
“WHAT’S GOOD FOR THE GOOSE IS GOOD FOR THE GANDER”: HOW PRIVATE UNIVERSITIES EVADE REPAIR

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ABSTRACT

Amid rising calls for justice and accountability, the landscape of higher education in the United States is undergoing a critical reckoning with its historical complicity in racial injustices. This Article reexamines the concept of Higher Education Redress Statutes (“HERS”), a relatively new legal framework designed to address the legacies of slavery and discrimination. Although aimed at fostering reparative justice, HERS have thus far overwhelmingly focused on public institutions, leaving private universities largely unaccounted for. Significantly, this is the first article to explore the persistent public-private divide in higher education law and policy, highlighting how this entrenched split shapes ongoing inequalities and undermines efforts toward justice.

Building on this foundation, the Article shines a spotlight on the poignant frustrations of community members who demand more comprehensive reparative measures. Through the adoption of Professor Shaun Ossei-Owusu’s statutory analytical framework from his seminal works, this analysis of HERS exposes a troubling dichotomy: Private entities continue to evade accountability while public institutions bear the disproportionate burden of rectifying systemic injustices. This disconnect not only diminishes the effectiveness of reparative efforts but also perpetuates the very injustices these statutes aim to amend. Therefore, this Article advocates for a collective shift that extends beyond mere

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political gestures, emphasizing the critical role of private universities in perpetuating harm and systemic inequality.

The urgency of this issue is amplified by the unprecedented escalation of attacks on higher education through aggressive political campaigns that seek to undermine university autonomy, dismantle protections for marginalized communities, and politicize educational funding. In this shifting landscape, it is more crucial than ever to confront and dismantle the systemic barriers that enable private institutions to evade accountability while public entities carry the weight of addressing historic wrongs. This moment is especially critical as federal influence over education policy continues to weaken, making public universities increasingly vulnerable to the whims of state and political actors.

Consequently, stakeholders must pursue innovative pathways for accountability, including the dissolution of the public-private divide in higher education. Policies must be embraced that hold all institutions—public and private—responsible for their roles in perpetuating inequality. This Article issues an urgent call to action: Only through comprehensive reform and a unified stance can we transform higher education into a genuine vehicle for justice, equity, and progress in this rapidly evolving political and social environment.

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INTRODUCTION

The legal frustration and profound despair experienced by many Black residents in Virginia reached a critical peak in the summer of 2021. Following a year marked by widespread civil unrest across the United States,¹ higher education activists demanded accountability from the higher education industry for its historical injustices against Black individuals.² They called on legislators in the state of Virginia to take bold action and offer concrete solutions, and to some extent, there was success. Activists' efforts were met with legislative responses aimed at addressing the systemic inequities embedded in the state's higher education system.³ "However," said Ms. Agnita, an exhausted, Black Virginia resident clearly disappointed with the Virginia legislature, "they left us out again."⁴ She added, "I'm tired; I'm tired of being overlooked. They give everything to everybody else, but they keep looking over us."⁵ I recall Ms. Agnita, talking directly to me as she continued:

This ain't right, sir, can you help us? We have been wronged too. Didn't that private school, Washington and Lee University, enslave my ancestors too? This is the type of legislation that harks back to the days when they treated Black enslaved persons differently for whatever reason: skin color, hair texture, or any excuse they used to sow division among us.⁶

Reflecting on the statute, Ms. Agnita and her community recognized it as yet another chilling reminder of slavery-era subordination tactics where enslavers would intentionally sow tension, hierarchy, and division among the enslaved by

¹ Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> (visually documenting nationwide and large-scale nature of Black Lives Matter protests during summer of 2020).

² See Michela Moscufo, *College Campuses See Growing Reparations Movement*, ABC NEWS (July 30, 2022, at 11:55 ET), <https://abcnews.go.com/US/college-campuses-growing-reparations-movement/story?id=87069082> [<https://perma.cc/UY4F-EAG9>].

³ E.g., VA. CODE ANN. § 23.1-615.1 (2025) (establishing scholarship program "for the purpose of reckoning with the history of the Commonwealth, addressing the long legacy of slavery in the Commonwealth, and acknowledging that the foundational success of several public institutions of higher education was based on the labor of enslaved individuals").

⁴ I reconstructed the dialogue in this Article from my recollections of discussions that took place at the Symposium and information from conversations in other settings where I have discussed this research. The reconstructions are not verbatim transcripts because neither the Symposium dialogue nor later conversations were formally recorded or documented. The narratives represent my synthesis of multiple conversations over time and are ultimately influenced by my perspective. Pseudonyms have been used to protect attendees' identities. Discussion with Attendees of the Ninth Annual Lemon Project Spring Symposium, in Williamsburg, Va. (Mar. 16, 2019) [hereinafter Symposium Discussion].

⁵ *Id.*

⁶ *Id.*

conferring higher statuses and better living conditions upon specific individuals.⁷ “But,” Ms. Agnita asserted:

That ain’t happening today. We won’t be divided. I’m happy for those folks who got their reparations, their day in the sun. They deserve the repair from the University of Virginia, William and Mary, James Madison University, and other Virginia public universities included in the statute, but we are also going to fight for what is due to us. How can they write a law in Richmond and not even think about our harm and hurt? Why weren’t private universities like Washington and Lee University, the University of Richmond, Hampden Sydney College, and others included in this statute? It makes no sense. My father taught me and my brothers a long time ago that what’s good for the goose is good for the gander.⁸

In other states, different frustrations have emerged about state higher education redress statutes—usually for reasons distinct from those in Virginia. For instance, in Florida, beneficiaries of the Rosewood Family Scholarship Program, which was established to provide opportunities for higher education, have expressed dissatisfaction with the program’s effectiveness.⁹ They claim that the statute has not lived up to its promises, failing to deliver on the benefits and support they were promised.¹⁰ One attendee criticized the Florida legislature noting:

I am happy the Florida legislature did something; it was 70 plus years in the making, but the money they are giving us has to go back to one of the public universities, like Florida State or University of Florida. I mean Florida A&M University [an HBCU] is public so I assume that’s a possibility, but it’s just one option and its extremely far from us. We cannot take the money owed to us and go to, I don’t know, one of the private

⁷ *Id.*; see Jennifer Smith, *Colorism: Shades of Freedom: The Legal Implications of Colorism in the United States Justice System*, 32 S. CAL. REV. L. & SOC. JUST. 283, 296 (2023); Ellis P. Monk, Jr., *The Unceasing Significance of Colorism: Skin Tone Stratification in the United States*, DAEDALUS, Spring 2021, at 76, 78 (“Colorism in the United States dates back to slavery when lighter-skinned slaves were favored by slave owners and were predominantly given work as house slaves as opposed to field slaves. These [Black persons] tended to have direct kinship ties to Whites through the sexual violence by Whites that created this population of lighter-skinned [Black persons] in the first place. Working in the house as opposed to the fields dramatically increased the chance that lighter-skinned [Black persons] (or mulattos) would be literate and trained in a trade. Also, the vast majority of the free Black population was composed of lighter-skinned [Black persons] and mulattos.”).

⁸ Symposium Discussion, *supra* note 4.

⁹ See C. Jeanne Bassett, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 FLA. ST. U. L. REV. 503, 520 (1994) (“Survivors were disgruntled because they felt the State was not living up to its promises. Survivors believed that House Bill 591 provided for twenty-five scholarships of \$4000 each (a total of \$100,000), and were concerned when the Legislature set aside only \$60,000 for the scholarships.”).

¹⁰ *Id.*

historically Black universities like Bethune-Cookman University, Florida Memorial University, or Edward Waters University, where I want to go.”¹¹

This criticism is rooted not only in the historical injustices faced by the Rosewood community but also in a broader critique of higher education redress statutes where *only* public universities are used as a proxy for repair.¹² The Rosewood massacre, a horrific episode in American history fueled by racial violence and systemic injustice, resulted in the destruction of an African American community in Florida in 1923.¹³ Decades later, as the Florida legislature implements reparations, the focus and subsequent monetary benefits from the scholarships go to public institutions in the state and limit the opportunities available to descendants of the Rosewood massacre.¹⁴ As the attendee keenly points out, “these white public institutions represent the same corrupt Florida public government that has often inflicted the suffering that has affected us.”¹⁵

As frustrations mounted,¹⁶ lawmakers from various states explained that these types of efforts represent yet another instance of failed political appeasement and flimflam toward Black Americans. Take, for example, District Commissioner Patrick Davenport from Athens, Georgia, who aptly characterized lawmakers and the University of Georgia’s efforts to address higher education’s historic wrongs against a local Black community as an “insult.”¹⁷ Indeed, his criticism highlights a significant issue with these types of statutes where law and policymakers often acknowledge historical injustices

¹¹ Symposium Discussion, *supra* note 4.

¹² See, e.g., FLA. STAT. ANN. § 1009.55(3)(c) (West 2025) (requiring students “[e]nroll as certificate-seeking or degree-seeking student[] at a state university, Florida College System institution, or career center authorized by law” to be eligible for award under Rosewood Family Scholarship Program).

¹³ Bassett, *supra* note 9, at 505-07 (summarizing events of Rosewood massacre, state government’s failure to intervene, and lack of vindication for victims through the courts).

¹⁴ See § 1009.55(3)(c) (Westlaw).

¹⁵ Symposium Discussion, *supra* note 4.

¹⁶ There are two distinct types of higher education redress statutes (“HERS”): (1) statutes that provide benefits to a specific, narrowly defined group in response to recognized harms caused by particular actors in higher education, see, e.g., FLA. STAT. ANN. § 1009.55 (West 2025); and (2) statutes focused on broader societal harms, where lawmakers and policymakers utilize higher education as a means to address wider societal issues. See, e.g., VA. CODE ANN. § 23.1-615.1 (2025). See generally Christopher L. Mathis, *Higher Education Redress Statutes: A Critical Analysis of States’ Reparations in Higher Education*, 79 WASH. & LEE L. REV. 1829 (2023) (discussing term “higher education redress statutes” and potential of higher education institutions to play significant role in rectifying systemic challenges and promoting social progress while ensuring justice for affected communities).

¹⁷ Stephanie Allen, *‘This Is the Beginning’: Athens-Clarke Commission Unanimously Passes Linnentown Resolution*, ONLINEATHENS: ATHENS BANNER-HEROLD (Apr. 2, 2021, at 10:51 ET), <https://www.onlineathens.com/story/news/politics/government/2021/02/16/athens-s-clarke-commission-unanimously-passes-linnentown-resolution/6775158002> [<https://perma.cc/LK8A-AL8V>].

superficially while neglecting to address the systemic and legal issues that hinder comprehensive and complete repair within Black communities today. In his statement, Davenport questioned why some cases receive more focus when countless other incidents of discrimination and racialized injustice are ignored.¹⁸ His perspective resonates with many who believe that the political discourse frequently emphasizes incomplete and piecemeal repair instead of comprehensive change.¹⁹

Conversely, other lawmakers have attempted to clarify that the limitations of these HERS are not rooted in racial biases or a deliberate attempt to systematically undermine the pain experienced by Black individuals and their descendants.²⁰ Instead, they contend that the challenges surrounding reparative efforts stem from the typical dynamics of political negotiation and compromise inherent in the legislative process.²¹ In many instances, when crafting legislation, various stakeholders and interest groups engage in a delicate balancing act, requiring lawmakers to navigate competing priorities by making concessions. This often means that affected parties receive only a portion of what they seek.²² The political system, they argue, is built on these negotiations, and it can result in legislation that, while well-intentioned, falls short of meeting the needs of those it aims to benefit.²³

While both of the preceeding arguments, taken at face value, hold merit, each fails to address or assess the deeper structural issues embedded within the reparative framework of these laws.²⁴ A significant aspect of the problem is that citizens, activists, and legislators often remain unaware of the profound—and sometimes even more egregious—harm inflicted by private actors. This lack of awareness results from the troubling dichotomy we, as a society, have created

¹⁸ *Id.* (“[Davenport] said he does not understand why [a specific historic wrong against a Black community] is ‘being put on a pedestal’ when there are more recent incidents of similar actions against Black communities.”).

¹⁹ Saul Levmore, *Interest Groups and the Problem with Incrementalism*, 158 U. PA. L. REV. 815, 819-23 (2010) (emphasizing occasional detrimental effects of incremental change on groups designed to benefit from that change).

²⁰ See Allen, *supra* note 17 (“While the resolution passed unanimously, it was not without discussion from commissioners, many of whom shared the sentiment that it should be only the first step in what would need to be a series of changes.”).

²¹ See *id.*

²² See Levmore, *supra* note 19, at 822-23 (arguing transaction costs, self-interest, and other factors lead to “illogical” result that “final resting point of a law is something unwanted when the polity started down the slope”).

²³ See *id.*

²⁴ Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A “Social Healing Through Justice” Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 5-9 (2009) (noting monetary reparations “have become too controversially loaded in the United States to do the needed heavy reparatory work” and “reconciliation” as a concept “is amorphous and often leaves policymakers and advocates working in the dark, without guidance or accountability”).

between public and private entities.²⁵ In the education context, this ultimately leads to inequitable statutory consequences where only public universities are held accountable for their historical harms or are encouraged to serve as conduits for remedying societal issues.²⁶ This uneven statutory construction neglects the essential role that private institutions should play in reparations.

Another factor contributing to the challenges these redress statutes face is the fictional, arbitrary public-private distinctions within our legal framework—especially in American law—that undermines and discourages meaningful regulation of private actor behavior.²⁷ Since the inception of our legal system, public institutions have faced different standards and scrutiny compared to their private counterparts.²⁸ In this particular case, the public-private distinction creates the unintended perception—and reality—for many affected individuals that only public actors are responsible for rectifying historical injustices.²⁹ The public-private divide also enables private universities to evade accountability for harmful practices without facing the same legal obligations.³⁰

The appropriateness of these statutes in a post-*Students for Fair Admissions* landscape—especially given the ongoing challenges to diversity, equity, and inclusion—may spark debate.³¹ However, regardless of one’s ideological

²⁵ See *infra* Sections I.D, II.A (discussing similar impacts private and public universities in Georgia and Virginia have had).

²⁶ See Mathis, *supra* note 16, at 1837 (critiquing HERS as discriminatory and underinclusive and demonstrating how they protect states and universities from full accountability for historical harms).

²⁷ Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425-26 (1982) (discussing nineteenth-century emergence of “view that state regulation of private relations was a dangerous and unnatural public intrusion into a system based on private rights”).

²⁸ See *id.* at 1423 (describing root of legal public-private distinction in late medieval period).

²⁹ See Mathis, *supra* note 16, at 1839 (“While these statutes have received some public praise, the inequity in the statutes persists, despite the objections from those left unprotected under the statutes and despite existing material that underscores non-equitable and discriminatory practices, including former reparation claims, historical evidence, references in academic literature, and government reports.”).

³⁰ RALPH RICHARD BANKS ET AL., STAN. CTR. FOR RACIAL JUST., PRIVATE UNIVERSITIES IN THE PUBLIC INTEREST: REIMAGINING A HISTORIC RELATIONSHIP FOR OUR TIME 8 (2024), <https://law.stanford.edu/publications/private-universities-in-the-public-interest-reimagining-a-historic-relationship-for-our-time> [https://perma.cc/8C7P-4GUD] (discussing declining sentiments toward and efficacy of private universities because of their evasion of established practices, norms, and laws).

³¹ Jason M. Scott, Paige Wilson, Tiffane Cochran & Andrea M. Pals, *The Imperative to Promote Diversity Post-Students for Fair Admissions Analyzing the Effects of Student-Body Diversity on Attrition, GPA, and Bar Passage in Law Students and Graduates*, 96 J. HIGHER EDUC. 596, 596 (2024) (“Now, as the era of race-conscious admissions draws to a close, this study examines whether the educational benefits that flow from racial and ethnic student-body diversity acknowledged in *Grutter v. Bollinger* (2003) persist in a law school context.”).

position, it is crucial to recognize that the imbalance created by the public-private distinction transcends mere oversight.³² This imbalance fundamentally undermines efforts toward justice and accountability, creating a landscape where the harms inflicted by private entities are often overlooked. At the same time, public institutions shoulder the burden of rectifying societal injustices. The imbalance reflects deeply ingrained societal values that prioritize addressing public harm while neglecting—or even perpetuating—the often far greater harms inflicted by private institutions. By failing to hold private entities to the same standards of accountability, we reinforce a system that allows significant injustices to persist unchecked.

Very few legal scholars have examined this area, focusing instead on other pressing and relevant issues, such as the cost of higher education,³³ institutional efforts,³⁴ endowment usage,³⁵ student loans,³⁶ admissions,³⁷ discrimination,³⁸

³² E.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2220, 2265-66 (2023) (holding affirmative action practices in college admissions generally violate Equal Protection Clause).

³³ E.g., Jonathan D. Glater, *The Unsupportable Cost of Variable Pricing of Student Loans*, 70 WASH. & LEE L. REV. 2137, 2138 (2013) (“A financial aid regime that requires students to shoulder ever more of the cost of higher education represents a decision to treat education more like a consumer investment.”).

³⁴ For the first empirical analysis of how universities’ involvement in slavery affects Black undergraduate students, see Juan Carlos Garibay, Christian West & Christopher Mathis, “*It Affects Me in Ways That I Don’t Even Realize*”: A Preliminary Study on Black Student Responses to a University’s Enslavement History, 61 J. COLL. STUDENT DEV. 697, 713 (2020). This article also recognizes a trend in United States higher education institutions that have proposed or recommended forms of reparations to amend their institution’s history of enslavement.

³⁵ Peter Conti-Brown, Note, *Scarcity Amidst Wealth: The Law, Finance, and Culture of Elite University Endowments in Financial Crisis*, 63 STAN. L. REV. 699, 704 (2011) (theorizing elite universities prioritize endowment preservation as symbol of prestige over budgetary stability during financial crises).

³⁶ Dalié Jiménez & Jonathan D. Glater, *Student Debt Is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 HARV. C.R.-C.L. L. REV. 131, 132 (2020) (contending student debt systemically disadvantages minority students by undermining educational access and opportunities).

³⁷ Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233, 239-40 (2022) (examining role of several racial stereotypes on Asian Americans in college admissions context); Vinay Harpalani, “*With All Deliberate Speed*”: The Ironic Demise of (and Hope for) Affirmative Action, 76 SMU L. REV. F. 91, 92 (2023) (evaluating prospects for race-conscious university admissions amidst recent Supreme Court challenges); Angela Onwuachi-Willig, *Roberts’s Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 194 (2023) (arguing Chief Justice Roberts’s majority opinion in *SFFA* revised “history, precedent, and reality through omissions, misstatements, and untruths”).

