PRINCIPLES FOR EFFECTIVE REPARATIONS INITIATIVES BASED ON DOMESTIC AND INTERNATIONAL HUMAN RIGHTS LAWS AND NORMS

Testimony to the California Task Force to Study and Develop
Reparation Proposals for African Americans

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Thank you to the distinguished members of this Task Force for the opportunity to testify before you today. I am deeply honored to play even a small role in your important work.

I was invited to speak today because my research has focused on Congress's power to enforce the Thirteenth Amendment to the U.S. Constitution. I hope that some of my work will be of use as you continue to think through the appropriate role that the State of California can and should play in addressing entrenched racial disparities and inequities.

I will begin by describing my work on the Thirteenth Amendment. While the analytical framework that I have developed in that context does not necessarily circumscribe the State of California's own efforts, I will use it as a jumping off point to pose some questions that may be helpful to consider as you move toward making a final set of recommendations.

The Thirteenth Amendment and the Badges and Incidents of Slavery

The Thirteenth Amendment to the U.S. Constitution, ratified in 1865, bans slavery and involuntary servitude, except as a punishment for crime, in the United States. Section Two of the Thirteenth Amendment states that "Congress shall have power to enforce this article by appropriate legislation." The natural question, then, is what sorts of legislation Congress can pass to enforce the ban on slavery and involuntary servitude.

On its face, Section Two clearly permits legislation that directly enforces the ban on coerced labor. Indeed, Congress has passed a number of laws doing precisely that, for example, by outlawing the slave trade and human trafficking. However, the Supreme Court has interpreted Section Two as empowering Congress to do much more than pass direct enforcement legislation, namely, "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[1]

[1] The Civil Rights Cases, 109 U.S. 3, 20 (1883).

This concept of the "badges and incidents of slavery" originated with the Supreme Court's 1883 decision in the *Civil Rights Cases*. It has since taken on canonical status as the description of the outer bounds of Congress's Thirteenth Amendment enforcement power. In *Jones v. Alfred H. Mayer Co.*, a 1968 Supreme Court decision, the Court stated that "Congress has the power . . . rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."[2] The Court upheld an 1866 federal law that prohibits discrimination in private property conveyances, agreeing that such discrimination is a badge and incident of slavery given the historical link between slavery and the race-based denial of property rights.

My scholarship[3] has considered the relative roles of Congress and the Supreme Court in enforcing the Thirteenth Amendment and identified a finite range of meaning for the concept of the "badges and incidents of slavery." "Incident of slavery" was a legal term of art that referred to laws inherently tied to the institution of slavery, including laws barring slaves from acquiring property, testifying in court against a white person, or entering into contracts. "Badge of slavery" was a more malleable term that, over time, came to refer to the broader set of political, civil, and legal disadvantages imposed on slaves, former slaves, and free Black people.

In considering what are the badges and incidents of slavery that Congress might regulate today under its Thirteenth Amendment enforcement power, I asked three questions: Whom can Congress protect? From what conduct? And by what actors? In answering those questions, I took into account both the historical usages of the terms as well as the structural separation-of-powers concerns that constrain Congressional action. (As I will discuss below, these separation of powers limitations do not necessarily apply to the work of this Task Force or the California legislature.)

Ultimately, I concluded that "badges and incidents of slavery" have the following characteristics: First, they are policies or practices that mirror a legal incident of slavery or infringe upon an aspect of liberty denied to slaves. Second, they are implemented by public or widespread, concerted private action. Third, they are aimed at disadvantaging African Americans or other populations that have previously been held in slavery. And fourth, they point "not remotely" to a violation of Section One of the Thirteenth Amendment — in other words, they pose an imminent threat to freedom or the ability to participate in the basic transactions of civil society.[4]

In my view, the category of "badges and incidents of slavery" is analytically distinct from the concepts of the "relics" and "vestiges" of slavery (which are terms that the Supreme Court has also used more informally in reference to the Thirteenth Amendment enforcement power). While the "badges and incidents of slavery" point to current instruments of subordination—

[2] 392 U.S. 409, 440 (1968).
[3] *See, e.g.,* Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561 (2012).
[4] *Id.* at 606.

practices that threaten the reimposition of a de facto slave system—the "relics" and "vestiges" of slavery refer to the enduring consequences of historical slavery.[5] For purposes of the Thirteenth Amendment enforcement power, it is important to include a causation element focused on current subordination because such an element ensures that legislation is properly prophylactic (in other words, deters violations of Section One by targeting otherwise constitutional conduct) and thereby operates as a constraint on the legislature and a guide for effective judicial oversight.

