act is far from systemic in the relief it seeks to provide. As the historical discussion set forth above demonstrates, the state abused its authority to enlist the public education system in a regime calculated to keep Blacks in a subordinate position, whether enslaved or free. State officials correctly perceived education as key to citizenship; therefore, they tied the right to vote to literacy, which, in turn, assured that Blacks would have little voice as the lion’s share of state resources went to educate White children. These methods, in addition to a system which appointed education officials precisely to limit Black political influence, conspired to construct a separate and unequal system of education for African Americans. When the Court finally outlawed segregation, thus opening the door to equalizing resources for all students, the state used its muscle again to maintain Black political and social inequality. Without doubt, when seen in this light, the state should have embarked on a path of institutional or systemic redress.

The “reparations as repair” paradigm that Eric Yamamoto has articulated provides a useful starting point for examining how the Virginia General Assembly could have provided substantial redress. This framework calls for reparations that “restructur[e] . . . the institutions and relationships that gave rise to the underlying justice grievance.”<sup>323</sup> To accomplish this goal, payments to individual claimants, as provided by the Brown Fund Act, can play a role, but cannot be the entire focus.<sup>324</sup> Rather, the redress must “encompass both acts of repairing damage to the material conditions of racial group life . . . and acts of restoring injured human psyches—enabling those harmed to live with, but not in, history . . . [to] foster the mending of tears in the social fabric, the repairing of breaches in the polity.”<sup>325</sup> Structuring a remedy under this framework requires looking beyond the school shutdowns to the state abuse of public education to effectuate its goal of subjugating African Americans. It requires a remedy that provides, in significant part, substantive reform of public schooling.

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323. Yamamoto, *supra* note 41, at 518.

324. *Id.*

325. *Id.* at 519.

### B. Repairing the Breach

Systemic and substantive reform of public education undoubtedly would have required much more of the Virginia lawmakers in terms of time, effort, and political capital. However, doing so most assuredly would have been the right thing to do, in the interest not only of Black citizens for whom justice is long overdue, but as well as the state as a whole. Fully mapping out the contours of a legislative strategy that would promote substantive education reform to remedy Virginia's past discrimination is beyond the scope of this Article; however, the following briefly suggests some forms of reparations that lawmakers should have considered.<sup>326</sup>

First, notwithstanding this Article's critique of the Brown Fund Act, monetary reparations should be a part of the state's effort to redress its wrongs. Thus, for example, the state could award scholarships for the descendants of the students who attended school during massive resistance in addition to those directly harmed. Lawmakers also could have established an educational trust fund dedicated to addressing the achievement gaps between Blacks and Whites, which would be an important step toward material change.

Critical race theorists also have envisioned other forms reparations might take that are particularly relevant here. For example, Pedro Malavet has argued for community reparations to repair the breach of trust between citizens and the state. In this instance, community reparations<sup>327</sup> would have a primary purpose of eliciting a public acknowledgement by lawmakers of the full scope of the harm that the state visited upon Black people and its concomitant injury to the integrity of the political system. Additionally, community reparations necessarily requires examining publicly and involving the community of harmed individuals to craft remedial strategies. In this regard, the General Assembly should hold hearings that examine both the history of discrimination in education, but also the present effects of that history. Lawmakers should engage various constituencies, including historians and scholars in the field of education, adults who were products of the segregated system, and parents of children presently in public schools.<sup>328</sup> Gathering a variety of views is essential to comprehending the scope of the injuries to be addressed, as well as the appropriate remedies. Additionally, other forms of community reparations should focus on improving the quality of education. For example, in light

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326. The discussion that follows only briefly explores possible options. I plan to examine the implications of reparation for policy in greater detail in another article.

327. See Pedro Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 BERKELEY LA RAZA L.J. 387, 413 (2002).

328. Cf. Sherrilyn A. Ifill, *Creating A Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQUALITY 263, 308 (2003) (proposing the creation of local truth commissions "to address lynching" and arguing that "ordinary people" must participate in this process).

of the state's history of segregating tax dollars and funneling most public revenues to White schools,<sup>329</sup> lawmakers should develop a system of school funding that ensures equitable funding for facilities and resources for all students at all schools. In this regard, lawmakers should develop some means of gauging state progress in equalizing quality education, for example, by creating and setting benchmarks to measure student progress and monitoring cohorts of students to follow their progress after graduation and into the workplace. Additionally, lawmakers should develop methods to hold the state accountable for the failure to educate students.