³⁸ E.g., Gabriela Dionisio, *Henderson and the Objective Observer Standard: The Future of Race-Conscious Standards Post-Students for Fair Admissions*, 48 SEATTLE U. L. REV. 255, 269 (2024) (defending constitutionality of *Henderson* objective observer standard against

and athlete compensation.³⁹ Unfortunately, the emerging topic of state statutory reparations in higher education has received far less attention. To fill this void, this Article draws on intellectual contributions from Professor Shaun Ossei-Owusu's, including the statutory analytical structure and framework in his seminal articles to address critical gaps in the scholarship surrounding higher education law.⁴⁰ This Article also utilizes archival research to enhance discussions and underscore the significance of private universities' evasion of statutory repair, particularly in relation to racial justice and equity. As Professor Ossei-Owusu notes, statutory analysis requires two essential intellectual approaches.⁴¹

First, this Article critically examines the construction of Higher Education Redress Statutes ("HERS"), a term derived from previous work that characterizes these laws as responses to the higher education sector's historical complicity in slavery and ongoing discrimination against Black individuals.⁴² A central focus of this analysis is the legal constraints tied to HERS, which currently applies exclusively to public institutions, leaving a glaring gap for private universities. The discussion in Part II emphasizes how these statutes, while attempting to address historical wrongs, fail to recognize private

challenges stemming from *SFFA*); see also Christopher J. Ryan, Jr., *Affirmatively in Peril: Predicting Federal Judicial Decision Making in University Admissions Cases*, 17 HARV. L. & POL'Y REV. 1, 13 (2022) (analyzing federal judicial decisions involving use of race in university admissions and predicting future outcomes).

³⁹ Neal Newman, *Let's Get Serious—The Clear Case for Compensating the Student Athlete—By the Numbers*, 51 N.M. L. REV. 37, 47 (2021) (advocating for model of student athlete payment regime where "5% of the revenue the team generates should be set aside for player compensation").

⁴⁰ In his articles, Professor Ossei-Owusu utilizes a four-part structure that effectively frames the analysis of pertinent statutes and outlines a normative pathway forward. See Shaun Ossei-Owusu, *Police Quotas*, 96 N.Y.U. L. REV. 529 (2021) [hereinafter Ossei-Owusu, *Police Quotas*]; Shaun Ossei-Owusu, *Velvet Rope Discrimination*, 107 VA. L. REV. 683 (2021) [hereinafter Ossei-Owusu, *Velvet Rope*]. This Article draws upon Professor Ossei-Owusu's framework, borrowing his method of presenting statutes in a clear and organized manner to uncover the underlying issues within HERS. By applying his four-part structure and argument construction, I aim to illuminate the specific challenges and inequities present in HERS.

⁴¹ In *Velvet Rope Discrimination*, Professor Ossei-Owusu outlines two essential intellectual maneuvers necessary for effectively analyzing and discussing statutes. First, he emphasizes the importance of clearly presenting the statutes under examination, providing a foundational understanding of their content and implications. See Ossei-Owusu, *Velvet Rope*, *supra* note 40, at 690. Following this, he advocates for the introduction of normative solutions aimed at addressing the identified issues within these statutes. See *id.* at 690-91 (advocating for prohibition of "core features of velvet rope discrimination," a "prescriptive position . . . rooted in a close analysis of public accommodations jurisprudence and growing statutory developments"). This structured approach not only clarifies the problems at hand but also paves the way for constructive remedies, fostering a more comprehensive dialogue around legal reform and social justice.

⁴² See Mathis, *supra* note 16, at 1833-34.

universities' roles in those wrongs.⁴³ I argue that this glaring oversight illustrates a fundamental inequity within these types of reparations that disallows a pathway for redress and can exacerbate the traumas experienced by victims of discrimination and degradation.⁴⁴ Furthermore, I scrutinize how these statutes obligate public universities to act as agents of reparative justice, yet simultaneously confine their effectiveness to a narrow interpretation of what constitutes recompense.⁴⁵ This operational framework reveals a paradox: While seeking to advance equity, the laws designed for reparation often reinforce social injustice and maintain a status quo that is anything but equitable. Through this description, the Article underscores the troubling reality that reparations within higher education are frequently contingent upon arbitrary distinctions that are hastily constructed and can appear socially objectionable. This legislative oversight to comprehensively address the harms inflicted by higher education institutions ultimately perpetuates further dignitary injuries to those who have been wronged.

As prescribed by Professor Ossei-Owusu's statutory analytical framework, the second portion in this discourse is fundamentally normative, as it challenges the assumptions surrounding the law's public-private distinction, particularly in the context of higher education reparations.⁴⁶ I argue that applying this distinction in matters of higher education repair is not only ironic, but also fundamentally flawed. This argument is anchored in analyzing the historical purpose and function of public-private distinction jurisprudence. Traditionally, the distinction between responsibilities and liabilities has been applied in various legal contexts in a manner that appears apolitical. However, this conventional application often produces political consequences that disproportionately harm marginalized communities. This sentiment is particularly relevant within the context of HERS, where such a narrow interpretation runs counter to the spirit and purpose of these statutes.

As awareness grows regarding the limitations of existing HERS,⁴⁷ and calls for comprehensive reform remain persistent, it becomes increasingly evident that this traditional legal framework is inadequate in addressing the complexities of harm that have occurred. I contend that, as a society, we have seen successful instances in other areas of law setting aside the traditional legal distinctions

⁴³ See *infra* Part II.

⁴⁴ See *infra* Part II (noting exclusion of private universities from HERS undermines purpose of redress statutes).

⁴⁵ See *infra* Part II ("Limiting reparative funds to public universities also shapes perceptions of opportunity by emphasizing a narrow view of repair that prioritizes integration into existing public systems. This raises critical questions about justice and accountability.").

⁴⁶ See *infra* Part III ("While there are various definitions of the public-private divide, this Article specifically examines the limitations and applications of public governmental law concerning private people and institutions.").

⁴⁷ Mathis, *supra* note 16, at 1837 ("[T]his Article asserts that HERS are an unexamined and unique area of the law, where substantial archival evidence proves that the laws' boundaries are underinclusive . . .").

between public and private entities. In doing so, this shift has allowed us to better align with contemporary notions of justice and accountability. By advocating for a reconsideration of this distinction within the context of higher education reparations, I aim to highlight a pathway toward a more equitable approach to justice. This reconfiguration would not only create wider opportunities for meaningful reparative measures but also reinforce the notion that addressing historical injustices requires a nuanced legal framework that transcends outdated dichotomies.

As such, this Article is structured into four parts.⁴⁸ Given these reparations statutes' novelty and lack of uniformity, Part I explores the evolution of four representative-enacted HERS across the nation.⁴⁹ Originating in Florida in the twentieth century,⁵⁰ these laws have gradually gained traction and been ratified in multiple states. Given this momentum, it is crucial to address existing structural issues within these statutes, particularly as lawmakers and state and local communities in California,⁵¹ Colorado,⁵² Virginia,⁵³ Maryland,⁵⁴

⁴⁸ Professor Ossei-Owusu's work is a compelling model for both presenting and analyzing statutes while also elucidating potential pathways for progress. *See generally* Ossei-Owusu, *Police Quotas*, *supra* note 40; Ossei-Owusu, *Velvet Rope*, *supra* note 40. While the topics discussed in his articles fall outside the higher education sphere, I find the framework useful to present and share this analysis.

⁴⁹ *See infra* Part I.

⁵⁰ *See* Bassett, *supra* note 9, at 521 (discussing Florida House Bill 591 as response to racial violence which occurred during twentieth century).

⁵¹ Sophie Austin, Tr  n Nguy  n & Olga R. Rodriguez, *California Bill Would Allow Public University Admission Priority for Slaves' Descendants*, ASSOCIATED PRESS (Dec. 2, 2024, at 19:54 ET), <https://apnews.com/article/california-universities-slavery-descendants-admission-s-4b0e84c27b40725a9f7929b230a591ca> [<https://perma.cc/LH85-VK4U>] (discussing California lawmaker's introduction of bill which would give admission priority to descendants of slaves at University of California and California State University).

⁵² *Educational Justice for Black Coloradans*, COLLABORATIVE HEALING INITIATIVE WITHIN CMTYS., <https://chicdenver.org/ejbc> [<https://perma.cc/6RAQ-K2MN>] (last visited Feb. 8, 2026) ("Educational Justice for Black Coloradans would guarantee that any Black person who resides in Colorado and meets the requirements for in-state tuition can access postsecondary degree, credential or certificate programs in a Colorado public institution one hundred percent cost-free and debt free.").

⁵³ Brandi Kellam, *Virginia Lawmakers Approve Commission to Examine Universities' Displacement of Black Communities*, PROPUBLICA (Mar. 14, 2024, at 06:00 ET), <https://www.propublica.org/article/virginia-commission-investigate-black-community-displacement-universities> [<https://perma.cc/JJ3A-2C8F>] (discussing Virginia legislature's creation of commission to investigate how public institutions of higher learning have displaced Black communities and consider possibilities for compensating dispossessed families).

⁵⁴ Kaicey Baylor, *Maryland Could Soon Create a Commission to Study Reparations*, CBS NEWS: BALT. (Apr. 3, 2025, at 20:17 ET), <https://www.cbsnews.com/baltimore/news/maryland-lawmakers-study-reparations-slavery-wes-moore> [<https://perma.cc/NBF5-ZMBD>] ("Reparations [outlined in the bill] also could include . . . tuition payment waivers for higher education.").

Georgia,⁵⁵ Alabama,⁵⁶ North Carolina,⁵⁷ New York,⁵⁸ Texas,⁵⁹ Vermont,⁶⁰ and Massachusetts⁶¹ are either drafting or evaluating the most effective ways to implement reparations laws, many of which include remedying injustices in the higher education system. This ongoing dialogue presents a significant opportunity to learn from past experiences and establish more equitable frameworks that better serve affected communities. Furthermore, as individuals, institutions, lawmakers, and citizens grapple with the implications of recent

⁵⁵ Chauncey Alcorn, *Black Lawmakers Make Their Case for Reparations in Georgia*, CAP. B: ATLANTA (Feb. 14, 2024), <https://atlanta.capitalnews.org/black-lawmakers-make-their-case-for-reparations-in-georgia> [[https:// perma.cc/ 5W2B-PEDC](https://perma.cc/5W2B-PEDC)] (discussing how Black college students in Georgia are particularly interested in seeing reparations program implemented).

⁵⁶ Gabriel Hays, *African American Families Demanding Reparations from Universities in Georgia, Alabama: Report*, FOX NEWS (June 8, 2023, at 11:53 ET), <https://www.foxnews.com/media/african-american-families-demanding-reparations-universities-georgia-alabama-report> [<https://perma.cc/27CS-FL8J>] (discussing demands from families seeking reparations from University of Alabama-Huntsville).

⁵⁷ Davarian L. Baldwin, *The Reparations Movement in Higher Education*, THINKING REPUBLIC (Oct. 11, 2020), [https:// www.thinkingrepublic.com/ being-counted/the-reparations-movement-in-higher-education](https://www.thinkingrepublic.com/being-counted/the-reparations-movement-in-higher-education) [<https://perma.cc/R4DH-YCVS>].

⁵⁸ See Assemb. B. A3080A, 2019 State Assemb., Reg. Sess. (N.Y. 2019) (“Relates to acknowledging the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the city of New York and the state of New York; establishes the New York state community commission on reparations remedies to examine the institution of slavery, subsequently [sic] de jure and de facto racial and economic discrimination against African-Americans, the impact of these forces on living African-Americans and to make recommendations on appropriate remedies; makes an appropriation therefor; and provides for the repeal of such provisions.”).

⁵⁹ See Judson L. Jeffries, *Juneteenth, Black Texans and the Case for Reparations*, 55 NEGRO EDUC. REV. 107, 113-14 (2004) (mentioning, among reparations to be considered for Black Texans, educational trust “designed to pay the college tuition of the descendants of those enslaved in Texas”); see also Daniel Van Oudenaren, *Reparations Planning for Austin African Americans*, AUS. BULLDOG (Mar. 16, 2024, at 12:07 ET), <https://theaustinbulldog.org/reparations-planning-for-austin-african-americans> [[https:// perma.cc/ BZC3-MVTX](https://perma.cc/BZC3-MVTX)] (“The city council March 4th approved a resolution that advocates see as a step toward their goal of securing city funding for what they call restitution payments. Such payments are akin to financial reparations for slavery—and might be implemented in similar or identical ways—but they aim to redress 20th century wrongs, rather than 19th century slavery.”).

⁶⁰ See Nora Peachin, *Vermonters Find Reparations Work ‘Painful and Messy and Complicated’*, BURLINGTON FREE PRESS (July 26, 2021, at 05:46 ET), <https://www.burlingtonfreepress.com/story/news/2021/07/26/reparations-what-vermonters-have-learned-government-grassroots-efforts/7948867002> [[https:// perma.cc/ BJ4Y-TTPL](https://perma.cc/BJ4Y-TTPL)] (discussing struggles of Vermont legislature to advance proposals to begin official reparations studies in state).

⁶¹ S. 1053, 193d Gen. Ct. (Mass. 2023) (highlighting educational funding discrepancies faced by African Americans and introducing commission which would “[r]esearch methods and materials for facilitating education . . . and other formal actions leading toward repair and a sense of justice among the people of the commonwealth”).

Supreme Court decisions regarding affirmative action at both private and public universities, this analysis is both urgent and timely.⁶² As such, these recent developments underscore the need for legislators to create thoughtful and inclusive statutes that not only address historical injustices but also adapt to the evolving landscape of higher education. Importantly, these initial efforts overlooked the actions and responsibilities of private universities, failing to consider them as avenues for repair.⁶³ As a result, the lack of accountability of private institutions and their inaction became normalized within these statutes, limiting the effectiveness of efforts to address historical injustices in higher education.

The increasing amount of legislation discussing reparations in higher education should apply to private institutions and universities as well. Yet, Part II of this Article demonstrates different a reality by exploring the construction, limitations, and contours of these statutes, revealing the shortcomings that allow private institutions to escape accountability.⁶⁴ In this Part, I will also highlight the numerous ways private universities in states with higher education reparations laws, particularly Virginia, have committed serious injustices, often rivaling or even surpassing the harm inflicted by public institutions.⁶⁵

Part III discusses the historical origins of the public-private divide in American law.⁶⁶ In addition, this Part discusses the contemporary operation of the divisive and unfair practices rooted in that divide in the current landscape of reparations in higher education.⁶⁷ The current reparations laws in higher education exemplify a troubling continuation of past ideologies.⁶⁸ Ironically,

⁶² See generally *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (holding race-based affirmative action admissions programs at Harvard and University of North Carolina violated Equal Protection Clause of Fourteenth Amendment). For a discussion on the effect of the *Students for Fair Admissions* decision and the future of race-conscious admissions policies, see also Dionisio, *supra* note 38.

⁶³ E.g., Kellam, *supra* note 53 (discussing only Virginia public universities facing pressure to respond to their roles in historical racial injustice, not private universities).

⁶⁴ See *infra* Part II (providing examples of HERS in Virginia, Florida, and Maryland, which exclude private universities even though they bear responsibility for some injustices these statutes attempt to resolve).

⁶⁵ See *infra* Part II (discussing how private universities like Washington and Lee University and University of Richmond have extensive history of reliance on slave and unpaid labor but have escaped effects of Virginia reparations statute due to statute's focus on public institutions).

⁶⁶ See *infra* Part III (examining historical "limitations and applications of public governmental law concerning private people and institutions").

⁶⁷ See *infra* Part III (examining how university systems have exemplified "the erosion of the public-private divide," requiring dismantling of "rigid legal distinctions between public and private sectors" to hold private universities accountable in HERS).

⁶⁸ See Mathis, *supra* note 16, at 1842-44 (discussing how recent HERS, which facially serve to address "broader concerns for racial justice, reparations, equity, and fairness," are

while these laws aim to provide pathways for recompense and remedy, they often create other harms that victimize individuals who have already been hurt.⁶⁹ In other words, the legal framework that is supposed to facilitate justice instead perpetuates the harm inflicted by private universities. Those individuals who have suffered due to the actions of private universities are often unable to seek redress within the existing legal system. As a result, victims are left to confront an exasperating dilemma: Victims cannot depend on the very legal structures designed to protect them, as those structures have historically facilitated their mistreatment rather than addressed it.⁷⁰ With no viable path to justice, these individuals are forced to grapple with the stark reality of seeking a remedy where the law meant to be their ally acts instead as a barrier to healing.

In addition, Part III maps out the arbitrary nature of the entrenched public-private legal distinction. Throughout history, innovative workarounds have emerged to navigate this divide, often prompted by the broader implications or greater good of specific issues brought before Congress, state legislatures, or the courts.⁷¹ These workarounds typically arise when issues necessitate a reconsideration of the boundaries between public and private, illustrating that this legal fiction can be dismantled, at any time, to serve the interests of justice.⁷²

Part IV will explore solutions rooted in tort law, which presents a compelling avenue for accountability.⁷³ Advocating for the inclusion of private causes of

nonetheless “minimal and reductionist” because they assume higher education is “an inherently democratic and democratizing endeavor”).

⁶⁹ See *id.* at 1844-45 (discussing how to enact Florida bill drafted to establish justice for those affected by Rosewood massacre of 1923, Black Caucus who introduced bill “had to concede other neighborhoods that were also devastated by racist acts,” causing statute to fail to recompense other victims of similar or worse violence in other Florida communities).

⁷⁰ See, e.g., *id.* at 1842, 1874-78 (discussing inadequacy of “Georgia Resolution,” which failed to hold University of Georgia and City of Athens accountable for immense harm they caused Black communities by limiting individuals to whom Resolution could provide redress).

⁷¹ See generally Horwitz, *supra* note 27 (considering evolution of public-private distinction from inception to modernity and how courts and political movements have attempted to address it).

⁷² See Michel Rosenfeld, *Rethinking the Boundaries Between Public Law and Private Law for the Twenty First Century: An Introduction*, 11 INT’L J. CONST. L. 125, 125-28 (2013) (introducing notion as modern nation-state complex becomes increasingly dominated by privatization and globalization, public-private distinction in law has created new complexities, suggesting distinction has become outdated).

⁷³ See *infra* Section III.B (presenting private causes of action as one possible method of providing redress for victims of racial injustices caused by private universities); Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1773 (2009) (exploring tort law as political tool to accomplish “individual justice,” particularly through corrective justice, which “seeks to restore the equilibrium that has been violated by a person who has wrongfully harmed another”). See generally Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320 (2017) (exploring political and sociological themes underlying tort law).

action within these statutes would empower individuals to hold private universities accountable for their actions. In other words, if the architects of these laws are unable or unwilling to work around the public-private university distinction, there may be a more pragmatic approach. By allowing lawmakers to carve out private causes of action, we can create a legitimate pathway for individuals to seek justice and accountability. This strategy addresses the need for reparations and reinforces the principle that all institutions, regardless of their classification, must be held responsible for their impact on marginalized communities. In this way, this Article aligns itself with a group of education law scholars, particularly those focused on higher education, who emphasize the urgent need for the industry to establish pathways that address and redress its historical injustices toward Black people in today's society. Part IV also takes a normative turn. It provides both legal and normative suggestions for increasing private universities' role in reparations.⁷⁴ The ideas in this Part are not meant to be a panacea or magic bullet, but it does offer thoughtful paradigms that might "reframe"⁷⁵ laws that include the harm created by both private and public institutions.⁷⁶

Before analyzing the statutes and their limitations, it is essential to highlight three concerns surrounding this topic: (1) the importance of examining private universities alongside statutory reparations, (2) the urgency and usefulness of these statutes in a post-*Students for Fair Admissions* environment, and (3) the pro-competitive, political, and social significance of perfecting these reparative laws in higher education.