California's Power to Address the Badges and Incidents of Slavery

The next question is whether this view of federal legislative power should guide the exercise of California's own legislative power. I am not an expert on California law, but I will share my impressions, raise some questions, and leave it to you to for further debate should you deem it necessary.

Article I, Section 6 of the California Constitution bans slavery and involuntary servitude. As I understand it, the California legislature possesses plenary legislative authority to address this issue subject only to constraints imposed by the U.S. and California constitutions.[6] The legislature indeed has passed laws to directly enforce this ban.[7] The law establishing this Task Force, however, contemplates more than direct enforcement legislation. It requires the study of, and proposal of remedies for, African Americans harmed as the result of "the institution of slavery" and its "lingering negative effects" as well as racially discriminatory laws and other forms of racial discrimination in the public and private sectors.

In many ways, this focus maps on to my conceptualization of the "badges and incidents of slavery." Indeed, the Task Force's Interim Report uses that phrase throughout to refer to the subject matter of its study. Therefore I thought it might be helpful to reflect on how the Task Force's focus may align or diverge from my own analytical framework.

I will start with places where our work appears to align, namely, the questions of actors and conduct. Following the legislature's mandate, the Interim Report focuses primarily on the way in which public law and widespread private action have created and reinforced systemic racial disparities in areas including housing, education, voting, criminal justice, and employment. This recognition that slavery and its aftermath were the product not just of law but also private conduct and custom is, of course, entirely accurate. Its correlate — that remedies for this

[5] *Id.* at 592 (citing Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in* Brzonkala v. Morrison, 75 N.Y.U. L. REV. 150, 152 (2000)).
[6] *See* Howard Jarvis Taxpayers Assn. v. Padilla, 62 Cal.4th 486, 498 (2016).
[7] *See* Cal. Civil Code § 52.6 (requiring certain businesses to post information regarding help lines operated by the National Human Trafficking Hotline or California Coalition to Abolish Slavery and Trafficking); Cal. Civil Code § 1714.43 (requiring "[e]very retail seller and manufacturer doing business in this state and having annual worldwide gross receipts that exceed one hundred million dollars ($100,000,000) [to disclose] its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale"); Cal. Penal Code § 207(c) (defining the crime of kidnapping to include removing a person from the state with the intent to sell that person into slavery or involuntary servitude).

injustice should engage both public law and private, systemic conduct — reflects an important operational insight that can serve as a guide for legislative efforts.

One place where our work may diverge concerns the question of whether conduct must have a threshold impact in order to be the proper subject of legislation. In my view, federal legislation is proper only where there is both a historical link to slavery *and* where current conduct poses an imminent threat to freedom that would violate Section One of the Thirteenth Amendment. This view stems from concern about federal separation of powers principles and ensuring the proper relationship between Congress and the Supreme Court when it comes to enforcing the Thirteenth Amendment.

It is not clear to me that these structural concerns operate identically in the context of the *state* reparations laws and policies being proposed by this Task Force. While the Interim Report does frequently address the ongoing, system-wide impacts of racially discriminatory policies and practices, it does not argue that those impacts currently violate (or threaten to violate) the California Constitution's ban on slavery. One question, then, is whether this Task Force needs to determine that the racial disparities it has identified pose an imminent threat of violating Article I, Section 6 of the California Constitution. The answer may well be "no." The nature of the plenary state legislative power, as well as a distinct separation of powers analysis under state law, might be consequential here. I therefore raise this question simply for your consideration.

One place where our analyses might diverge more meaningfully is the question of who can receive remedies or reparations. I know that the Task Force has dedicated time and study to this question, and resolved that eligibility for reparations would be "based on lineage, determined by an individual being an African American descendant of a Chattel enslaved person or a descendant of a free Black person living in the United States prior to the end of the 19th Century." As I understand it, however, there is still a racial component to the definition: Eligibility still depends on race. An indigenous Californian, for example, whose ancestors were also enslaved would not be similarly eligible. Thus, the Task Force's proposal is underinclusive in the sense that only some people whose lineage includes slavery are eligible, but not all.

In my work, I have suggested that the focus of federal, Thirteenth Amendment legislation should be on any racial group or population that has previously been held in slavery or servitude. Indeed, I have suggested that the Thirteenth Amendment may well empower Congress to pass race-specific legislation that is not subject to the type of equal-protection scrutiny that one would normally expect to accompany racial classifications.[8]

The context of *state* reparations legislation and policies, however, clearly implicates the Fourteenth Amendment's Equal Protection Clause, and I would recommend that this Task Force explicitly consider how that Clause might guide or constrain California's legislative efforts to

[8] *See* McAward*, supra* note 3, at 609-10.

remedy the badges and incidents of slavery. While not all of the Task Force's Preliminary Recommendations are race-conscious (for example, the recommendation to provide funding for free tuition to California colleges and universities), others are (for example, the recommendation to establish a state-subsidized mortgage system that guarantees low interest rates for qualified California Black mortgage applicants). These race-conscious recommendations in particular strike me as requiring further analysis to determine their viability under current Fourteenth Amendment doctrine.

