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Title
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Permalink
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Journal
UCLA Law Review Disc., Vol. 71, pp.70-89, 2023

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Publication Date
2023-10-01

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U.C.L.A. Law Review

Designing a Latter-Day Freedmen's Bureau

Jon D. Michaels

ABSTRACT

This Essay, based on written and oral testimony before the California Task Force to Study and Develop Reparation Proposals for African Americans, addresses how best to translate substantive reparations proposals into durable, legible, legitimate, and democratically accessible programs. Specifically, this Essay evaluates institutional design choices, makes recommendations regarding staffing decisions and protocols, considers strategies to promote robust public engagement, and opines on the suitability of different funding sources.

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This Essay derives from my written and oral testimony before the California Task Force to Study and Develop Reparation Proposals for African Americans, delivered in conjunction with its March 2023 hearings. In readying me for that hearing, four UCLA Law students—Ariana Diverio, Tristan Heart-Myers, Omar Jishi, and Sarah Stebbins—rendered invaluable assistance, and colleagues Blake Emerson and Alex Wang provided critical counsel. Joseph Auer and his colleagues on the *UCLA Law Review* provided excellent editorial assistance.

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INTRODUCTION

The State of California is poised to take three significant and pathbreaking steps: to officially apologize for sanctioning and supporting the enslavement of Black Americans, to take remedial measures to end ongoing forms of systemic and institutional racism, and to offer compensation for the descendants of slavery. The state's work began in earnest with passage of Assembly Bill (A.B.) 3121 in September 2020. Though civil rights advocates had been championing reparations for years, political support surged in 2020 as part of the racial justice awakening, one that followed hard on the heels of the killings of George Floyd and Breonna Taylor.[1] A.B. 3121 established the Task Force to Study and Develop Reparation Proposals for African Americans (Task Force) and directed that nine-member body to study, among other things, California's active and tacit support of chattel slavery, its promulgation and acceptance of systemically racist policies that "disproportionately and negatively affect African Americans as a group and perpetuate the lingering material and psychosocial effects of slavery," and measures that can now be taken to reverse longstanding harms and provide compensation (and perhaps restitution) to African Americans, particularly those who are descendants of enslaved persons.[2]

Though the Task Force published its final report at the end of June 2023,[3] this Essay focuses on the Task Force's interim report (Interim Report), issued in June 2022.[4] Given my hope, however fanciful, that this Essay could be of some use to state legislators and state agency officials, I deemed it preferable to publish my comments on the Interim Report and thus have those comments in circulation while political and legal deliberations were still ongoing.[5]

1. Assemb. B. 3121, 2019–2020 Leg., Reg. Sess. (Cal. 2020).
2. *Id.*
3. The Task Force issued its final report on the very day the U.S. Supreme Court published its decision effectively outlawing race-conscious admissions programs in America's colleges and universities. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023). The Court insisted such programs ran afoul of the federal Constitution's Equal Protection Clause, notwithstanding that clause's Reconstruction pedigree.
4. XIYUN YANG ET AL., CAL. TASK FORCE TO STUDY & DEV. REPARATION PROPOSALS FOR AFRICAN AMS., INTERIM REPORT (2022).
5. By no means is this note about timing intended as a dig at this or any other law review. Law reviews are rigorous in what they select and publish. And rigor takes time. If anything, my proceeding based only on what is included in the Interim Report should be viewed as a validation of that comprehensive and generative working document and of the Task Force members and staff contributors who produced it.

To be sure, the Interim Report is a magisterial document in its own right. It weaves together history, economics, and demographic analysis to develop a comprehensive record of great value not only to state legislators and state agency officials but also to scholars, teachers, civil servants, community leaders, and the families of California whose history has been largely erased, ignored, or downplayed. Needless to add, its value undoubtedly extends far beyond state borders as all Americans can benefit tremendously not only from what's contained in this manuscript but also from the example its sponsors, authors, and contributors have set by simply undertaking a project of this magnitude and import.

The Interim Report focuses primarily on the historical, economic, and moral case for reparations—and offers recommendations for how best to proceed. Quite understandably, the Report does not devote as much space and attention to questions of institutional design, implementation, and administration—that is, how can the legislature best translate the Task Force's proposed initiatives into durable, legible, legitimate, and readily accessible programs. Such questions may seem overly wonky or distracting, especially to audiences understandably focused on what substantive services, programs, and benefits will or won't be included (not to mention those audiences understandably focused on legal challenges). But no matter how inspired a substantive reparations package may be, its ultimate success depends critically on careful institutional design and a thoughtful governance strategy.[6] Moreover, decisions regarding institutional design may have some bearing on whether and how legal challenges may be framed.[7]

This Essay aims to give fuller treatment to some of the principal design and governance issues that warrant close consideration. The ordering of this Essay is top-down: from a proposed agency's architecture, to staffing, to public engagement.

6. One cannot help but recall the late Congressman John Dingell's infamous line, "I'll let you write the substance . . . you let me write the procedure, and I'll screw you every time." *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. L. & Governmental Rels. of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983).
7. For these purposes, I leave to the side discussions of federal and state constitutional questions or possible challenges.