While it may appear unusual to juxtapose private universities and statutory reparations, treating them as separate can obscure their interrelated impacts and reinforce misunderstandings. Private universities function as exclusive entities, often free from external oversight, which allows them to set their own policies

⁷⁴ See *infra* Part IV (arguing multidisciplinary, multi-layered approach to providing redresses to Black and brown people for harm caused by white supremacy in higher education can be done not only through incorporation of private causes of action to hold private universities responsible but also by creating more standardized means for private universities to address their systemic injustices).

⁷⁵ In *Velvet Rope Discrimination*, Professor Ossei-Owusu asserts the necessity for normative work to reshape the discourse surrounding topics that remain underexplored and undertheorized. See Ossei-Owusu, *Velvet Rope*, *supra* note 40, at 694. He argues that by actively engaging in this reframing, we can illuminate critical issues that have been overlooked, fostering a deeper understanding and prompting meaningful dialogue. *Id.* This approach not only enriches academic discussion but also helps to challenge prevailing narratives and advocate for more nuanced perspectives on pressing social concerns.

⁷⁶ See *infra* Part IV (calling on legislators and stakeholders to recognize private rights of action as critical to holding private universities accountable and proposing research program which would examine ways in which legal divide between public and private higher education institutions has affected racial justice and accountability).

and educational services for a specific group.⁷⁷ In contrast, statutory reparations are laws enacted by public representatives aimed at benefiting the broader community and promoting the welfare of marginalized groups.⁷⁸ While these definitions highlight a distinction, they also reveal a crucial intersection: both can be viewed through the lens of legal frameworks that affect individuals and communities. This recognition necessitates a thoughtful exploration of how these ideas interact and influence one another.

When we treat private universities and statutory reparations as isolated topics, we risk continuing dignitary harm. Such an approach can undermine individuals' self-worth, selectively acknowledge injustices, and erase the narratives of communities affected by these issues.⁷⁹ Recognizing the overlap between these two concepts is crucial for understanding their broader social implications.

By analyzing them in tandem, we can uncover issues at play, revealing how both contribute to ongoing inequities in higher education. This perspective enables us to advocate for a more equitable framework that addresses the historical injustices faced by marginalized communities. Moreover, it allows us to consider how private institutions and statutory measures can work together to foster dignity and representation. In addition to highlighting the synergies between private universities and statutory reparations, it is crucial to recognize how these two structures contribute to the erasure of perceptions surrounding race, political power, and our understanding of harm, along with covert or overt connections among those variables. This reality influences those who have historically faced the consequences of actions by private entities.⁸⁰ As a result, their voices may go unheard in a system that prioritizes established institutions over marginalized communities.⁸¹

This dynamic communicates that the harms experienced by Black communities are not worthy of comprehensive redress, cultivating an expectation that these individuals should be satisfied with minimal efforts rather than advocating for full accountability and meaningful reparative measures.⁸²

⁷⁷ See BANKS ET AL., *supra* note 30, at 19 (discussing how private universities' governance structure and financial wealth afford them significant autonomy).

⁷⁸ See Lauren Gambino, *Calls for Reparations Are Growing Louder. How Is the US Responding?*, GUARDIAN (June 20, 2020, at 05:00 ET), <https://www.theguardian.com/world/2020/jun/20/joe-biden-reparations-slavery-george-floyd-protests> [<https://perma.cc/T8VU-7QW9>] (discussing representatives attempting to advance legislation that includes reparations to help relieve Black Americans of inequities resulting from slavery).

⁷⁹ See Mathis, *supra* note 16, at 1839 (discussing unintended consequences of universities' attempts to remedy their involvement in slavery separately from state laws).

⁸⁰ See Mathis, *supra* note 16, at 1833 (discussing higher education's role in "disinvestment, displacement, and degradation of Black people, as well as its part in the intellectualization of Black inferiority" and how current redress statutes are inadequate and further "harm[], isolat[e], and silenc[e]" those they are meant to serve).

⁸¹ See *id.* at 1837 (asserting current HERS protect states and universities over providing remedies to all those harmed).

⁸² See Levmore, *supra* note 19, at 823 (discussing effects of incremental advocacy).

Such attitudes enable political powers to promote superficial attempts at redress, creating a façade of progress without addressing the underlying issues that contribute to inequities.⁸³ The narrative becomes one in which merely taking action—regardless of its inadequacy—provides lawmakers with a false sense of accomplishment while failing to confront the injustice that renders these communities invisible. Consequently, this devaluing and erasing of narratives reinforces a sense of fatigue and frustration among impacted individuals, stemming from the persistent feeling of never being fully seen or heard.⁸⁴ It fosters an environment where marginalized groups feel compelled to accept less, leading to disillusionment and disengagement. By implying that their struggles are less significant or deserving of only token gestures, this approach diminishes their sense of agency and undermines their efforts to demand meaningful change.⁸⁵

It is also important to note that higher education redress statutes present essential pathways for advancing equity in light of the Supreme Court’s recent decision to overturn affirmative action.⁸⁶ The *Students for Fair Admissions* ruling effectively dismantled the race-conscious admission policies⁸⁷ that were permitted by landmark cases such as *Regents of the University of California v. Bakke*,⁸⁸ *Grutter v. Bollinger*,⁸⁹ and *Fisher v. University of Texas at Austin*.⁹⁰

⁸³ See generally *id.* (explaining how incremental advocacy may lead political powers to enact “wrong” or incongruent regulations).

⁸⁴ *Cf. id.* at 857 (“Incremental regulation can divide interest groups and pit them against one another.”).

⁸⁵ See *id.* at 822-23 (describing tendency of incrementalism to produce less than optimal regulations which fail groups they are meant to help).

⁸⁶ See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2175 (2023).

⁸⁷ See Russell K. Robinson, *The Incoherence of the ‘Colorblind Constitution,’* 113 CALIF. L. REV. 997, 998-1000 (2025) (“The Court invalidated the race-conscious admissions policies before it, but it also ruled that equal protection does not prevent universities from admitting students based on essays that discuss their lived experience with race. . . . The Court asserted that equal protection requires that a student’s race may never be used as a ‘negative,’ policies may not ‘stereotype’ students based on race, and policies must have a fixed endpoint.”); *id.* at 994, 1014 (arguing *SFFA* holding has been widely overstated); *id.* at 998-1000 (“The Court invalidated the race-conscious admissions policies before it, but it also ruled that equal protection does not prevent universities from admitting students based on essays that discuss their lived experience with race.”).

⁸⁸ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978) (striking down special program which reserved set number of seats for underrepresented applicants but upholding use of race as an individualized “plus” factor in admissions).

⁸⁹ *Grutter v. Bollinger*, 539 U.S. 306, 335-37 (2003) (upholding University of Michigan Law School’s admissions policy which used race as one flexible “plus” factor on individualized basis).

⁹⁰ *Fisher v. Univ. of Tex. at Aus. (Fisher I)*, 570 U.S. 297, 314-15 (2013) (remanding case for proper application of strict scrutiny to race-conscious admissions policies); *Fisher v. Univ.*

While *Bakke* initiated the journey towards recognizing racial diversity as a compelling interest in admissions, *Grutter* and *Fisher* affirmed it, allowing institutions to adopt holistic review processes that considered race as one of many factors.⁹¹ However, the recent decision suggests that similar race-based admissions processes at institutions failed to meet strict scrutiny standards, primarily due to a lack of clarity and measurability.⁹²

In light of the constitutional blow to our decades-long understandings of affirmative action in higher education, it is important to recognize that the Justices have not completely rejected the pursuit of diversity. In fact, I argue that the Court has implicitly left room for programs that can offer particular benefits, such as financial aid, to narrowly defined groups rather than using broad classifications, such as race, that may perpetuate “incoherent” or “irrational” stereotypes.⁹³ Justice Gorsuch’s concurring opinion directly confronts the misuse of racial categories in higher education, expressing frustration over their formation by bureaucrats lacking expertise.⁹⁴ His comments highlight the inadequacies of generalizing identities under the broad label of “Black,” which fails to capture the full spectrum of experiences.⁹⁵

In this context, Justice Gorsuch’s emphasis on specificity in categorization challenges higher education institutions to refine their approaches to categorizing students. This is where HERS come into play. By defining eligibility criteria based on distinct historical and social contexts rather than vague racial identifiers, these laws align closely with Justice Gorsuch’s implicit demands.⁹⁶ They permit the recognition of unique experiences and backgrounds—specifically targeting groups, such as descendants of enslaved

of Tex. at Aus. (*Fisher II*), 579 U.S. 365, 388 (2016) (upholding University of Texas at Austin’s admissions policy of using race as factor in holistic review).

⁹¹ *Grutter*, 539 U.S. at 325 (“[S]tudent body diversity is a compelling state interest that can justify the use of race in university admissions.”); *Fisher I*, 570 U.S. at 309 (holding race-conscious admissions lawful if applicants are evaluated as individuals and race is not used as defining feature); *Fisher II*, 579 U.S. at 381 (“[A] university may institute a race-conscious admissions program as a means of obtaining ‘the educational benefits that flow from student body diversity.’”).

⁹² *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2166-68 (2023) (holding universities’ admissions programs unconstitutional because they failed to “comply with strict scrutiny,” they “use[d] race as a stereotype or negative,” and they lacked logical endpoint).

⁹³ *Id.* at 2210-12 (Gorsuch, J., concurring).

⁹⁴ *Id.* at 2210 (noting bureaucrats, when creating racial classifications used in admissions, acted without any scientific input and cautioned against using such classifications as determinants of eligibility for participation in programs).

⁹⁵ *Id.* at 2211 (asserting “‘Black or African American’ covers everyone from a descendant of enslaved persons who grew up poor in the rural South, to a first-generation child of wealthy Nigerian immigrants, to a Black-identifying applicant with multiracial ancestry whose family lives in a typical American suburb”).

⁹⁶ *See id.* at 2210-12 (arguing constitutional issue with affirmative action was universities’ use of racial categorizes being too broad and rooted in incoherent stereotypes).

persons—without relying on generalizations that could misrepresent individual identities.⁹⁷ In doing so, HERS not only navigate the latest “colorblind” judicial requirements but also reflect the underlying principles of equity that affirmative action sought to achieve.

Moreover, Justice Gorsuch is not alone in hinting at potential pathways for HERS. During the oral arguments for *Students for Fair Admissions*, Justice Kavanaugh posed an intriguing question to an expert witness: Should a benefit given to descendants of slaves—whether a cash payment or something less tangible, such as preferential treatment in college admissions—be considered race-based?⁹⁸ Justice Kavanaugh suggested it should not.⁹⁹ He argued that, while most descendants of enslaved individuals in the United States identify as Black, having a personal connection to historical wrongdoing could be viewed as a race-neutral factor.¹⁰⁰ This perspective opens up possibilities for lawmakers to craft policies that recognize and address historical injustices without having to rely on race-based classifications.

This reasoning could extend beyond admissions policies into broader legislative frameworks aimed at rectifying systemic harms inflicted by higher education institutions. If personal connections to historical injustices are deemed race-neutral, lawmakers could develop redress statutes that seek to address the impacts of these wrongs, providing solutions to descendants of those impacted by higher education as a necessary form of restitution rather than perceived benefits tied to race.¹⁰¹ More specifically, such policies could also apply to private universities, which often possess substantial resources that could be allocated toward redressing historical inequities.¹⁰² By embracing Kavanaugh’s

⁹⁷ Mathis, *supra* note 16, at 1843-44 (defining HERS and highlighting their intent to benefit specific, narrowly defined group in response to recognized harms).

⁹⁸ Transcript of Oral Argument at 15, *Students for Fair Admissions, Inc.*, 143 S. Ct. 2141 (2023) (No. 20-1199) [hereinafter *SFFA* Oral Argument Transcript] (“Justice Kavanaugh: So today a—a benefit to descendants of slaves would not be race-based, correct?”).

⁹⁹ *Id.* at 16 (“Justice Kavanaugh: . . . [Y]ou said to Justice Gorsuch . . . that the benefit for former slaves was not race-based. If that’s correct, then the benefit for descendants of former slaves is also not race-based. . . . [Y]ou can make other arguments if you want about that, but it does not seem to be race-based under what you said to Justice Gorsuch, correct?”); *see also* David Leonhardt, *The Hard Question of Affirmative Action and Slavery*, N.Y. TIMES (May 1, 2023), <https://www.nytimes.com/2023/05/01/briefing/supreme-court.html> (“Kavanaugh’s question about slavery was jarring because the overlap was complete: An admissions policy based on a family’s history of enslavement certainly sounds like a race-based policy, without being one on paper.”).

¹⁰⁰ *SFFA* Oral Argument Transcript, *supra* note 98, at 15-16.

¹⁰¹ *Id.* at 15.

¹⁰² *See generally* Tristan Stein & Arianna Fano, *Addressing Disparities in Campus-Based Aid*, BIPARTISAN POL’Y CTR. (June 24, 2024), <https://bipartisanpolicy.org/explainer/addressing-disparities-in-campus-based-aid> (describing how federal campus-based aid programs disproportionately benefit wealthy private universities despite their smaller low-income student populations, highlighting inequities in current funding formulas and proposing reform); Matt Richmond, *Equity Before Adequacy in Higher Education Funding*,

logic, lawmakers can argue that offering targeted assistance to those affected by higher education not only acknowledges the legacy of harm but also fosters equity.

Finally, it is crucial to emphasize the pro-competitive, political, and social significance of expanding HERS before moving forward. Given the current climate of political uncertainty surrounding the disbandment or restructuring of the Department of Education, the ambiguity around student loan forgiveness, First Amendment speech issues on campus, student visas statuses, the chilling effect of *Students for Fair Admissions* on diversity, equity, and inclusion practices at many institutions, and escalating political tensions on campuses, it may seem insignificant to focus resources and scholarly input on correcting these statutes. However, dismissing the need to correct these laws as “distractions” overlooks their profound implications.¹⁰³ In adopting such a view, we run the risk of complicating two perceived realities.

First, from an American antitrust perspective, the failure to hold private universities accountable for their roles in reparations creates and normalizes unfair competitive advantages for these institutions.¹⁰⁴ This situation undermines the foundational American principle of fair competition, especially as higher education increasingly functions as a market-driven industry that treats students as commodities.¹⁰⁵ When laws allow private universities to retain their resources without addressing their obligations to provide reparations, these institutions are empowered to direct their wealth toward initiatives that attract more tuition dollars, endowments, and donations.¹⁰⁶ This concentration of

NEW AM. (Dec. 12, 2024), <https://www.newamerica.org/education-policy/briefs/equity-before-adequacy-in-higher-education-funding> (examining historical roots of inequitable higher-education funding and proposing equity-centered reforms to correct resource disparities).

¹⁰³ In *Velvet Rope Discrimination*, Professor Ossei-Owusu emphasizes the importance of addressing even seemingly minor instances of discrimination, urging us not to trivialize any inequity, regardless of its context within larger structural injustices. See Ossei-Owusu, *Velvet Rope*, *supra* note 40, at 698. He argues that overlooking these subtleties can perpetuate systemic disparities, underscoring the need for a comprehensive approach that recognizes and rectifies all forms of inequity, no matter how small. *Id.* By doing so, we can work towards meaningful change that acknowledges the interconnectedness of all issues of fairness and justice. *Id.*

¹⁰⁴ See generally Douglas R. Richmond, *Antitrust and Higher Education: An Overview*, 61 UMKC L. REV. 417 (1993) (providing overview of antitrust applications to higher education).

¹⁰⁵ See Alia Wong, *The Commodification of Higher Education*, ATLANTIC (Mar. 30, 2016), <https://www.theatlantic.com/education/archive/2016/03/the-commodification-of-higher-education/475947> [<https://perma.cc/99FQ-6TD3>] (explaining why colleges and universities have transformed into market-driven industries).

¹⁰⁶ See, e.g., Stephanie Beasley, *Mega-Gifts Are Funding University Tuitions. Which Students Do They Help?*, CHRON. PHILANTHROPY (Apr. 29, 2024), <https://www.philanthropy.com/article/mega-gifts-are-funding-university-tuitions-which-students-do-they-help> (discussing impact of donations on university budgets, noting in particular effect of large donations on tuition increases); Tracy Filosa & Billy Prout, *Can College and University*

financial resources not only boosts the power of private institutions but also creates an uneven playing field that disadvantages public universities, which often lack similar financial flexibility.¹⁰⁷ This inequitable dynamic can potentially lead to significant disparities, where private universities flourish and accumulate more wealth, while public institutions face increasing financial pressures and challenges.

Second, from a political and social perspective, the current construction of HERS and the continued diminishment of private universities in reparations will likely lead to ongoing dissatisfaction among valuable voting constituencies. If lawmakers and policymakers do not expand HERS to include private institutions, they risk politically isolating those groups who have suffered harm at the hands of private institutions. Conversely, expanding these statutes to encompass private universities can foster a sense of harmony and collaboration between those directly impacted by past injustices and those who have not been affected.

This approach not only addresses the immediate needs of marginalized populations, but also promotes a more inclusive political climate that unites various constituencies. In fact, I argue that these expanded statutes can effectively circumvent traditional critiques and political concerns surrounding reparations in America. Critics often assert that the issue of reparations is too vast and complex to tackle, claiming it is difficult to devise a fair system when the perpetrators of past harm are often indistinct.¹⁰⁸ This confusion stems from the nature of racism in the United States because of her storied past, white supremacist societal norms, and government complicity in facilitating the

Endowments Do More?, CAMBRIDGE ASSOCS. (June 22, 2017), <https://www.cambridgeassociates.com/insight/can-college-and-university-endowments-do-more> [<https://perma.cc/BH5P-T69B>] (reviewing impact of endowments on decision-making autonomy of universities and colleges).

¹⁰⁷ E.g., Christopher Avery, Ronald Ehrenberg, Catharine Hill & Douglas A. Webber, *Endowment Spending Rules*, in FINANCING INSTITUTIONS OF HIGHER EDUCATION 10-11 (John Y. Campbell & Kaye Husbands Fealing eds.) (Feb. 2026), <https://www.nber.org/system/files/chapters/c14978/c14978.pdf> [<https://perma.cc/PA4P-9RLP>] (examining endowment spending practices among private universities).