The U.S. Supreme Court has held that racial classifications in state laws are inherently suspect, and therefore will be subject to strict scrutiny, with the caveat that strict scrutiny is not necessarily fatal. Strict scrutiny applies whether the racial classification is invidious or benign. Specifically, states must demonstrate that the classification is narrowly tailored to achieve a compelling government interest. In cases involving affirmative action and set-aside programs in education, public contracting, and public employment, the Supreme Court has considered what sorts of state interests might be sufficiently compelling to justify explicit racial classifications or preferences.

In a series of decisions, the Court has rejected the idea that the government can use race-conscious action to remedy the effects of "societal discrimination" writ large.[9] The Court has criticized such a broad remedial interest as relying on "an amorphous concept of injury that may be ageless in its reach into the past."[10]

In certain cases, however, the Court has held that remedying the present effects of the state's own past discrimination may be a compelling interest. In such a case, however, there would have to be a strong basis in evidence to show that there has been past discrimination and that remedial action is necessary.[11] For example, in *United States v. Paradise*,[12] the Court considered a case in which there was clear evidence that the Alabama Department of Public Safety had systematically excluded Black people from serving as state troopers. While the justices differed on the question of the appropriate remedy, every justice agreed that the state's own "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy.

As you are doubtless aware, in more recent years, the Court has focused on the question of whether diversity generally is a compelling interest in the context of higher education. This coming Term, the Court is set to address this issue once again in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, set for oral argument on October 31, 2022. Although the question of the permissibility of remedial legislation is not before the Court, it is

[9] *See, e.g.*, Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 731 (2007).
[10] Regents of the University of California v. Bakke, 438 U.S. 265, 307 (opinion of Powell, J.). *Accord* Adarand Constr. Inc. v. Peña, 515 U.S. 200, 220 (1995).
[11] *See, e.g.*, Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 277 (1986) (plurality op.).
[12] 480 U.S. 149 (1987).

possible that the Court, at least in dicta, might express a view on the matter. Given the expressed view of three members of the current court that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"[13] I would recommend that this Task Force closely follow the Court's arguments and upcoming decision in the Harvard case.

Even if the Court stands by the position that remedying specific past governmental discrimination is a compelling state interest in the abstract, there would still be the question of whether the race-conscious portions of the Task Force's Preliminary Recommendations would satisfy strict scrutiny and be deemed narrowly tailored. I would suggest further study on the following issues: Will the lineage-based eligibility requirements be deemed a racial classification? Will the detailed fact finding already performed by this Task Force suffice to demonstrate a compelling state interest? Should and, if so, how should, the Task Force's race-conscious recommendations be altered to ensure that they are narrowly tailored? And finally, would it make sense for the Task Force and legislature to prioritize certain remedies that might not trigger strict scrutiny at all?

Prioritizing the Task Force's Preliminary Recommendations

The topic of this panel is "Principles for *Effective* Reparations Initiatives." For anything to be effective, it must be both implementable and implemented. I therefore conclude by considering how this Task Force might prioritize among its recommendations to ensure their effectiveness.

There will surely be multiple criteria that you use in identifying your final recommendations, from constitutionality, to political feasibility, to cost, to breadth and depth of impact. I would suggest that another guiding criterion might be likelihood of litigation. What recommendations, if implemented, might be likely to draw a legal challenge in either state or federal court? How likely would such a challenge be to succeed? Even if such a challenge is ultimately unsuccessful, is the financial and logistical cost of litigating a particular recommendation worth the benefit of being able to pursue that recommendation? Put differently, how essential is each of this Task Force's recommendations to the goal of advancing racial justice?

Because it is the first of its kind, this Task Force is breaking new ground. It is clear just how much intensive study has guided your own work and informed your Preliminary Recommendations. The knowledge and research you have amassed are incredibly important as this nation continues to grapple with the legacy of slavery and racial discrimination. As you finalize your work, I thank you for your commitment to advancing the equal dignity of all persons. It has been a privilege to speak with you today.

[13] *Parents Involved*, 551 U.S. at 748 (opinion of Roberts, C.J.).