Finally, as Malavet also suggests, psychological reparations to address the harm visited upon Black Virginians' psyches<sup>330</sup> should be available as well. Specifically, systemic reform should redress the less tangible aspects of the state's history of subordinating Blacks through education, drawing upon the Court's famous indictment of segregation as poison to the hearts and minds of young children.<sup>331</sup> Here again, hearings and testimony from experts considering the impact of the school closings, particularly within the historical and social context detailed above, will be necessary to develop strategies for addressing not only the ingrained messages of inferiority, but also identifying the manifestations of these psychic harms. In addition, the state should develop strategies and curricula to promote an equitable, unbiased learning environment. For example, the state could require training for all teachers in the history and impact of discrimination in education, which would focus on substantive topics as well as instruction on racial bias in teaching. Such tools should provide teachers with the skills necessary to have high expectations for all children, irrespective of race or any other irrelevant characteristic.<sup>332</sup> Similarly, the state board of education should require that the state's racial history be included in the curriculum to ensure that the important lessons of the past are not forgotten.<sup>333</sup> These elements, in addition to others such as payments to the grandchildren of those students of the shutdown years, an apology, and commemorative events, for example, would lead the state toward "repairing [the] damage to the material conditions" of its Black

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329. It should be noted that litigants have challenged Virginia's system of school funding unsuccessfully as a violation of the state constitution's guarantee of an efficient education. See *Scott v. Commonwealth*, 443 S.E.2d 138 (Va. 1994). For a critical examination of the litigation, see Ashley McDonald Delja, *Across Four Aprils: School Finance Litigation in Virginia*, 2004 BYU EDUC. & L.J. 191. See also, Blaise A. Scinto, *Talents Which Nature Has Liberally Sown: Promoting Fiscal Equity in Virginia's Public Education System*, 9 J.L. & POL. 749 (1993) (proposing legislative alternative for funding Virginia's public schools).

330. Malavet, *supra* note 327, at 417.

331. *Brown*, 347 U.S. at 494.

332. See Diver, *supra* note 316, at 713 (citing Ronald F. Ferguson, *Teachers' Perceptions and Expectations and the Black-White Test Score Gap*, 38 URB. EDUC. 460 (2003)).

333. See, e.g., Michael Janofsky, *Philadelphia Mandates Black History for Graduation*, N.Y. TIMES, June 25, 2005, available at <http://www.nytimes.com/2005/06/25/education/25philly.html>.



citizens and restoring their “injured psyches,” that is, toward reparations designed to promote material change in the state for all its citizens.<sup>334</sup>

## CONCLUSION

The Brown Fund Act is a laudatory accomplishment, noteworthy as a public recognition of the wrongs of massive resistance, something no other state has yet to do; nonetheless, the Act remains a limited effort, reflecting a cramped vision of both the state harm and possible remedies. As reparations theory makes clear, lawmakers should have taken a broader view of this wrong, placing it within a historical context of centuries-old state-sponsored subordination. Seen in this light, the commonwealth’s refusal to comply with *Brown* was an inevitable, indeed natural outgrowth of the state’s abuse of power. In this instance, the state function of educating its citizens was misused to reify Blacks’ subordinate status through an extensive web of laws that prohibited literacy for slaves, established elastic educational requirements specifically to prevent Blacks from voting, and created a taxation system that guaranteed that Black schools would be underfunded, among other things. With every branch of state government working to cement Blacks’ place on the lowest rungs of the social, economic, and political order, it is hardly surprising that other entities in the state would fall in line. Reparations theory invites us to reckon with this history in meaningful ways.

Specifically, reparations theory instructs us to acknowledge the depth of the historic discrimination, recognizing the various tools the state used to subordinate Blacks, and to craft appropriate remedies that can take a variety of forms. In the context of the Brown Fund Act, reparations theory illuminates the thorough nature of Black subordination, and the many state actors who were key to this machinery: for example, the General Assembly that denied Blacks the political means to hold the state accountable, the courts that upheld segregation as a time-honored Virginia tradition, and the Governor, who set the stage for resisting *Brown*, giving localities the green light to keep interposition alive. Performing as the apparatus of subjugation, the state breached its promise and obligation to its people. The harm, therefore, is much more than the five years of massive resistance; rather, it is the abuse of the state power to educate to the purposeful detriment of its African American citizens.

The prism of reparations theory thus not only recasts the harm, but necessarily calls for a distinct remedy, one that goes beyond the one-time, race-neutral payments the Brown Fund Act provides. As discussed above, reparations theory provides a framework for repairing the breach between Black citizens and the state to promote material change, which is essential

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334. See Yamamoto, *supra* note 41, at 519.

to dismantle the persistent vestiges of state-sponsored subordination. In this connection, compensatory damages are but a start. Rather, reparations must address the broad spectrum of state-inflicted harms; namely, there must be a process to redress the psychic and community harms, and prevent future related injuries. As described above, systemic remedies of this nature necessarily encompass reform of the educational system to ensure that all of Virginia's children may realize fully their talents and abilities, as young Barbara Rose Johns so deeply desired fifty years ago.