¹⁰⁸ See, e.g., Kaimipono David Wenger, “Too Big to Remedy?”: *Rethinking Mass Restitution for Slavery and Jim Crow*, 44 LOY. L.A. L. REV. 177, 201-17 (2010) (considering whether restitution is too big or complex to remedy); see also Valorie E. Douglas, Note, *Reparations 4.0: Trading in Older Models for a New Vehicle*, 62 ARIZ. L. REV. 839, 851-62 (2020) (examining different possible legal avenues for reparations and problems inherent with each); Yamamoto & Obrey, *supra* note 24, at 5-9 (discussing difficulties with implementing monetary reparations given widespread criticism); Vanessa de Oliveira Andreotti, Sharon Stein, Cash Ahenakew & Dallas Hunt, *Mapping Interpretations of Decolonization in the Context of Higher Education*, 4 DECOLONIZATION: INDIGENEITY, EDUC. & SOC’Y, no. 1, at 21, 32-33 (2015) (discussing “soft-reform” and “radical-reform” in higher education); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 689-748 (2003) (evaluating ethical arguments for and against reparations).

mistreatment of Black people.¹⁰⁹ Moreover, the United States government has historically sewn racial injustice into every facet of life for marginalized communities, making the perpetrator of the harm difficult to point to and often indistinguishable from the practices of the time.¹¹⁰ However, HERS present a focused approach to reparations that bypasses these traditional concerns. By narrowing the scope of reparations to higher education institutions, these statutes make it easier to identify and address specific harms. These institutions typically maintain extensive archives chronicling their involvement in significant decisions and events affecting marginalized populations.¹¹¹ Such documentation allows lawmakers and advocates to clearly delineate to some extent where harms began and ended, creating a more manageable framework for addressing these issues.

Moreover, a common critique of reparations is that current generations should not be held accountable for past harms, deeming it unfair for contemporary individuals to pay for the sins of their forefathers.¹¹² The beautiful aspect of these statutes is that they have emerged from the political process, reflecting the will of the people within local contexts. This establishes a legitimate foundation for reparations that recognizes a contemporary societal commitment to addressing historical injustices.

Additionally, these statutes engage directly with longstanding legal challenges surrounding proximate causation, which frequently obstruct efforts to establish negligence claims in the reparations discourse.¹¹³ Notwithstanding statute of limitations concerns, to prevail in a negligence action, a plaintiff must establish five elements: duty, breach, actual causation, proximate causation, and demonstrable damages.¹¹⁴ Among these, proximate causation—determining whether the harm was a foreseeable result of the defendant’s actions—often generates substantial obstacles.¹¹⁵ In the context of higher education redress,

¹⁰⁹ See generally Wenger, *supra* note 108 (describing state-sanctioned deprivation of rights inflicted upon Black Americans during slavery and Jim Crow era).

¹¹⁰ *Id.*

¹¹¹ See, e.g., *The Black Student Experience at Harvard: Historical Sources*, HARV. LIBR. (Sep. 9, 2025, at 16:33 ET), <https://guides.library.harvard.edu/c.php?g=1061363&p=7716371> [<https://perma.cc/2Q3A-YUQ5>] (providing archived resources detailing treatment of Black students by Harvard University).

¹¹² Douglas, *supra* note 108, at 852 (recognizing “strong tradition in the United States for ethical individualism in which individuals are not blameworthy for acts out of their control”).

¹¹³ See generally Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279 (2006) (examining problems causation poses to reparation statutes); Kaimipono David Wenger, *Forty Acres and a Lawsuit: Legal Claims for Reparations*, in 22 RACE, ETHNICITY AND LAW 89-101 (Mathieu Deflem ed., 2017) (explaining how courts have rejected legal claims for reparations in part because of lack of established causation).

¹¹⁴ RESTATEMENT (SECOND) OF TORTS § 281 (A.L.I. 1977) (outlining elements of tort claim).

¹¹⁵ See *Atkinson v. Scheer*, 508 S.E.2d 68, 71 (Va. 1998) (“The proximate cause of an event is that act or omission which, in natural and continuing sequence, unbroken by an

lawmakers can clearly articulate, through institutional archives, how these institutions bore a duty to their communities and how they breached that duty through actions that contributed to harm.¹¹⁶ The records maintained by these institutions serve as crucial evidence demonstrating how institutional decisions directly led to injustices experienced by marginalized communities.¹¹⁷ By framing these statutes within this legal context, lawmakers establish a clear pathway to satisfy the requirements of proximate causation. The framework they create illustrates a direct connection between institutional actions and the resulting harms, effectively addressing the challenges that arise in negligence arguments related to reparations.

In summary, HERS not only provide a targeted means of rectifying historical injustices but also a means to navigate the significant hurdles posed by traditional critiques of reparations in America, particularly those surrounding proximate causation. They demonstrate how the political system can respond to the will of the people, honoring the legislative process and acknowledging the efforts of those who have successfully advocated for these important measures. This makes these statutes a practical and compelling solution in the pursuit of justice and equity.

I. REGULATORY FRAMEWORK AND STATE'S CONTOURS

This Part serves two key purposes by analyzing the intent and relevant facts that shaped the enactment and evolution of four HERS.¹¹⁸ First, it introduces these statutes and, second, it highlights the challenges states have faced in implementing them.

Legislators often encountered significant resistance, raising doubts about the feasibility of enacting these statutes.¹¹⁹ It is essential to examine each statute's evolution in this context, as the motivations for offering reparations differ

efficient intervening cause, produces the event, and without which that event would not have occurred. There may be more than one proximate cause of an event." (citation and internal quotation marks omitted)).

¹¹⁶ See Mathis, *supra* note 16, at 1842-54 (tracing legislative histories of various HERS in Virginia, Florida, Georgia, Maryland, and other states).

¹¹⁷ *Id.*

¹¹⁸ It is essential to revisit the categorization established within these statutes: First, there is one group of statutes that assign benefits to a specific, narrowly defined group in response to harm caused by particular actors within higher education that lawmakers have identified as requiring redress. The second group includes statutes that address societal harms, where lawmakers and policymakers leverage higher education as a mechanism to remedy broader societal issues stemming from private citizens, government entities, or other actors. See *supra* note 16.

¹¹⁹ See Elizabeth Shwe, *Maryland Settles HBCU Federal Lawsuit for \$577 Million*, MD. MATTERS (Apr. 28, 2021, at 11:42 ET), <https://marylandmatters.org/2021/04/28/maryland-settles-hbcu-federal-lawsuit-for-577-million> (describing long road to getting equitable funding for Maryland's Historically Black Colleges and Universities ("HBCUs")).

widely.¹²⁰ Each state's journey is shaped by its unique historical experiences and varying levels of acknowledgment concerning the harm inflicted on marginalized communities.¹²¹

To fully grasp the complexities of the statutes, it is important to understand that the intent behind these laws and the obstacles to their implementation are largely dependent on the specific circumstances within each state. The challenges surrounding higher education redress initiatives are not uniform; they reflect the distinctive histories and needs of the communities affected. Moreover, resistance to these laws has emerged from a variety of sources, adding another layer of complexity to their implementation. This variability underscores the importance of understanding how local factors influence the acceptance and effectiveness of higher education redress initiatives.

A. *Virginia: The Enslaved Ancestors College Access Scholarship and Memorial Program*

While this Section will ultimately examine the evolution of the characters involved in the law in Virginia, it is crucial to position this statute within the wider political movement that has developed over recent decades. Understanding this context not only emphasizes the importance of the statute but also highlights the collective efforts of activists, students, faculty, administrators, and lawmakers in advocating for its ratification. By situating this law within the broader narrative of social reform, we can gain a deeper appreciation for its impact and recognize the ongoing need for rigorous examination of this law in the field of higher education law.

At the start of the new millennium, faculty, students, and staff at over seventy United States colleges and universities began to critically examine their institutions' historical connections to the enslavement of people of African descent.¹²² This shift was primarily driven by student activism and external

¹²⁰ See, e.g., Chris Dowd, *The ACC Commission Passes the Linnentown Resolution, Calls for Reparations*, ATHENS POL. NERD (Feb. 26, 2021), <https://athenspoliticsnerd.com/linnentown-resolution-passes> [<https://perma.cc/CZ6P-7Y6D>] (discussing passage of resolution providing reparations to descendants of Black families who had their property seized by city of Athens in 1960s); Ryan Gillespie, *25 Years Ago, Florida Compensated Survivors of Rosewood Racial Violence*, ORLANDO SENTINEL (May 3, 2019, at 21:56 ET), <https://www.orlandosentinel.com/2019/05/03/25-years-ago-florida-compensated-survivors-of-rosewood-racial-violence> (recounting history of bill providing reparations to descendants of Black families who were killed during Rosewood massacre).

¹²¹ See, e.g., Anna Liss-Roy, *Virginia Law Requires Universities to Create Scholarships for Descendants of Enslaved Workers*, WUSA9 (Apr. 1, 2021, at 19:18 ET), <https://www.wusa9.com/article/news/local/virginia/virginia-law-reparations-universities-profit-slave-labor/65-31ae2fd2-75a7-42b1-818b-e7bfaf0edf60> [<https://perma.cc/4GCJ-9XJY>] (“Each of [the] five schools [covered by the Virginia “Enslaved Ancestors College Access Scholarship and Memorial Program”] has taken steps to acknowledge [their] history in recent years, but [one Virginia state legislator] noted they are not all in the same place.”).

¹²² Moscufo, *supra* note 2 (explaining trend of colleges examining their racist past).

political pressures.¹²³ Although this number may seem small relative to the total number of academic institutions in America, the influence of these prominent colleges and universities ignited a renewed and sustained focus on addressing this important issue.¹²⁴

Brown University played a crucial role in this movement by establishing a framework that other universities began to emulate, demonstrating the isomorphic behavior prevalent in the higher education sector.¹²⁵ This collective re-examination of higher education's ties to slavery, along with its impact on Black individuals and the perpetuation of racist ideologies, led to significant developments across various fields. For example, academic researchers initiated entire streams of study dedicated to these critical topics. Scholars like Juan Garibay and Amalia Daché launched Project SHARPE to explore reparative efforts and to investigate historical injustices committed by universities founded before the Civil War by gathering input from students of African descent.¹²⁶ Concurrently, institutional leaders took proactive measures to establish new majors, offices, and programs aimed at addressing these pressing issues directly.¹²⁷ A notable example is the University of Virginia's ("UVA") creation

¹²³ See, e.g., P.R. Lockhart, *Georgetown University Plans to Raise \$400,000 a Year for Reparations*, VOX (Oct. 31, 2019, at 11:05 ET) <https://www.vox.com/identities/2019/10/31/20940665/georgetown-reparations-fund-slavery-history-colleges> [<https://perma.cc/SLG9-2UEJ>] (noting Georgetown announced it would provide reparations after students voted to create scholarship fund); UChicago Against Displacement, *A Community-Led Approach to Reparations at UChicago*, CHI. MAROON (Feb. 9, 2022), <https://chicagomaroon.com/28860/viewpoints/op-ed/community-led-approach-reparations-uchicago> [<https://perma.cc/4AS5-S6K6>] (listing demands from student organization for University of Chicago to provide reparations).

¹²⁴ See Moscufo, *supra* note 2.

¹²⁵ See generally Shontay Delalue, *The Evolution of Diversity, Equity, and Inclusion Work at Brown University: An Institution Changed by the Slavery and Justice Report*, BROWN UNIV.'S SLAVERY & JUST. REP., <https://slaveryandjusticereport.brown.edu/essays/delalue> [<https://perma.cc/XDB9-GDGV>] (last visited Feb. 8, 2026) (describing lasting effect of Brown's reparations framework, published in University's slavery and justice report).

¹²⁶ Penn GSE, *With Project SHARPE, Amalia Daché Documents Reparations in Higher Ed*, PENN TODAY: NEWS ARCHIVE (Apr. 11, 2024), <https://penntoday.upenn.edu/news/project-sharpe-penn-gses-dache-documents-reparations-higher-ed> [<https://perma.cc/5CU2-EW2V>] ("Project SHARPE is currently surveying students of African descent from 11 universities over four years about their experiences on campus. The team . . . has also built a database of institutions nationwide documenting schools' work on reparations based on published institutional website content.").

¹²⁷ E.g., Rachel Schilke, *UI African American Studies Program to Form Institute, Promote Black Culture*, DAILY IOWAN (June 18, 2020), <https://dailyiowan.com/2020/06/18/ui-african-american-studies-program-to-form-institute-promote-black-culture> [<https://perma.cc/ZM5T-SRDM>] (describing University of Iowa's new institute "focused on Black history and culture to promote diversity throughout the Midwest"); Laurie D. Willis, *New African American Studies Program Underway*, WAKE FOREST NEWS (Aug. 30, 2021), <https://news.wfu.edu/2021/08/30/new-african-american-studies-program-underway> [<https://perma.cc/73CL-38NB>]

of the group “Virginia’s Colleges and Universities Studying Slavery” in 2014, which became “Universities Studying Slavery” in 2015 when Georgetown University joined the consortium and now includes over one hundred higher education institutions from the United States, Canada, Colombia, Scotland, Ireland, and England.¹²⁸ This initiative garnered significant media attention and resonated far beyond academia. It actively engaged local legislators, fostering a vital dialogue that connected scholarly insights with community concerns.¹²⁹ By bridging the gap between research and policymaking, this initiative created a compelling platform for addressing critical issues, driving a collective call to action that inspires change within the higher education landscape. The increased visibility and public response achieved two essential outcomes: It underscored UVA’s commitment to confronting its historical involvement in slavery and spurred local lawmakers to examine the interplay between state actions and institutional practices.¹³⁰

As interest from students, citizens, researchers, and institutions surged, lawmakers recognized a critical opportunity for action. David Reid, a Democratic member of the Virginia House of Delegates, was particularly inspired by the local and national activism that sought to confront historical injustices.¹³¹ He aimed to build coalitions to address the harms perpetuated by

(describing Wake Forest’s new African American Studies program); Chelcey Adami, *Trustees Approve Creation of Department of African and African American Studies*, STAN. REP. (Oct. 20, 2023), <https://news.stanford.edu/stories/2023/10/trustees-approve-creation-new-department> [<https://perma.cc/ECB3-ZFKP>] (reporting Stanford University plan to create African and African American studies department).

¹²⁸ MARCUS L. MARTIN ET AL., UNIV. OF VA., PRESIDENT’S COMMISSION ON SLAVERY AND THE UNIVERSITY: REPORT TO PRESIDENT TERESA A. SULLIVAN 64 (2018), https://slavery.virginia.edu/wp-content/uploads/2021/03/PCSU-Report-FINAL_July-2018.pdf [<https://perma.cc/L97W-6TYS>].

¹²⁹ See Anne E. Bromley, *New Law, Signed at UVA, Focuses on Reparations for Descendants of Enslaved Workers*, UVA TODAY (May 5, 2021), <https://news.virginia.edu/content/new-law-signed-uva-focuses-reparations-descendants-enslaved-workers> [<https://perma.cc/WY6C-C4WE>] (noting Virginia Delegate David Reid’s acknowledgment of Universities Studying Slavery consortium at ceremonial signing of legislation to create Enslaved Ancestors College Access Scholarship and Memorial Programs); Associated Press, *Reparations Mark New Front for U.S. Colleges Tied to Slavery*, L.A. TIMES (Dec. 14, 2019, at 15:12 PT), <https://www.latimes.com/world-nation/story/2019-12-14/reparations-mark-new-front-for-u-s-colleges-tied-to-slavery> [<https://perma.cc/X289-44BV>] (citing Universities Studying Slavery consortium in discussion of efforts by academic institutions to reckon with their ties to slavery).

¹³⁰ See MARTIN ET AL., *supra* note 128, at 64 (“The growing Universities Studying Slavery consortium remains dedicated to organizing multi-institutional collaboration as part of an effort to facilitate mutual support in the pursuit of common goals regarding research, acknowledgement, atonement, and repair for historical entanglement in human bondage and complicity in the racist legacies of slavery.”); Bromley, *supra* note 129.

¹³¹ Bromley, *supra* note 129 (referencing Reid’s role in introducing legislation to create reparative scholarship and memorial programs at Virginia universities).

the higher education system.¹³² Reid highlighted the historical significance of this movement by stating: “There is only 30 miles of distance and three weeks of separation between the formation of the first elected legislative body in the country, the Virginia House of Burgesses, and the first Africans who were brought here.”¹³³ This recognition of history spurred him to investigate the five public colleges in Virginia founded during the colonial period that relied on slave labor for their establishment and operation.¹³⁴

Reid’s investigation ultimately led to the introduction of a contentious bill that passed almost entirely along party lines—with only one Republican voting for the bill’s passage.¹³⁵ Reflecting on the difficulties he faced, Reid remarked, “When [the law] was working through the legislature, I didn’t use the word reparations.”¹³⁶ He went on to explain that the successful push for a narrowly tailored reparations bill was only made possible by the convergence of pivotal events: the protests following the murder of George Floyd, the Supreme Court’s challenge to affirmative action in higher education, and the lingering effects of the COVID-19 pandemic.¹³⁷

This effort resulted in the passage of a little-known yet significant law by the Virginia legislature in 2021, mandating reparations through scholarships and other forms of support.¹³⁸ Officially titled Section 23.1-615.1, the Enslaved Ancestors College Access Scholarship and Memorial Program requires the five public colleges in Virginia, each with ties to slavery during the antebellum period, to document and memorialize their historical connections to slavery.¹³⁹ Furthermore, the law mandates that these institutions provide scholarships to

¹³² *Id.* (“Truly addressing the long-term, systemic impacts of slavery that permeate so many aspects of our society will require a multi-generation commitment. Not only legislation and policies that span multiple generations, but multiple generations of governors, legislators, activists and citizens who are committed to undoing the painful legacy of the past 400 years,” [Reid] said.”).

¹³³ J. Brian Charles, *Virginia Wants to Give Scholarships to Descendants of Slaves. It’s Harder than It Looks.*, CHRON. HIGHER EDUC. (Sep. 12, 2024), <https://www.chronicle.com/article/virginia-wants-to-give-scholarships-to-descendants-of-slaves-its-harder-than-it-looks>.

¹³⁴ *Id.*

¹³⁵ *Id.* (referring to partisan divisions in Virginia legislature over race-conscious policymaking and reparative measures in higher education).

¹³⁶ *Id.*

¹³⁷ *Id.* (linking Virginia bill’s passage to broader national movement on race and inequality which created momentum for reparative legislation).

¹³⁸ *See* VA. CODE ANN. § 23.1-615.1 (2025) (mandating certain public universities implement programs to memorialize enslaved individuals and provide related scholarships or community initiatives).

¹³⁹ *Id.* (“[The universities] shall each implement and execute the Program . . . by annually (i) identifying and memorializing, to the extent possible, all enslaved individuals who labored on former and current institutionally controlled grounds and property . . .”).

descendants of enslaved individuals or invest in economic development initiatives for communities disproportionately affected by slavery.¹⁴⁰

B. *Florida: House Bill 591—The Rosewood Massacre Reparations*

On the morning of May 4, 1994, the old capitol in Tallahassee, Florida, became a historic site when then-Governor Lawton Chiles signed into law the nation's first measure to compensate Black individuals for historical racial violence, specifically acknowledging the atrocities of the 1923 Rosewood Massacre.¹⁴¹

For a comprehensive exploration of the events surrounding the Rosewood Massacre, I encourage the examination of the many archives that maintain the history of Rosewood through oral transcripts, written articles, and other historical accounts.¹⁴² However, I will provide a brief high-level overview to contextualize the event. This narrative aims to highlight the key elements and significance of the Rosewood Massacre in a concise manner.

On January 1, 1923, life in Rosewood changed dramatically when Fannie Taylor, a white woman from nearby Sumner, claimed she had been attacked by a Black man. The truth of her allegations was unclear, but her husband and other white residents believed she had been raped, leading to demands for retribution.¹⁴³ The local sheriff assembled a posse, and tensions escalated as rumors spread that Black residents were protecting the alleged assailant.¹⁴⁴

By the evening of January 4, a group of armed white vigilantes had descended on Rosewood, targeting the home of Sylvester Carrier, a Black man rumored to have made racist and threatening statements. Violence erupted when they kicked in the front door to the Carrier home, and Sylvester shot the armed intruders in an attempt to defend his family, killing two members of the mob and wounding others. However, these casualties did not deter the vigilantes, who began burning

¹⁴⁰ *Id.* (“[The universities] shall each implement and execute the Program . . . by annually . . . (ii) providing a tangible benefit such as a college scholarship or community-based economic development program for individuals or specific communities with a demonstrated historic connection to slavery . . .”).

¹⁴¹ See generally R. Thomas Dye, *The Rosewood Massacre: History and the Making of Public Policy*, 19 PUB. HISTORIAN, no. 3, July 1997, at 25 (commemorating passage of Rosewood Compensation Act, which provided state reparations to survivors and descendants of Rosewood massacre).

¹⁴² E.g., *Minnie Langley Testimony Before the Florida Legislative Special Master for House Bill 591 (Rosewood Bill), 1994*, FLA. MEMORY: STATE LIBR. & ARCHIVES OF FLA., <https://www.floridamemory.com/items/show/350844> (last visited Feb. 8, 2026) (recounting experience sheltering with relatives in Carrier home as white mob opened fire on it); Jeanne Bassett, *supra* note 9, at 505-07.

¹⁴³ Dye, *supra* note 141, at 28-29 (noting despite white community's conclusion, “[w]hether or not [Taylor] had been raped has never been determined”).

¹⁴⁴ *Id.* at 30 (describing how posse used dogs to track scent from Taylor home to empty home of Aaron Carrier and sought to issue summary punishment, believing Carter had aided in alleged assailant's escape).

homes and churches on their way out of Rosewood to regroup, forcing many Black families to flee into the swamps.¹⁴⁵

As news of the events in Rosewood spread and more armed white people descended on the town, the violence and destruction continued. Among the many victims of the ensuing chaos was James Carrier, the elderly uncle of Sylvester, who was killed by roaming vigilantes who mistakenly believed he was involved in the shootout at Sylvester's home.¹⁴⁶ Ultimately, over two-hundred armed whites arrived in and wreaked havoc on the town, leaving Rosewood devastated and its residents permanently scarred by the tragedy of the massacre.¹⁴⁷

The path to enacting reparations for such a traumatic event was fraught with significant obstacles and political resistance. Legislators began their lobbying efforts at the start of the 1994 legislative session, but they quickly encountered reluctance from many lawmakers who deemed the bill too politically charged to support.¹⁴⁸ With a backdrop of negative public sentiment, advocates faced a deluge of hostile inquiries and letters, including hate mail from groups such as the Ku Klux Klan.¹⁴⁹ Legislator Hurley Rudd conveyed the overwhelming nature of the opposition, noting that the correspondence was not only abundant but overwhelmingly negative, creating an environment of fear around supporting the legislation.¹⁵⁰

The Congressional Black Caucus in Florida further highlighted the difficulties involved, stating that despite the disinvestment, death, and pain endured by the Rosewood community at the hands of racist mobs, the pursuit of reparations was not straightforward.¹⁵¹ A newspaper account revealed that the caucus had to employ political ultimatums and strategic maneuvering to compel Governor Chiles to support the bill.¹⁵² Famously, the Caucus presented an ultimatum: They would withhold their backing for Governor Chiles's critical healthcare package unless he used his influence to help secure enough votes for the bill.¹⁵³

Despite this significant resistance and the complex political landscape, advocates persevered, fueled by a deep sense of duty to honor the victims of

¹⁴⁵ *Id.* at 31.

¹⁴⁶ *Id.* at 32 (noting "it was unlikely that James Carrier, old and partially paralyzed from a stroke, could have participated in the defense of the Carrier home").

¹⁴⁷ *Id.* at 32-33 (depicting aftermath of Rosewood Massacre).

¹⁴⁸ *Id.* ("When [two state representatives] began to lobby for the bill at the beginning of the 1994 session, many lawmakers declined to meet with the sponsors on the grounds that the bill was too politically charged to risk supporting.").

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* ("Democrat Hurley Rudd said, 'It's not a preponderance of calls and letters against it, but a super-preponderance opposing it!' A survey of letters to the editor in Florida papers came in 10 to 1 against the bill." (footnote omitted)).

¹⁵¹ Bassett, *supra* note 9, at 511-12.

¹⁵² Dye, *supra* note 141, at 37 (describing tense lunch between Black Caucus and Governor Chiles as legislative session neared its close).

¹⁵³ *Id.*

Rosewood and address the long-standing injustices faced by the community. Support began to emerge even from the Republican Party, with House Republican Leader Sandra Mortham pledging her backing while indicating that the party would take a neutral stance on the issue.¹⁵⁴ However, in order to secure the bill's passage, compromises had to be made, including reducing the monetary compensation awards and limiting eligibility for reparations in the form of higher education scholarships to Florida's largely white public universities only.¹⁵⁵

C. *Maryland: MD House Bill 1*

The story of Maryland's Historically Black Colleges and Universities ("HBCUs") is defined by a persistent struggle against systemic neglect and underfunding within a higher education system that has long undervalued their contributions. This fight began in earnest in 2000 when the state entered a partnership with the Department of Education to address the lingering disparities resulting from decades of institutionalized segregation.¹⁵⁶

The Coalition for Equity and Excellence in Maryland Higher Education, composed of students and alumni from Morgan State University, Coppin State University, Bowie State University, and the University of Maryland Eastern Shore, has worked tirelessly to highlight their grievances, including chronic underfunding and the harmful duplication of unique academic programs at HBCUs by traditionally white institutions ("TWIs").¹⁵⁷ These practices not only undermined the distinct missions of Maryland's HBCUs but also placed them at a competitive disadvantage, revealing the state's chronic disregard for educational equity.¹⁵⁸

In 2013, United States District Court Judge Catherine C. Blake ruled that Maryland's actions constituted a violation of the constitutional rights of HBCU students.¹⁵⁹ However, the state's response felt insufficient, with legislative

¹⁵⁴ *Id.* at 36.

¹⁵⁵ *Id.* at 36-37.

¹⁵⁶ See *Securing Justice for Maryland's Historically Black Colleges and Universities: The Coalition for Equity and Excellence in Maryland Higher Education, Inc., et al. v. Maryland Higher Education Commission, et al.*, LAWS.' COMM. FOR C.R. UNDER L., <https://www.lawyerscommittee.org/maryland-hbcus> [<https://perma.cc/M8M3-M34U>] (last visited Feb. 8, 2026) (describing agreement between Maryland and Department of Education and Maryland's failure to meet its commitments with respect to HBCUs).

¹⁵⁷ *Id.* In this Article, I use traditionally white institutions and predominantly white institutions interchangeably.

¹⁵⁸ See Fourth Amended Complaint at 6-29, *Coal. for Equity & Excellence in Md. Higher Educ. v. Md. Higher Educ. Comm'n*, 295 F. Supp. 3d 540 (D. Md. 2017) (No. 1:06-CV-02773).

¹⁵⁹ *Coal. for Equity & Excellence in Md. Higher Educ. v. Md. Higher Educ. Comm'n*, 977 F. Supp. 2d 507, 544 (D. Md. 2013) ("[I]t is the court's conclusion that the extensive program duplication in Maryland is a traceable vestige of the *de jure* era, that it continues to exacerbate the racial identifiability of Maryland's HB[CU]s by limiting their competitiveness in program

efforts focused primarily on public universities while neglecting the critical issue of program duplication at private institutions.¹⁶⁰ This selective oversight illustrated a broader reluctance among state actors to fully acknowledge the challenges faced by HBCUs. A significant turning point occurred in early 2020, when Maryland House Speaker Adrienne Jones and other advocates pushed for an emergency appropriations bill known as HB 1260.¹⁶¹ During a committee hearing, Jones stressed the urgency of acting to mitigate “lost time for tens of thousands of students waiting for the legal process to resolve itself.”¹⁶² She underscored the need for equitable support for all students, irrespective of their institution.¹⁶³

Mickey Burnim, interim president at Coppin State University, reinforced this sentiment, stating that HB 1260 “affords the unique opportunity to tackle decades of previous untraceable and traceable state-supported inequities and the unnecessary duplication in programs at HBCUs in the state.”¹⁶⁴ The bipartisan support for the bill, culminating in its unanimous passage, indicated a shared recognition of the legacy of discrimination.

Shortly after HB 1260’s enactment, Maryland Governor Lawrence Hogan vetoed the bill, along with numerous others, citing the unprecedented economic impact of the COVID-19 pandemic as the reason for cutting state spending.¹⁶⁵ However, in March 2021, the House of Delegates passed a nearly identical emergency appropriations bill, known as HB 1, which earmarked \$577 million for HBCUs over the following decade.¹⁶⁶ This decision was a culmination of years of advocacy and legal pressure, reflecting a crucial acknowledgment of the

offerings, and that there is no sound educational justification preventing the mitigation of this duplication.”).

¹⁶⁰ See Elizabeth Shwe, *Hogan Signs \$577 Million Settlement Bill for Maryland’s Historically Black Universities*, MD. MATTERS (Mar. 24, 2021, at 18:37 ET), <https://marylandmatters.org/2021/03/24/hogan-signs-577-million-settlement-bill-for-marylands-historically-black-universities>.

¹⁶¹ H.B. 1260, 2020 Gen. Assemb., Reg. Sess. (Md. 2020), <https://mgaleg.maryland.gov/2020RS/bills/hb/hb1260T.pdf> [<https://perma.cc/5MFB-48DR>] (vetoed by governor in 2020 and reintroduced and passed following year as HB1).

¹⁶² Danielle E. Gaines, *Speaker, Supporters Press for End to Long-Running HBCU Lawsuit*, MD. MATTERS (Feb. 26, 2020, at 06:40 ET), <https://marylandmatters.org/2020/02/26/speaker-supporters-press-for-end-to-long-running-hbcu-lawsuit>.

¹⁶³ *Id.*

¹⁶⁴ Kenya Evelyn, *Maryland HBCUs Awarded Half a Billion in Racial Discrimination Compensation*, GUARDIAN (Mar. 26, 2020, at 10:33 ET), <https://www.theguardian.com/us-news/2020/mar/26/maryland-hbcus-racial-discrimination-compensation> [<https://perma.cc/2C6R-4NK8>].

¹⁶⁵ See Veto Letter from Lawrence J. Hogan, Jr., Governor, to Bill Ferguson, Senate President, and Adrienne A. Jones, Speaker of the House of Dels. (May 7, 2020), https://mgaleg.maryland.gov/2020RS/veto_letters/hb1260.pdf [<https://perma.cc/6JYU-QK6E>] (citing COVID-19 pandemic as cause for veto of various enumerated bills).

¹⁶⁶ H.B. 1, 2021 Gen. Assemb., Reg. Sess. (Md. 2021), https://mgaleg.maryland.gov/2021RS/chapters_noln/Ch_41_hb0001E.pdf [<https://perma.cc/HA45-7Q55>].

difficulties HBCUs have faced. The funding allows these institutions to establish new degree programs, recruit faculty, enhance marketing efforts, and invest in scholarships and financial aid.¹⁶⁷ Despite this progress, the release of funds was contingent upon finalizing a settlement agreement in the Coalition for Equity and Excellence in Maryland Higher Education litigation by June 2021, highlighting the ongoing instability of HBCU funding.¹⁶⁸

Despite Judge Blake's approval of the settlement agreement aimed to rectify past injustices, it is clear that HBCUs must continue to fight against an establishment that has historically relegated them to secondary status. The passage of HB 1260 and the settlement agreement represent a significant milestone in the ongoing struggle for equity faced by Maryland's HBCUs, but sustained advocacy and commitment are necessary to ensure these institutions receive the recognition and support they so profoundly deserve.

D. *The City of Athens and the University System of Georgia Resolution*

In the mid-twentieth century, urban renewal programs, backed by significant federal funding, aimed to revitalize American cities by transforming blighted areas.¹⁶⁹ However, this initiative had a devastating impact on many predominantly Black communities located near UVA,¹⁷⁰ the University of Pennsylvania,¹⁷¹ University of Chicago,¹⁷² University of South Carolina,¹⁷³

¹⁶⁷ *Id.* at 5-6.

¹⁶⁸ *See id.* at 11.

¹⁶⁹ *See generally* DAVARIAN L. BALDWIN, IN THE SHADOW OF THE IVORY TOWER: HOW UNIVERSITIES ARE PLUNDERING OUR CITIES (2021) (describing how university-led urban renewal projects affected established communities).

¹⁷⁰ Brian Cameron & Andrew Kahrl, *UVA and the History of Race: Property and Power*, UVA TODAY (Mar. 15, 2021), <https://news.virginia.edu/content/uva-and-history-race-property-and-power> [<https://perma.cc/59DC-RFD6>] (describing racist destruction of historically Black Vinegar Hill neighborhood as part of Charlottesville urban renewal scheme); Faith Kelley, *Abundant Life Black History Month Highlights: Vinegar Hill, the Demolished Thriving Black Neighborhood*, ABUNDANT LIFE MINISTRIES (Feb. 8, 2023), <https://charlottesvilleabundantlife.org/abundant-life-black-history-month-highlights-vinegar-hill-the-demolished-thriving-black-neighborhood> [<https://perma.cc/M6J4-TBGG>].

¹⁷¹ Taylor Allen, *As Building Boom Continues in West Philly, Black Bottom Tribe Fights for a Sign of the Community They Lost*, WHYY (Aug. 9, 2021), <https://whyy.org/articles/as-building-boom-continues-in-west-philly-black-bottom-tribe-fights-for-a-sign-of-the-community-they-lost> [<https://perma.cc/2RSZ-P684>] (describing local activists' fight for recognition of Black Bottom neighborhood).

¹⁷² Lee Harris, *The University and the South Side*, CHI. MAROON: NEWS (Sep. 14, 2017), <https://chicagomaroon.com/24823/news/university-south-side> [<https://perma.cc/4GX3-3YEN>] (describing historical causes of Chicago's South Side communities' distrust of University of Chicago).

¹⁷³ Chris Horn, *Remembering the Days: South by Southwest, the University's Expansion into Ward 1, Wheeler Hill*, UNIV. OF S.C. (Oct. 14, 2021), https://sc.edu/uofsc/posts/2021/10/remembering_the_days_south_by_southwest_episode_34.php [<https://perma.cc/Z9N4-VD>]

University of Maryland,¹⁷⁴ Georgia Institute of Technology,¹⁷⁵ Old Dominion University,¹⁷⁶ Temple University,¹⁷⁷ and a host of other public and private universities.¹⁷⁸ While the federal legislation cited commendable goals—seeking to enhance urban landscapes and improve educational facilities—in reality, its effects were often harmful.

Instead of creating equitable opportunities for all, urban renewal frequently led to the demolition of homes and the displacement of thousands of Black families. Between 1955 and 1966, these projects uprooted over 300,000 individuals and disproportionately affected communities of color.¹⁷⁹ Many neighborhoods were replaced with new academic buildings, upscale dormitories, and expansive hospital facilities, erasing the rich histories and connections that had defined those areas for generations.¹⁸⁰

In a landmark move towards justice and acknowledgment, the City of Athens and the University of Georgia (“UGA”) system signed a resolution on January 19, 2021, recognizing the historical injustices endured by the Linnentown community and other Black neighborhoods harmed by UGA’s urban renewal

FG] (recounting demolition of Wheeler Hill as part of “so-called slum clearance project overseen by the city of Columbia and the University of South Carolina”).

¹⁷⁴ Maggie Halam, *Bringing Justice—and a New Chapter—to a College Park Community*, UNIV. OF MD.: DIV. OF RSCH. (Dec. 13, 2022), <https://research.umd.edu/articles/bringing-justice-and-new-chapter-college-park-community> [https://perma.cc/S2K6-F96R] (describing University of Maryland effort to revive “thriving African American community” in Lakeland).

¹⁷⁵ Robert K. Nelson & Edward L. Ayers, *Renewing Inequality: Urban Renewal, Family Displacements, and Race 1950-1966*, UNIV. OF RICHMOND: DIGIT. SCHOLARSHIP LAB, <https://dsl.richmond.edu/panorama/renewal/#view=0/0/1&viz=cartogram> (last visited Feb. 8, 2026) (to see data regarding Georgia Tech’s urban renewal project, choose “next” then “enter” to view interactive map; then, in “search by city or state” bar, search for “Atlanta” and click highlighted circle on map of United States; then select area of map of Atlanta highlighted in pink and labeled “Georgia Tech”).

¹⁷⁶ Brandi Kellam, *Lawmaker Seeks Study, Relief for Black Communities Uprooted by Virginia Universities*, NPR: VPM (Jan. 19, 2024, at 08:00 ET), <https://www.vpm.org/news/2024-01-19/study-black-displacement-virginia-universities> (describing Virginia legislator Dolores McQuinn’s proposition to establish commission for investigating “historic land acquisitions by public colleges and universities in Black communities”).

¹⁷⁷ McCaillaigh Rouse & Sarah Frasca, *North Philadelphia Residents Deserve a Say in Temple’s Future*, TEMPLE NEWS (Apr. 18, 2023), <https://temple-news.com/north-philadelphia-residents-deserve-a-say-in-temple-future> [https://perma.cc/7GRY-FWU4] (“As early as the 1960s, Temple has had expansion plans that would displace Black residents . . .”).

¹⁷⁸ See *id.* (illustrating and discussing displacement of families due to federally-funded urban renewal programs, including those conducted by colleges and universities).

¹⁷⁹ *Id.*

¹⁸⁰ See, e.g., MAYOR & COMM’N OF ATHENS-CLARKE CNTY., GA., LINNENTOWN RESOLUTION (Jan. 19, 2021), <https://www.accgov.com/DocumentCenter/View/75675/Linnentown-Resolution—Final-Version> [https://perma.cc/NES9-WD5M] (recounting decades of inequitable treatment of Black families in furtherance of University of Georgia’s (“UGAs”) developmental goals).

initiatives. This milestone did not occur in isolation; it was the result of decades of advocacy by former Linnentown residents and their allies, who bravely confronted a legacy marked by racial violence, forced displacement, and economic marginalization. The roots of this struggle trace back to the early 1960s when urban renewal plans sanctioned the demolition of the Linnentown neighborhood, forcing out 176 Black families and erasing local businesses—actions hidden under the misleading rhetoric of “slum clearance.”¹⁸¹ These efforts by UGA and the City of Athens were marked by a calculated disregard for the lives of those displaced, prioritizing the construction of three luxury dormitories for the university’s predominantly white student body over the rights and dignity of the existing community.¹⁸² Instead of fulfilling their oaths to serve all citizens, elected officials chose to align with the interests of a privileged few.

Of particular concern is the fact that the resolution acknowledges and addresses the actions of public actors—namely, UGA and the City of Athens—while failing to hold private entities accountable for their complicity in this systemic injustice. The collaboration between public officials and private developers facilitated the coordinated effort to displace Black families, yet this resolution sidesteps the critical role that private actors played in the process.¹⁸³ By neglecting to address the broader network of individuals and organizations that profited from the urban renewal project, the resolution inadvertently reinforces the idea that the harms inflicted were solely the result of public policy, overlooking the deep-rooted collusion between public and private actors that perpetuated these injustices.

The tactics employed to displace Linnentown residents included intimidation and the use of eminent domain, which in many cases involved private interests benefiting from the acquisition of land.¹⁸⁴ Families were offered meager compensation, often far below the market value of their homes. Hattie Thomas Whitehead’s recollection of her family’s struggles underscores the intergenerational devastation caused by such actions—actions made possible by both public policy and private greed.¹⁸⁵ While the tangible losses—homes, community structures, and businesses—are stark, the psychological impacts of this displacement also linger. Geneva Johnson, a direct survivor of this upheaval, articulates the lasting emotional scars that are often neglected in discussions

¹⁸¹ *Id.* at 2.

¹⁸² *See id.*

¹⁸³ *See generally id.* (failing to discuss role of actors other than UGA and City of Athens—and associated individuals—in erasure of Linnentown).

¹⁸⁴ *Id.* at 2.

¹⁸⁵ *See* Email from Hattie Thomas Whitehead, Chairperson, Linnentown Project, to Jere W. Morehead, President, Univ. of Ga. (July 22, 2021) (on file with the Boston University Law Review).

about urban renewal.¹⁸⁶ Scholars like Mindy Thompson Fullilove have documented how the stress associated with displacement can exacerbate health issues and contribute to community disintegration, demonstrating that the consequences of these policies extend far beyond financial loss.¹⁸⁷

The enactment of the Linnentown Resolution marked a critical acknowledgment of these harms and articulated a series of demands for redress, including a formal apology, the establishment of a memorial, and funding aimed at reinvesting in historically underserved communities. However, the resolution has faced scrutiny for its narrow focus on Linnentown, sidelining the broader history of injustices inflicted upon Black residents by UGA and the city—not to mention its failure to examine the contributions of private actors to this systemic chaos.

Athens District 1 Commissioner Patrick Davenport expressed frustration that the resolution felt like an “insult” to the larger Black community, suggesting that the actions taken to recognize Linnentown should not overshadow the equally valid grievances of other communities that have similarly suffered disenfranchisement.¹⁸⁸ Activists emphasize the need for a comprehensive approach to reparative justice that encompasses all communities affected by systemic inequalities, asserting that acknowledgment of UGA’s broader history of dispossession, including the complicity of private actors, is essential for genuine reparative efforts.

The signing of the resolution is not just a historical footnote; it is a clarion call to address the systemic injustices that have plagued Black communities in Athens and across the nation. While this resolution marks a step in the right direction, it is just the beginning of a longer journey toward accountability, recognition, and restorative action. True reparative justice will require ongoing effort and commitment to confront the deep-seated issues of inequality and exclusion that continue to affect marginalized populations. The story of Linnentown serves as both a reminder of the past and a guide for forging a more equitable future, urging the community, policymakers, and institutions like UGA to confront their histories in their entirety and work toward meaningful change for all affected communities.

II. THE LIMITING LANGUAGE OF HIGHER EDUCATION REDRESS STATUTES

HERS are formal measures that require public universities to address past wrongs related to discrimination against or the degradation of specific groups. These statutes also recognize situations where public universities act as

¹⁸⁶ See FIRST PERSON PROJECT, *Interview with Geneva Blasingame*, UNIV. OF GA. RICHARD B. RUSSELL LIBR. FOR POL. RSCH. & STUD., at 30:11 (July 12, 2013), <https://ohms.libs.uga.edu/viewer.php?cachefile=russell/RBRL324FPP-0014.xml#segment1234>.

¹⁸⁷ See Mindy Thompson Fullilove, *Root Shock: The Consequences of African American Dispossession*, 78 J. URB. HEALTH 72, 72-80 (2001) (analyzing long-term sociopolitical consequences of African American dispossession).

¹⁸⁸ See Allen, *supra* note 17.

governmental conduits for remedying historical injustices. Because terms like “redress” and “reparations” often carry negative connotations, these statutes typically avoid using such language and instead adopt a variety of alternative or “anti-inflammatory” terms to achieve similar objectives. These phrases—sometimes used sincerely and at other times as a façade—include “scholarships,” “resolutions,” “additional funding,” and “memorialization projects.”

To gain a deeper understanding of HERS and their exclusionary language, one can analyze the limiting principles at play by examining archival evidence, elucidating how this exclusion—from a justice perspective—is unconscionable.

A. *The Enslaved Ancestors College Access Scholarship and Memorial Program*

Table 1. Virginia House Bill.

Virginia: H.B. 1980¹⁸⁹	A. The Enslaved Ancestors College Access Scholarship and Memorial Program (the Program) is established for the purpose of reckoning with the history of the Commonwealth, addressing the long legacy of slavery in the Commonwealth, and acknowledging that the foundational success of several public institutions of higher education was based on the labor of enslaved individuals. B. Consistent with the purpose set forth in subsection A, Longwood University, the University of Virginia, Virginia Commonwealth University, the Virginia Military Institute, and The College of William and Mary in Virginia shall each implement and execute the Program, with any source of funds other than state funds or tuition or fee increases, by annually (i) identifying and memorializing, to the extent possible, all enslaved individuals who labored on former and current institutionally controlled grounds and property and (ii) providing a tangible benefit such as a college scholarship or community-based economic development program for individuals or specific communities with a demonstrated historic connection to slavery that will empower families to be lifted out of the cycle of poverty.
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Virginia’s statute boldly seeks to address the complex relationship between higher education and the legacy of enslavement in the Commonwealth. During the legislative sessions and hearings, the primary aim of this statute became evident: to compel institutions of higher learning in Virginia to confront their historical ties to slavery. This broad framing indicates a recognition of the systemic issues at play and a call for collective accountability across Virginia.

¹⁸⁹ VA. CODE ANN. § 23.1-615.1 (2025).

However, a disconnect emerges between the text of the law, its intended spirit, and the actual implementation.

A closer examination reveals a significant paradox within the statute: While it acknowledges the necessity of confronting the Commonwealth's historical injustices, it simultaneously restricts its provisions solely to public universities in the following section. This selective approach effectively cherry-picks which aspects of the Commonwealth's past warrant redress, undermining the statute's overall intent. By arbitrarily confining its scope to public institutions, the statute inherently fails to comprehensively address the profound legacy of slavery that has contributed to the success of higher education as a whole. This construction not only diminishes the historical context but also signals a reluctance to fully engage with the complexities of the past that impact both public and private institutions, ultimately weakening the statute's effectiveness in fostering genuine reparative justice. This limitation undermines the commitments made during legislative hearings and compromises the fundamental goals of the statute. Specifically, Section A establishes The Enslaved Ancestors College Access Scholarship and Memorial Program (the "Program") to reckon with the Commonwealth's history, address the enduring legacy of slavery, and acknowledge that the success of public higher education institutions is deeply rooted in the exploitation of enslaved individuals.

However, by excluding private colleges and universities such as Washington and Lee University, the University of Richmond, Hampden-Sydney College, Hollins University, Randolph-Macon College, Randolph College, Roanoke College, Sweet Briar College, Shenandoah University, and Mary Baldwin University—each with significant histories of slavery on their campuses—the statute overlooks a crucial segment of Virginia's educational landscape. This exclusion contradicts the intent laid out in Section A by not wholly contending with the Commonwealth's history and raises serious questions about justice and fairness for families who experienced equal, if not greater, levels of harm than those at the public colleges and universities included in the statute. For instance, the University of Richmond heavily relied on the labor of enslaved persons during its early years. Enslaved individuals were present at the Dunlora education center, which was foundational for the university's formation in 1832, as well as on its early campuses at Spring Farm and the "Columbia" location by what is now Broad and Grace Streets.¹⁹⁰ Historical records indicate that at least twenty-four adults and numerous children were classified as "hired out" because the institution leased enslaved individuals to sustain its operations.¹⁹¹

¹⁹⁰ See generally SHELBY M. DRISKILL & LAURANETT L. LEE, "A SEASON OF DISCIPLINE": ENSLAVEMENT, EDUCATION, & FAITH IN THE LIFE OF ROBERT RYLAND (2021), <https://www.scribd.com/document/496623695/A-Season-of-Discipline-Enslavement-Education-Faith-in-the-Life-of-Robert-Ryland> (recounting Robert Ryland's use of enslaved labor in developing Richmond College).

¹⁹¹ *The Ryland Family and the University of Richmond*, UNIV. OF RICHMOND: AN UNFOLDING HISTORY, <https://unfoldinghistory.richmond.edu/article/robert-ryland#the-ryland-family-and-the-university-of-richmond> [<https://perma.cc/G8XF-HTS4>] (last visited Feb. 8,

Similarly, Washington and Lee University carries a troubling legacy marked by the exploitation of at least seventy-three enslaved Black women, children, and men.¹⁹² Ten years after profiting from their labor, the university sold the majority of these individuals.¹⁹³ Further demonstrating its disregard for the human dignity of Black persons, the university hired out enslaved workers to generate revenue by placing them in the service of other masters. Consequently, the college hired out twenty-eight enslaved individuals for annual sums ranging from \$10 to \$120, collectively generating around \$1,000 each year—an impressive financial benefit derived at the expense of their humanity.¹⁹⁴ Even more shocking is the fact that the university had the right to retain ownership of these enslaved individuals for a minimum of fifty years.¹⁹⁵

These examples illustrate how the behavior of private universities in Virginia paralleled their public counterparts regarding their historical ties to slavery. It is also noteworthy to highlight the level of cooperation and collusion between these institutions.¹⁹⁶ Historical archives reveal that leaders from both public and private universities regularly convened to discuss strategies for navigating the challenges posed by the impending Civil War, which threatened the livelihood and financial stability of higher education in the state.¹⁹⁷ This collaboration further emphasizes the shared responsibility of all institutions as to their legacies and the injustices of the past.

This shared history underscores the moral imperative for Virginia to hold its higher education institutions—public and private—accountable for their roles in

2026) (describing Ryland’s hiring out of enslaved men, women, and children to “individuals, enterprises, and [Richmond College]”).

¹⁹² Working Grp. on the Hist. of Afr. Ams. at W&L, *African Americans at Washington and Lee*, WASH. & LEE UNIV., <https://www.wlu.edu/working-group-on-african-american-history/timeline-of-african-americans-at-w-l> [https://perma.cc/5BL4-MHXG] (last visited Feb. 8, 2026) (noting Washington College, later Washington and Lee University, was entrusted with approximately seventy enslaved persons when slaveowner “Jockey” John Robinson bequeathed his entire estate and all property to institution).

¹⁹³ *Id.* (describing 1836 sale of approximately fifty-five enslaved persons to Samuel Garland, co-owner of plantation in Hinds County, Mississippi).

¹⁹⁴ Working Grp. on the Hist. of Afr. Ams. at W&L, *List of Washington College Slaves in 1834*, WASH. & LEE UNIV., <https://www.wlu.edu/working-group-on-african-american-history/timeline-of-african-americans-at-w-l/list-of-washington-college-slaves/list-of-washington-college-slaves> [https://perma.cc/277A-XT8S] (last visited Feb. 8, 2026) (listing enslaved persons hired out by Washington College in 1834, their age, and value assessed by college).

¹⁹⁵ Working Grp. on the Hist. of Afr. Ams. at W&L, *supra* note 192.

¹⁹⁶ See CRAIG STEVEN WILDER, *EBONY AND IVY: RACE, SLAVERY, AND THE TROUBLED HISTORY OF AMERICA’S UNIVERSITIES* ch. 8 (2013) (e-book) (discussing American Colonization Society, organization that “refined the intellectual and political arguments against abolition,” members of which “headed every college in New York State, New Jersey, Connecticut and Massachusetts . . . and led several schools in Maryland, Virginia, North Carolina, Georgia, and Kentucky” during pre-Civil War period).

¹⁹⁷ *Id.* (noting annual meetings of American Colonization Society to discuss combatting abolitionist movement).

perpetuating slavery. By excluding private universities from the statute's provisions, the Commonwealth not only diminishes the efficacy of its efforts but also neglects to honor the experiences of all those affected by past injustices. Only by including every institution in these discussions can Virginia truly confront its history and work toward meaningful reparations and reconciliation.

Furthermore, a critical reason for the state's engagement in this type of redress was to bridge the gap left by universities' institutional efforts to reconcile and address their involvement with slavery, which often fell short in acknowledging the needs of the descendants of the enslaved. A poignant example is Leah Williams, a descendant of enslaved individuals associated with Washington and Lee University.¹⁹⁸ Her insights powerfully underscore the need for state intervention—she expressed hope that her views would be taken into account when the university decides how to contextualize its history. Williams stated:

I would like there to be something more substantial acknowledging that part of the history, that the school benefited from their labor and from them being sold. . . . Seeing my ancestors' prices, that's a feeling I can't really describe. I was disgusted, saddened, angry, all in one moment. I think they deserve more than a plaque.¹⁹⁹

These sentiments reinforce the demand for comprehensive reform and serve as crucial evidence for legislators advocating for state action. However, an irony emerges: While lawmakers reference the pain and dissatisfaction expressed by the descendants of private universities, such as those from Washington and Lee, the statute ultimately excludes these institutions from its redress provisions. This contradiction is significant because it underscores how the very evidence of harm that supports the need for repair and reparations comes from individuals who are—due to arbitrary legal distinctions between private and public institutions—systematically left out of the solution.

By overlooking Virginia's private universities—many of which played a role in perpetuating slavery—the statute risks reinforcing a selective narrative that neglects the full extent of higher education's complicity in historical injustices. This exclusion not only undermines the statute's effectiveness but also fails to acknowledge the shared responsibility of all educational institutions in addressing their pasts and fostering a path toward genuine reconciliation.

¹⁹⁸ See generally Leah D. Williams, *A Name Change May Be a Start, but It Is Not Enough*, 77 WASH. & LEE L. REV. ONLINE 59, 62 (2020) (calling out “disparity in veneration and acknowledgment” by Washington and Lee between former university president Robert E. Lee and enslaved persons whose labor was fundamental to success of university).

¹⁹⁹ Taylor Dolven, *College Named for Robert E. Lee Is Considering Reparations to Descendants of 84 Slaves It Owned*, VICE (May 21, 2018, at 17:41 ET), <https://www.vice.com/en/article/college-named-for-robert-e-lee-is-considering-reparations-to-descendants-of-84-slaves-it-owned> [https://perma.cc/C4JY-TQF5].

B. *House Bill 591—The Rosewood Massacre Reparations***Table 2.** Florida House Bill: Rosewood Family Scholarship Program.

Florida: HB 591 ²⁰⁰	(1) There is created a Rosewood Family Scholarship Program for the direct descendants of the Rosewood families, not to exceed 50 scholarships per year. . . . (3)(c) [To receive a scholarship, eligible descendants must e]nroll as certificate-seeking or degree-seeking students at a state university, Florida College System institution, or career centered authorized by law.
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The Rosewood Massacre statute, while clearly worded, establishes an arbitrary boundary that restricts descendants of the victims from enrolling in private universities if they wish to benefit from the scholarship program. Instead, it mandates that they attend only public universities or colleges within Florida. As noted by scholars, this limitation has far-reaching implications. By directing scholarship funds exclusively to publicly funded institutions, including predominantly white universities such as Florida Atlantic University, Florida Gulf Coast University, Florida International University, Florida Polytechnic University, Florida State University, New College of Florida, University of Central Florida, University of Florida, University of North Florida, University of South Florida, University of West Florida, and the one public HBCU, Florida A&M University (“FAMU”),²⁰¹ it severely restricts the educational options available to victims’ descendants.

This restriction sustains the legacy of harm inflicted by public entities involved in the massacre and sends an unresolved message about justice. It forces families who have already suffered systemic injustice to rely solely on these public institutions for reparative measures. This approach can seem to compound the injury by forcing them back into systems associated with their original suffering. Put simply, instead of allowing descendants to pursue the educational paths they desire (including private HBCUs where many wish to attend), the system once again undermines the autonomy of Black persons by confining their options to a narrow set of public universities.

Limiting reparative funds to public universities also shapes perceptions of opportunity by emphasizing a narrow view of repair that prioritizes integration

²⁰⁰ FLA. STAT. ANN. § 1009.55 (West 2025).

²⁰¹ While Florida A&M University (“FAMU”) is a cornerstone of Black higher education and remains a valuable option for descendants of Rosewood Massacre victims, admission to FAMU is very competitive. Thus, descendants may feel their choices are limited to either being accepted to FAMU or not attending college through this program at all. Further, private universities, which many descendants may prefer for their programs, campus atmosphere, or smaller class sizes, are not eligible for the scholarship, further narrowing descendants’ options to pursue majors aligned with their interests, experience different campus environments, or benefit from diverse classroom sizes and settings.

into existing public systems. This raises critical questions about justice and accountability. Should entities responsible for harm be allowed to benefit from mechanisms that have historically marginalized and oppressed Black communities?

C. *MD House Bill 1*

Table 3. Maryland House Bill.

Maryland: HB 1 ²⁰²	The General Assembly finds that: (1) The State of Maryland wishes to provide all of its citizens with equal access to higher education at excellent and affordable public colleges and universities; (2) The General Assembly has carefully reviewed the memorandum opinions and orders of the United States District Court for the District of Maryland, issued October 7, 2013, and November 8, 2017, in the action, <i>The Coalition for Equity and Excellence in Maryland Higher Education, et al. v. Maryland Higher Education Commission, et al.</i>, 06-CV-02773-CCB; (3) The District Court found that the state failed to eliminate a traceable de jure era policy of unnecessary duplication of programs at Historically Black Colleges and Universities in the state that has exacerbated the racial identifiability of Maryland's Historically Black Colleges and Universities; (4) Maryland's Historically Black Colleges and Universities, which are Bowie State University, Coppin State University, Morgan State University, and University of Maryland Eastern Shore, should receive additional support to remedy the findings of the District Court; (5) The additional support shall be provided in the form of additional funding in the amount of \$577,000,000, which shall be provided in amounts as calculated under § 15-126 of this article in each of fiscal years 2023 through 2032, and shall be allocated among the institutions; and (6) The provisions of §§ 15-126 and 15-127 of this article shall ensure that Maryland's Historically Black Colleges and Universities shall receive this support.
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In 2006, the Coalition for Equity and Excellence in Maryland Higher Education filed a complaint seeking declaratory, injunctive, and mandamus relief against the state of Maryland to challenge its operation of a dual system of

²⁰² H.B. 1, 2021 Gen Assemb., Reg. Sess. (Md. 2021), https://mgaleg.maryland.gov/2021RS/chapters_noln/Ch_41_hb0001E.pdf [<https://perma.cc/HA45-7Q55>].

public education based on race.²⁰³ The coalition aimed to prevent the state from allowing unnecessary duplication of academic programs, whereby predominantly white institutions (“PWIs”) imitated specialty programs first developed at HBCUs.²⁰⁴ This program duplication enabled public PWIs like the University of Maryland, Towson University, and the University of Baltimore to attract students of all races, effectively resegregating historically Black schools and making it increasingly difficult for HBCUs to secure funding and thrive.²⁰⁵

The federal district court ruled in favor of the HBCUs, determining that the Maryland Higher Education Commission allowed and, in some cases, encouraged practices that strategically handicapped those institutions in order to bolster the traditionally white public universities in the state. This ruling led to the enactment of a statute mandating that Maryland commit \$577 million to support HBCUs and to address the inequities within the higher education system.²⁰⁶

However, advocates for HBCUs pointed out a critical oversight in the statute: The same state actors who disadvantaged HBCUs were also facilitating the creation and duplication of programs at private universities. This state support mirrored the harmful practices that previously destabilized HBCUs and contributed to a persistent cycle of inequity. Even today, Maryland has established a funding system that directly supports private universities. To understand the implications of this funding, it is essential to examine the Sellinger formula, which has been in effect since 1973.²⁰⁷ This funding mechanism was established amidst significant societal changes, including the legally mandated racial integration of Maryland’s public colleges and

²⁰³ Complaint for Mandamus, a Declaratory Judgment and Preliminary and Permanent Injunctive Relief at 2, *Coal. for Equity & Excellence in Md. Higher Educ. v. Md. Higher Educ. Comm’n*, 295 F. Supp. 3d 540 (D. Md. 2017) (No. 1:06-CV-02773).

²⁰⁴ *Id.* at 23 (asserting defendants breached duty to not permit unnecessary duplication of HBCU programs in masters business administration, computer/electrical engineering, public health, math education, science education, and master’s in education at geographically proximate traditionally or predominantly white institutions (“PWIs”)).

²⁰⁵ *Id.* at 24 (alleging “[d]efendants violated the laws against racial segregation and breached their duty to ensure equitable funding by failing to fund academic programs approved for HBCUs, then duplicating the programs at nearby TWIs and then providing full funding to the duplicate programs, making it extraordinarily difficult for HBCUs to develop their programs, to achieve racial diversity in enrollments, to maintain student enrollments and to compete against the duplicate programs at the TWIs”).

²⁰⁶ *See Coal. for Equity & Excellence in Md. Higher Educ. v. Md. Higher Educ. Comm’n*, 295 F. Supp. 3d 540, 585 (D. Md. 2017) (holding state must provide funding to HBCUs for student recruitment, financial aid, and marketing); Shwe, *supra* note 119; Shwe, *supra* note 160.

²⁰⁷ MD. CODE ANN., EDUC. § 17-101 (LexisNexis 2025) (establishing “a program of State aid to private nonprofit institutions of higher education known as the Joseph A. Sellinger Program”); *id.* § 17-103 (establishing eligibility requirements for Sellinger Program, including requirement institutions must be private); *id.* § 17-104 (explaining Sellinger formula, which is used to calculate aid available to institution under Sellinger Program).

universities, the emergence of HBCUs in the state, the admission of women to previously all-male institutions, and the civil rights and anti-war movements. The formula was specifically designed to bolster the academic stature of PWIs. This design stemmed from a concern that public universities, now required to accept a more diverse student body, may struggle to uphold their previous standards and prestige. As a result, the formula not only reinforced existing inequities but also reflected Maryland's commitment to private universities and its extreme reluctance to fully embrace the transformative potential of an inclusive academic environment.

Even more troubling is that despite the enactment of the statute, funding for private universities has increased in some cases to directly counter the statute's provisions. This is particularly concerning at institutions that have historically duplicated programs originally offered by HBCUs because it perpetuates the very injustices for which public universities were held accountable in federal court and through the statute itself. Ironically, this trend continues even after the lawsuit's resolution. For example, in the 2025 fiscal year, Maryland allocated approximately \$137.1 million in direct aid to private colleges and universities.²⁰⁸

This collaboration between the private and public sectors solidifies a dual system of higher education and deepens the disparities that disproportionately favor private institutions while sidelining HBCUs. As a result, HBCUs continue to grapple with financial challenges, underscoring the pressing need for statutory provisions that authentically confront the historical injustices embedded in Maryland's educational landscape.

A striking example of this hypocrisy is the state's resistance to the establishment of a medical school at Morgan State University, an HBCU in Baltimore. Despite officials' claims that such a school was not in the best interest of Baltimore residents, the state has allocated millions to private institutions like Johns Hopkins University, which has a medical school and continues to flourish in terms of prominence and prestige.²⁰⁹

This glaring inequity highlights a troubling pattern that raises critical questions about the oversight regarding the exclusion of private universities and their harmful impact on HBCUs in the statute. Our legal system's public-private divide has allowed the state to circumvent accountability for both itself and private universities in maintaining and expanding PWIs, while the historical injustices HBCUs face remain unaddressed. Such a dynamic calls for a reevaluation of funding priorities to ensure that all educational institutions,

²⁰⁸ DEP'T OF LEGIS. SERVS., OFF. OF POL'Y ANALYSIS, HIGHER EDUCATION FISCAL 2025 BUDGET OVERVIEW 2 (2024), <https://mgaleg.maryland.gov/Pubs/BudgetFiscal/2025fy-budget-docs-operating-HIGHED-Higher-Education-Overview.pdf> [<https://perma.cc/7CQH-LRZB>].

²⁰⁹ See *Maryland Sellinger Grant*, JOHNS HOPKINS UNIV., <https://sfs.jhu.edu/maryland-sellinger-grant> [<https://perma.cc/JR8Y-V6GL>] (last visited Feb. 8, 2026) ("Through the Sellinger Program, the State provides grants to eligible independent colleges and universities. . . . In FY2025, John Hopkins will spend over \$19 million in Sellinger funds to provide need-based grants and scholarships to Maryland residents").

regardless of their historical backgrounds, receive equitable support that fosters true inclusivity and justice in Maryland's higher education system.

III. HISTORICAL ORIGINS OF PUBLIC-PRIVATE DISTINCTION AND ITS EFFECT ON HERS

While there are various definitions of the public-private divide, this Article specifically examines the limitations and applications of public governmental law concerning private people and institutions. It emphasizes the constraints that public law imposes on these entities and explores how these boundaries shape the governance of private entities. Since the very beginning of America's history, a contentious debate has emerged over the boundaries between the public and private realms.

Many American individuals and institutions assert a fundamental right to privacy; however, it is essential to recognize that the concept of "privacy rights" has often been manipulated to uphold outdated norms and practices. This manipulation continues in contemporary society, frequently stifling progress and obscuring the path to true liberation for marginalized communities. In nearly every legal distinction between public and private, marginalized individuals often find themselves ensnared in the complexities of this divide.

For instance, significant disagreement persists among Americans regarding whether privacy encompasses a woman's right to an abortion or if that right resides within the domain of public regulation.²¹⁰ This debate illustrates how the concept of privacy can become a battleground for maintaining control over personal freedoms, disproportionately affecting women and marginalized groups.

Similarly, the rise of private and charter schools further exemplifies how the public-private divide can serve archaic motives. The trend of directing public education funds to private institutions has historical roots in white resistance to school desegregation following the landmark case *Brown v. Board of Education*.²¹¹ Segregationist groups used the guise of "privacy rights" to circumvent integration by channeling taxpayer dollars into segregated private schools, effectively aiming to minimize the presence of Black students in white-dominated schools. This not only perpetuated segregation but also reinforced systemic inequalities in education.

²¹⁰ See generally Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 135-46 (2011) (providing overview of right to privacy).

²¹¹ 347 U.S. 483 (1954); see MARTHA MINOW, IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK ch. 5 (2010) (e-book) (discussing how school choice, "initiatives authorizing the use of government resources to enable parents and school-aged children to select a school rather than simply be assigned to one," became "tactics of avoidance or obstruction" of school desegregation).

Even in matters of safety and policing, the public-private divide exacerbates existing disparities.²¹² In some jurisdictions, private security officers hold on private property the same authority as sheriff's deputies, a practice reminiscent of private slave patrols, where individuals had broad latitude to apprehend "property." This arrangement often results in discriminatory practices, such as the over-surveillance and harassment of Black and brown individuals in such spaces. These private actors operate outside the protections of the Fourth, Fifth, and Sixth Amendments, which safeguard against unlawful search and seizure and ensure the right to counsel. They are also immune from federal statutes that hold public officials accountable for rights violations. Consequently, private security personnel can act with more freedom than public law enforcement, leading to systemic injustices that undermine principles of justice and equality.

While there are numerous examples of the public-private divide impacting marginalized individuals, it is unsurprising that its legal foundations were established during the colonial era when the rights and needs of these communities were often entirely overlooked. At its inception, this divide emerged on unstable political and legal grounds, creating anxieties within citizens by prioritizing institutional control and exclusivity.

Harvard University—the first and oldest college in the nation, which was established as Harvard College in 1636—is an early example of public dissatisfaction with this doctrine. From the outset, many community members voiced concerns regarding the institution's classification as a private corporation, particularly considering the Act Establishing the Overseers of Harvard College. This founding document highlighted that a significant portion of Harvard's funding relied on "the revenue of the ferry twixt Charlestown and Boston,"²¹³ a public funding source that directly connected the university to community interests and raised important questions about its private status. Furthermore, long before the constitutional concept of the state action doctrine was formally established, Harvard operated under substantial public influence. The Board of Overseers included the Governor, Deputy Governor, and various Magistrates from the jurisdiction, reflecting the institution's ties to public governance.²¹⁴ This arrangement indicated that, despite its private corporation status, Harvard functioned much like a public entity due to the significant input from and oversight by state officials.

The context of public influence becomes clearer when we consider the Supreme Court's ruling in *Lebron v. National Railroad Passenger*

²¹² See Seth W. Stoughton, *The Blurred Blue Line: Reform in an Era of Public & Private Policing*, 44 AM. J. CRIM. L. 117, 124 (2017) (arguing historical use of slave patrols to control Black populations continues to inform modern policing practices that disproportionately impact Black populations).

²¹³ JUDITH AREEN & PETER F. LAKE, *HIGHER EDUCATION AND THE LAW* 28 (2d ed. 2014).

²¹⁴ See *id.* at 27 ("The colonists consciously tried to replicate the curriculum and student life of Oxford and Cambridge, but they adopted a new governance structure—one that gave authority to governing boards made up of political and religious leaders rather than to the faculty.").

Corporation,²¹⁵ which established criteria for determining whether a corporation qualifies as a government entity for the purposes of state action.²¹⁶ In this ruling, the Court stated that (1) the government must create the corporate entity by special law, (2) it must create the entity to further governmental objectives, and (3) the government must retain permanent authority to appoint a majority of the corporation's directors.²¹⁷ Given this framework, scholars and observers often pose the important question: Can Harvard College in the seventeenth century be accurately classified as either a public or private institution, particularly in light of its significant public support and governance structure established in 1642?²¹⁸

The doctrine of public-private distinction in higher education has incited considerable frustration among citizens. However, courts have reinforced this divide in landmark cases, such as *Trustees of Dartmouth College v. Woodward*.²¹⁹ In this pivotal case, the Supreme Court considered whether Dartmouth College, a prominent private colonial institution, could operate free from the constraints of existing common law. Ultimately, the Court asserted that Dartmouth was exempt from regulatory frameworks governing municipal and trading corporations, which were traditionally viewed as extensions of state authority.²²⁰

However, this pivotal decision glossed over significant contextual factors that shaped the case. The allegations made by Dartmouth President John Wheelock against the college's Board of Trustees highlighted concerns about unchecked power. Wheelock accused the Trustees of misappropriation of funds and of threatening both government and democracy. He argued that public oversight was essential to rein in their "improper use of power" that was "ominous to the moral and political interests of society, and to the rights of humanity."²²¹ In response, the Trustees dismissed Wheelock's accusations as "gross and

²¹⁵ 513 U.S. 374 (1995).

²¹⁶ *Id.* at 399.

²¹⁷ *Id.* at 374, 397 (finding Amtrak was government corporation because (1) it was created by special statute, (2) to further governmental goal of averting extinction of passenger trains in interest of public convenience and necessity, and (3) that President of United States can appoint six of eight externally named board members).

²¹⁸ AREEN & LAKE, *supra* note 213, at 27.

²¹⁹ 17 U.S. (4 Wheat.) 518, 518 (1819) (holding Dartmouth College's corporate charter was contract between private parties and thus not subject to state legislature's interference).

²²⁰ *Id.* at 651-54 (concluding Dartmouth College may not be governed by New Hampshire legislature because "whole power of governing the college" was vested with trustees according to founder's wishes as expressed in charter).

²²¹ JOHN WHEELOCK, SKETCHES OF THE HISTORY OF DARTMOUTH COLLEGE AND MOORS' CHARITY SCHOOL, WITH A PARTICULAR ACCOUNT OF SOME LATE REMARKABLE PROCEEDINGS OF THE BOARD OF TRUSTEES FROM THE YEAR 1779 TO THE YEAR 1815, at 88 (1815).

unprovoked libel,”²²² prompting intervention from New Hampshire legislators, which ultimately led to the suit.²²³

This irony reveals a critical oversight in the case: The very ruling intended to clarify the legal rationale for the public-private distinction neglected the pressing issues of unchecked authority and potential misconduct within private corporations. This raises an important normative question: Should we not, as a society, be vigilant about the actions of private entities? Instead of permitting them to operate without accountability, we must advocate for greater oversight and regulation, ensuring that private actors do not prioritize their interests at the expense of public welfare. Moreover, the Court’s ruling in *Trustees of Dartmouth College* facilitated the enfeeblement of doctrines designed to protect against unfair contracts. This shift emerged from the assumption that contracts are purely private agreements between consenting individuals, devoid of any state interest. By 1850, private universities began exploiting these allowances, frequently contracting out of common law duties, expectations, and standards of fairness to safeguard their institutions during periods of political and financial instability.

Other appellate courts have revisited the dynamics of the public-private relationship in higher education, particularly illustrated in the case of *Trustees of Rutgers College in New Jersey v. Richman*.²²⁴ In this landmark decision, the New Jersey Superior Court upheld a 1956 statute designed to increase state control over then-private Rutgers University, affirming that the Rutgers Board of Trustees had the authority to sanction the takeover.²²⁵ This case reveals significant complexities in the distinction between public and private institutions. Even during its time as a private university, Rutgers experienced considerable state influence. For example, in 1927, the Board expanded its composition of *ex officio* trustees from three to seven by adding key state figures, including the Chancellor, the President of the Senate, the President of the State Board of Education, and the Commissioner of Education.²²⁶ This decision aimed to foster “closer cooperation in educational work between [Rutgers] and the other educational agencies” in New Jersey, indicating an early intertwining of state oversight with private governance.²²⁷

²²² TRS. OF DARTMOUTH COLL., A VINDICATION OF THE OFFICIAL CONDUCT OF THE TRUSTEES OF DARTMOUTH COLLEGE, IN ANSWER TO “SKETCHES OF THE HISTORY OF DARTMOUTH COLLEGE,” AND “A CANDID ANALYTICAL REVIEW OF THE SKETCHES,” &C. 102 (1815).

²²³ *Id.* at 104 (listing resolutions including those to disapprove Eleazar Wheelock’s will and remove John Wheelock as President of Dartmouth College).

²²⁴ 125 A.2d 10, 33-34 (N.J. Super. Ct. Ch. Div. 1956) (holding state appropriations justified when applied to public instrumentalities serving public purposes, such as universities, even when those universities are private institutions).

²²⁵ *Id.* at 33.

²²⁶ *Id.* at 14 (chronicling history, nature, and organization of Rutgers with particular focus on state involvement).

²²⁷ *Id.*

Furthermore, in 1928, the New Jersey Legislature adopted a joint resolution appointing a commission to examine the relationship between the state and Rutgers University.²²⁸ After thorough hearings and deliberations, the commission concluded that “Rutgers has rendered most valuable service to the State in its work of higher public education.”²²⁹ Importantly, the commission recommended against drastically altering the relationship between Rutgers and the state or establishing a “distinctive State University” by requiring a Governor-appointed majority on the Board of Trustees.²³⁰ Instead, it proposed the creation of the New Jersey State Board of Regents, which would further institutionalize Rutgers’ ties to state governance.

This historical context highlights the intricate, unclear, boundaryless, and often muddled relationship between private and public institutions. Although Rutgers operated as an autonomous university, its abilities to raise funds and function independently were consistently connected to its responsibilities to the public and reliance on public support.

The ruling in *Rutgers* also raises critical discussions surrounding accountability and oversight. Irony lies in the observation that private universities like Rutgers can initially benefit from their independence, pursuing their fundraising efforts without public scrutiny, but when financial challenges arise, these institutions can quickly access public support systems, effectively circumventing the principles of autonomy they previously claimed. Specifically, Rutgers asserted that it could not meet the full demand for its services and that it needed to subsequently partner with the state to meet their new demands.²³¹ Several factors contributed to this escalating demand: a significant “upward population trend” driven by “increased birth rate[s] and immigration into the [s]tate,” “relative inadequacy” of private educational options within the state, and hurdles related to “the University’s own financial resources and [the limitations] of private donations to higher education in general.”²³² Given these needs, Rutgers leaned into its already established ties with the public sector and used more monies, contracts, other resources, and ultimately the status of New Jersey’s public sector to close their fiscal gaps and preserve their university.

While the *Rutgers* case exemplifies the erosion of the public-private divide, it is neither the first nor the last instance of this phenomenon.²³³ Such boundaries

²²⁸ *Id.*

²²⁹ *Id.* (internal quotation marks omitted).

²³⁰ *Id.* (identifying drastic changes and establishment of “distinctive State University” not in best interests of state).

²³¹ *Id.* at 19 (“[Rutgers] states it is even now unable to meet the full measure of demand for its services, and the demand is certain to intensify in the predictable future far beyond its present capabilities.”).

²³² *Id.* (introducing several factors backed by data to draw attention to Rutgers’ need for state support).

²³³ See, e.g., *Ryan ex rel. Ryan v. Hofstra Univ.*, 324 N.Y.S.2d 964 (N.Y. Sup. Ct. 1971) (arguing Hofstra University, despite being privately owned, has fundamental legal responsibilities to public and is not exempt from constitutional provisions as such).

often shift whenever those in power decide to redefine them for their own interests. Throughout history, cases like this have resulted in legal workarounds that subtly erode the distinction between public and private entities. These solutions often stem from a commitment to achieving a greater benefit. In this instance, the state legislature recognized Rutgers University as a valuable asset to New Jersey—an economic engine that contributes significantly to the state’s well-being. Concerned about citizens leaving New Jersey for neighboring states’ colleges, the legislature saw a compelling reason to invest in Rutgers, effectively blurring the lines between public support and private operation.²³⁴

This dynamic underscores the potential for dismantling rigid legal distinctions between public and private sectors when necessary to prioritize community interests and address systemic challenges. However, in the current iteration of this dichotomous legal structure—especially as it pertains to higher education reparations—there is a clear reluctance to mandate that private universities engage with and implement reparations, primarily due to their status as private entities.

In the discourse surrounding higher education reparations, we observe a troubling continuity from historical injustices to present-day practices. Much like the situation in *Trustees of Dartmouth College*, legislators seem to allow private universities to operate free from reparations obligations.²³⁵ The lack of checks and balances permits these institutions to evade accountability, creating a critical void where responsibility is desperately needed.

The exemption of private universities from reparatory frameworks facilitates the ongoing silencing of Black stories and results in incomplete reparations that lack the comprehensiveness and effectiveness required for genuine restoration. This deficiency manifests in tangible ways, as private universities are not compelled to allocate financial resources or other essential forms of support, such as intellectual and communal investments, for restoration efforts. In other words, private universities tangibly benefit from not offering reparative measures.

As we navigate the increasingly complex landscape of contemporary higher education, the distinction between private and public institutions becomes increasingly blurred. We can observe how private universities are increasingly behaving like public entities due to financial backing, while public universities may adopt private characteristics to shield themselves from the fluctuating demands of legislators and to maintain autonomy in decision-making. Consequently, it is vital to reevaluate the public-private divide’s boundaries in discussions about reparations within higher education. It is crucial to recognize that other fields of law have begun to critically interrogate the public-private

²³⁴ See *Rutgers*, 125 A.2d at 19 (“Our State Commissioner of Education reports that New Jersey exports 55% of its college students, more than any other state in the nation.”).

²³⁵ See, e.g., VA. CODE ANN. § 23.1-615.1 (2025) (requiring implementation and execution of scholarship program by public universities in Virginia, but not private universities).

distinction,²³⁶ which, by 1940, legal scholars were already questioning as arbitrary.²³⁷ Remarkably, few forward-thinking legal minds of that era would have predicted that this dichotomy would not only persist but also gain prominence in contemporary discourse.²³⁸ Thus, legislators' increasing emphasis on public-private boundaries within the legal framework of higher education reflects a troubling trend that underscores the arbitrary application of these distinctions and their historical origins in the sector. I assert that this framework represents nothing more than a relic of a bygone era—one characterized by decentralized capitalism, systemic racism, and rampant individualism. In today's context, if we hope to strive for equity and justice, such a framework needs to be reevaluated and ultimately excised.

As we confront these outdated paradigms, it becomes imperative to dismantle the rigid boundaries that inhibit meaningful dialogue around reparations and social justice. By doing so, we can move beyond the constraints of historical precedents and work towards a more inclusive and equitable approach in higher education and beyond.

IV. LEGAL AND NORMATIVE PATHWAYS FORWARD

Professor Ossei-Owusu's analytical framework demands that we ask the question: How do we remedy the insights unearthed from this exploration regarding the public-private divide in relation to HERS? This Part proffers vital suggestions for strengthening existing statutes and enhancing future acts as they gain traction in legislative discussions. First, the primary legal goal must be to eliminate the artificial legal divide between public and private universities, as this is essential for achieving true justice in higher education. However, if stakeholders hesitate to accept this crucial call to action, we must consider an alternative: statutory reform. Specifically, rewriting statutes to incorporate private causes of action through tort law would create a vital avenue for accountability. This reform is not just a fallback; it serves as a necessary step toward fostering a more equitable educational landscape. By holding all

²³⁶ See generally Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982) (discussing legal distinction between public and private sectors in labor law); Susan B. Boyd, *Can Law Challenge the Public/Private Divide? Women, Work, and Family*, 15 WINDSOR Y.B. ACCESS TO JUST. 161 (1996) (analyzing gender, work, and family within public-private framework); Victoria Schwartz, *Overcoming the Public-Private Divide in Privacy Analogies*, 67 HASTINGS L.J. 143 (2015) (examining privacy rights and public-private divide).

²³⁷ See generally Horwitz, *supra* note 27, at 1426 ("By 1940, it was a sign of legal sophistication to understand the arbitrariness of the division of law into public and private realms."); Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1987) (analyzing role of public-private distinction across American law and society); WILLIAM P. KREML, *THE CONSTITUTIONAL DIVIDE: THE PRIVATE AND PUBLIC SECTORS IN AMERICAN LAW* (1997) (examining constitutional underpinnings of public-private divide).

²³⁸ See Horwitz, *supra* note 27, at 1427.

institutions to the same standards, we can ensure that the harms inflicted on marginalized communities are acknowledged and addressed.

Professor Ossei-Owusu notes that in addressing complicated multi-dimensional problems, like the harm inflicted on Black and brown people by higher education, the solution requires more than just legal solutions.²³⁹ He asserts, and I concur, that the challenges surrounding complex issues and remedying gaps in statutes are often strained by obstacles like the implementation of white supremacy,²⁴⁰ colonial ideologies,²⁴¹ and judicial hostility toward civil rights enforcement, as well as a mix of political,²⁴² social, and economic factors.²⁴³ Therefore, any remedial efforts must embrace this complexity and adopt a “multi-pronged and multi-disciplinary” approach.²⁴⁴ By doing so, we can ensure that our solutions are both effective and holistic, addressing the root causes of the inequalities within our educational institutions.

Third, I deliberately refrain from evaluating the effectiveness of the various approaches that individual institutions take to address their historical wrongs.

²³⁹ For example, Professor Ossei-Owusu emphasizes that a complex array of challenges—such as entrenched white supremacy, judicial resistance to civil rights enforcement in federal courts, and various other systemic barriers—creates significant hurdles in addressing the problem of police quotas that cannot be addressed through simple legal or policy solutions. Ossei-Owusu, *Police Quotas*, *supra* note 40, at 590. As such, he argues that efforts to eliminate police quotas must adopt a multifaceted approach that incorporates diverse disciplines and strategies to effectively tackle these deeply rooted issues. *See id.* at 590-96 (asserting “any attempt to curb quotas must be multi-pronged and multi-disciplinary” and offering recommendations for such an attempt).

²⁴⁰ *See id.* (discussing “gauntlet of obstacles” that must be overcome to address problem of police quotas). Consider also the following three propositions offered by Professor Lori Patton regarding inequity in higher education:

Proposition 1: The establishment of U.S. higher education is deeply rooted in racism/White supremacy, the vestiges of which remain palatable.

Proposition 2: The functioning of U.S. higher education is intricately linked to imperialistic and capitalistic efforts that fuel the intersections of race, property, and oppression.

Proposition 3: U.S. higher education institutions serve as venues through which formal knowledge production rooted in racism/White supremacy is generated.

Lori D. Patton, *Disrupting Postsecondary Prose: Toward a Critical Race Theory of Higher Education*, 51 URB. EDUC. 315, 317 (2016).

²⁴¹ *See* de Oliveira Andreotti, Stein, Ahenakew & Hunt, *supra* note 108 (defining “coloniality” as system representing expansionist control of lands, elimination and subjugation of racial difference, and epistemic violence).

²⁴² *See* Jeffrey Prager, *Do Black Lives Matter? A Psychoanalytic Exploration of Racism and American Resistance to Reparations*, 38 POL. PSYCH. 637, 648 (2017) (contrasting failed political struggles on behalf of African Americans since Civil War with restorative qualities of reparations as “politics of love”).

²⁴³ *Id.* (recognizing African Americans are not accorded basic social respect and are denied capacity to live fully and freely due to scarcity of resources).

²⁴⁴ *See* Ossei-Owusu, *Police Quotas*, *supra* note 40, at 590.

While many higher education scholars have explored these efforts,²⁴⁵ such scrutiny often results in fragmented analyses that obscure the deeper systemic issues necessitating reparative actions. Numerous private universities have launched reparative measures, ranging from symbolic gestures like renaming buildings to more substantive initiatives, such as, offering scholarships or establishing research centers.²⁴⁶ However, the ad hoc nature of these responses and their arbitrary implementation reveal significant inconsistencies and unpredictability, underscoring the urgent need for statutory intervention. The central issue is not merely the effectiveness of one institution's efforts or incentives; rather, it lies in the imperative to enhance existing legal frameworks and statutory schemes. There is an urgent need to introduce comprehensive policies in jurisdictions that have yet to recognize the critical importance of dismantling the public-private divide and addressing the need for higher education reparations.

Lastly, it is imperative to articulate a cautionary note before presenting specific pathways. This Article notes that there exist no legal mechanism that prevents legislatures from creating or regulating private institutions, statutory law often incorporates private actors. However, this Article contends that it is rather the longstanding legal traditions and the assumed public-private divide that has produced a settled, largely unquestioned separation within HERS that enables unequal treatment. The problem is mainly philosophical: The division persists because of entrenched interpretive habits and institutional practice, not because statutes forbid a different approach, and recognizing that distinction alters both diagnosis and remedy. The Article is intentionally imaginative; while it concedes some strengths of the current framework, it advances proposals for a more just legal order and offers them tools for rethinking. Finally, there is a real risk of misappropriation of the arguments in this Article: These recommendations are grounded in justice-oriented principles and should be used in that spirit, not twisted to serve political ends that contradict the Article's commitments. Readers are therefore urged to engage with justice-focused aims, rather than repurposing the analysis for incongruent or disingenuous political.

A. *A Reimagined Higher Education Legal Landscape*

The public-private divide in higher education has inflicted significant harm on marginalized communities, underscoring the urgent need for the legal community to advocate for the removal of this artificial distinction. It is time to reimagine a legal landscape that compels all universities—private institutions

²⁴⁵ See Juan C. Garibay, Christopher L. Mathis & Christian P.L. West, *Black Student Views on Higher Education Reparations at a University with an Enslavement History*, 25 RACE ETHNICITY & EDUC. 607, 607 (2022) (exploring “Black undergraduates’ level of support for various forms of university reparations at a Southern university with an enslavement history”).

²⁴⁶ See, e.g., MARTIN ET AL., *supra* note 128, at 64 (describing Universities Studying Slavery Consortium, which “allows participating institutions to work together as they address the complicated legacies of slavery in modern American society”).

included—to provide reparations comparable to those mandated for public universities. Legislators and stakeholders must acknowledge that the operational and financial structures of these institutions are largely indistinguishable.

While there exist several examples of this boundary eroding, most legal and higher education scholars point toward higher education's finances and financial structures. More specifically, such scholars note that as state investments in higher education continue to dwindle, the rationale for maintaining a legal divide becomes increasingly untenable. With both public and private universities functioning within the same educational framework, the lack of substantive differences between them intensifies the demand for systemic reform.

Incorporating insights from leading reparations scholar Robin Kelley's 2002 book, *Freedom Dreams: The Black Radical Imagination*, can enhance our understanding of the imperative to address the structures that impede comprehensive reparative efforts within higher education.²⁴⁷ Kelley emphasizes that reparations proposals stem from a profound desire for social justice, reconciliation, and the dismantling of systemic barriers that perpetuate inequality.²⁴⁸ This perspective is critical as it reveals how existing frameworks and systemic barriers often create disparate and unfair treatment, thereby exacerbating the disparities faced by marginalized communities. Kelley also advocates for a vision of reparations that extends beyond mere financial compensation; instead, reparations should serve as transformative strategies that dissolve structures in order to meet the specific needs of affected communities.²⁴⁹ Reimagining reparative justice in this way shifts the focus from superficial reforms to a holistic approach that prioritizes the collective well-being of marginalized populations.

This call to action can be realized by reimagining higher education. I advocate for dissolving the public-private divide, as well as addressing the effects of white supremacy and institutional racism, which continue to negatively impact marginalized individuals within the educational system. By establishing a unified legal framework that eliminates this distinction, we can facilitate equitable access to educational resources and opportunities, ultimately fostering a more just and inclusive environment for all students.

In doing so, we can actively work towards dismantling the systemic inequities that have historically hindered progress for marginalized communities and lay the foundation for a more equitable future in higher education.

²⁴⁷ See ROBIN D. G. KELLEY, *FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION* iv-xii (2002) (introducing themes related to Black radical thought).

²⁴⁸ *Id.* at 114 (suggesting view of reparations campaign in United States as social movement which reveals money was never primary factor).

²⁴⁹ See *id.* at 132 (explaining successful reparations campaign “would bring a massive infusion of capital for infrastructure, housing, schools, and related institutions in communities with large [B]lack populations,” as well as supporting civic organizations and helping establish strong civil society among people of African descent).

B. *Utilizing Tort Law as Remedy*

Advocacy for legislators to incorporate a private right of action into existing HERS is essential to holding private universities accountable. Using the same eligibility requirements and parameters applicable to public universities, this legal provision would enable individuals to sue private universities when they commit conduct that, had it been committed by a public university, would be deemed appropriate for repair, providing a crucial pathway to justice and fostering a culture of responsibility within the higher education system. While expanding private rights of action represents a vital step, it is a less desirable option than erasing the legal distinction between public and private universities altogether.

Legislators and stakeholders can take confidence from the proven success of private rights of action in other areas of law. Specifically, the effectiveness of these rights in sectors such as civil rights and consumer protection demonstrates their ability to promote equity.²⁵⁰ They have empowered individuals to challenge discriminatory lending practices and address unsafe environmental conditions, leading to significant legal precedents. By integrating similar provisions into higher education laws, marginalized communities can gain the essential tools needed to engage with private universities in this critical discussion, thereby ensuring equitable access to education.

Legislators must recognize that expanding private rights of action is crucial for fostering fair treatment. Such amendments would empower individuals to advocate for their rights while encouraging universities to adopt ethical practices and inclusive policies. Furthermore, as new laws and educational institutions evolve, including private rights of action as a standard component will ensure that all universities—both public and private—meet consistent accountability standards. Establishing a clear path for legal recourse can address the specific challenges faced by those who have been affected by private universities' actions, reinforcing the need to eliminate the legal distinctions that allow these disparities to persist.

C. *A Multidisciplinary Research Project*

To effectively address the complexities of the private-public divide in higher education regulations, a multidisciplinary approach is crucial. This initiative seeks to analyze how legal distinctions impact both public and private institutions by examining foundational principles and specific statutes aimed at addressing inequalities. By acknowledging the existing divide, we can evaluate the uneven application of laws that benefits some institutions while leaving others unregulated, exacerbating systemic inequities.

²⁵⁰ See George Rutherglen, *Private Rights and Private Actions: The Legacy of Civil Rights in the Enforcement of Title VII*, 95 B.U. L. REV. 733, 734 (2015) (“The long history of civil rights, dating back to Reconstruction, makes them quintessentially private rights, whose exercise and enforcement should depend primarily on the initiative of the individuals who bear those rights.”).

The project will also explore the changing legal landscape, particularly as states assume greater responsibility under the Tenth Amendment, creating an opportunity to redefine accountability in higher education. By integrating perspectives from legal scholars, policymakers, and community stakeholders, we can aim to identify innovative strategies.

Furthermore, this program will collect and conduct both qualitative and quantitative studies to better understand how individuals affected by these laws perceive and experience them, focusing on issues of social inclusion and community well-being. Ultimately, this multidisciplinary effort aspires to generate practical solutions and foster a more equitable framework for higher education that aligns with principles of justice and accountability.

D. *Reimagined Legislation*

As mentioned above, this study draws heavily on the insights from leading reparations scholar Robin Kelley's book, *Freedom Dreams: The Black Radical Imagination*. It is here that we adopt the call and charge to recognize the necessity of addressing the structural impediments (e.g., the current construction of HERS) that hinder meaningful reparative initiatives in higher education.²⁵¹ This viewpoint is vital, as it highlights how current frameworks and barriers often result in unequal treatment, worsening the challenges faced by marginalized communities.

Furthermore, Kelley promotes a redefined vision of reparations that goes beyond simple financial restitution, advocating instead for transformative strategies that dismantle the very structures perpetuating inequity and cater to the unique needs of affected populations.²⁵² By envisioning reparative justice in this manner, we shift our focus from superficial changes to a more comprehensive approach that emphasizes the collective welfare of marginalized groups.

To forge a path forward, we must champion new legislation that is not only bold but also willing to confront the complexities of our past. Such legislation should invite legislators, policymakers, and other stakeholders to recognize that across the political spectrum there is a growing exploration of these options, particularly in the wake of the *Students for Fair Admissions* ruling. This shared movement signals that, amidst the turmoil brought about by the disbandment of the Department of Education and uncertainties surrounding federal student

²⁵¹ See KELLEY, *supra* note 247, at xii.

²⁵² *Id.* at 114 (“By looking at the reparations campaign in the United States as a social movement, we discover that it was never entirely, or even primarily, about money. The demand for reparations was about social justice, reconciliation, reconstructing the internal life of black America, and eliminating institutional racism. This is why reparations proposals from black radical movements focus less on individual payments than on securing funds to build autonomous black institutions, improving community life, and in some cases establishing a homeland that will enable African Americans to develop a political economy geared more toward collective needs than toward accumulation.”).

loans, there remains a collective concern for equity in education that transcends political divides.

However, despite the optimism and bipartisan support for reform, progress has remained frustratingly slow, hindered by deeply embedded systemic barriers, political resistance, and widespread public apprehension. Many lawmakers express fears that extending protective measures to private institutions could deepen community divisions or provoke backlash from those unconnected to the historical and systemic injustices perpetuated by universities.

This underscores the critical need for a strategic research and advocacy agenda. By raising public awareness and fostering deliberate partnerships with community leaders and stakeholders, we can create the momentum necessary to propel meaningful legislation forward. Education, coalition-building, and informed advocacy will be essential to reshaping the conversation and highlighting the broader social benefits of inclusive laws. Ultimately, the more informed legislators are about these options, the greater our chances of making significant strides toward justice in education. By transforming awareness into action, we can work collectively to dismantle the barriers that have long hindered progress.

Additionally, it is vital to strengthen and clarify current laws. My previous research has shown that many existing statutes suffer from ambiguity, enforcement issues, and a lack of inclusion of private universities.²⁵³ Revisions should focus on closing these gaps by making laws more explicit, enforceable, and responsive to the lived realities of those impacted. Legislation must reflect the nuanced experiences of individuals affected by both public and private institutions, ensuring that justice and equitable redress are accessible to all.

Ultimately, legislative reform should be both strategic and comprehensive. Expanding the scope of higher education reparations laws and refining their provisions to encompass private universities will be essential steps toward closing systemic gaps. Such reforms are critical to advancing justice, addressing historical inequalities, and creating a truly equitable higher education system that recognizes its role in systemic repair.

CONCLUSION

Although the distinction between the public and private divide in HERS has largely been overlooked, it is evident that many members of the public see these divisions as barriers to achieving true justice. There is a growing belief that both sectors can serve as meaningful avenues for advancing equity in a post-*Students for Fair Admissions* environment. This Article aims to deepen our understanding of how the higher education system can shift toward more justice-centered reforms and underscores the pressing need to address these institutional boundaries.

²⁵³ See generally Mathis, *supra* note 16 (identifying various shortfalls of HERS and significant harms they impose).

As we consider future actions, both short-term and long-term efforts must acknowledge the reality that maintaining this divide often results in more negative consequences than positive ones. Creating genuine progress will require courageous approaches to eliminate these barriers, fostering a more inclusive and equitable higher education landscape. Only by closing the legal gap between public and private institutions can we pave the way for a system that truly upholds the principles of fairness and opportunity for all students.