I. INSTITUTIONAL ARCHITECTURE

The Report proposes the establishment of a cabinet-level secretary position over a California African American/Freedmen Affairs Agency (CFAA).[8] A brick-and-mortar agency of the sort the Task Force seemingly contemplates is indeed prudent, especially in light of the myriad divisions, offices, and bureaus prescribed in the Report.

It is of course true that new initiatives need not be carried out through new, freestanding agencies. Responsibilities as rangy as those described in the Report could be divvied up and assigned to legacy agencies, including the state Departments of Justice, Health and Human Services, Corrections, Education, Environmental Protection, and the like.[9] Responsibilities could be outsourced and administered through a web of contractors in keeping with some of the preferred "businesslike government" approaches popularized at the end of the twentieth century.[10] Responsibilities could be turned over to a quasi-private foundation or trust. Needless to add, it's just as conceivable, if not even more plausible, that some combination or amalgam of what I've just characterized as discrete and siloed alternatives could take root.

Some of these alternatives are not unattractive—and may have the support of important stakeholders. Compared to a new, freestanding brick-and-mortar agency, these alternatives might well be less expensive, at least at the outset. And, if tasks are delegated to already up-and-running agencies, reparations programs might be put into effect more quickly. If the state were to rely on contractors or on

8. YANG ET AL., *supra* note 4, at 24. I take no strong position on the prudence and propriety of "Freedmen" versus "African American." For present purposes, I leave to the side any reservations I may have regarding the explicit gendering of an otherwise inclusive beneficiary community.

9. A potentially sprawling agency is, of course, not without its challenges. *See* Dara Kay Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 700–12 (2006). The problems associated with the federal Department of Homeland Security (DHS) do indeed weigh on my mind. But that's principally because we have so few data points for the creation of new, twenty-first century agencies rather than because there are substantive, structural, or even contextual similarities between DHS and a proposed California Freedmen Affairs Agency (CFAA). One could just as easily look to the Freedmen's Bureau and note, with Dr. DuBois, that "the comprehensiveness of the Bureau's functions as a virtue: only such a multi-institutional approach could hope to address the deep problem of racial subordination, as its roots stretched across the grounds of social life." BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 70–71 (2019) (capturing the essence of Du Bois's analysis of the Freedmen's Bureau).

10. *See* JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC *passim* (2017).

a foundation, there likely would be more flexibility in hiring and firing (and recruiting and retaining) staff; there might also be the perceived advantage of operating pursuant to fewer regulatory requirements (what some might pejoratively label "red tape"[11]). Additionally, there might be less political backlash, if only because the diffusion of responsibilities and the avoidance of explicitly labeling various initiatives as "CFAA programs" could blunt some of the clumsier attacks.[12]

All of these supposed benefits are, however, fleeting—outweighed by countervailing considerations or not actually salutary in design or operation. Below I list some reasons to be wary of the alternatives.[13]

Constantly pushing initiatives through legacy agencies is, ultimately, incredibly taxing. Whatever upfront benefits may be achieved by leveraging the resources of already operational agencies are likely to be offset over time by the costs associated with having to request, urge, and nudge those agencies to give due

11. *See, e.g.*, AL GORE, REP. OF THE NAT'L PERFORMANCE REV., FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS, at i–iv (1993); DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR, at xv–xxii (1992). Those accounts, in my estimation, pay particularly short shrift to socioeconomic and racial power asymmetries and how informality privileges those with the most political, economic, or social capital. They thus undervalue the importance of careful, deliberative, and highly regularized public administration as a special safeguard for those with the least political, economic, or social capital as well as for those from historically disadvantaged or subordinated populations. *Cf.* Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404–06, 423–27 (1987).

12. I use political attacks in the conventional sense—namely, lobbying and advocacy to scale back the reparations initiatives. But in today's political climate, one cannot discount the likelihood of political opposition morphing into political violence. *See* Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEMOCRACY 160, 161–71 (2021); Melanie Mason & David Lauter, "*We Are a Tinderbox*": *Political Violence Is Ramping Up, Experts Warn*, L.A. TIMES (Oct. 30, 2022, 6:00 AM), https://www.latimes.com/politics/story/2022-10-30/paul-pelosi-attack-in-california-political-violence [https://perma.cc/68KA-JXZY]; Editorial Board, *America Can Have Democracy or Political Violence. Not Both*, N.Y. TIMES: OP. (Nov. 3, 2022), https://www.nytimes.com/2022/11/03/opinion/political-violence-extremism.html [https://perma.cc/BR8A-5ZPL].

13. Of what follows in this Part, as well as the others, is informed by my work on how best to design, staff, and fund American administrative agencies. *See, e.g.*, MICHAELS, *supra* note 10; Jon D. Michaels, *We the Shareholders: Government Market Participation in the Postliberal U.S. Political Economy*, 120 COLUM. L. REV. 465, 502–27, 539–45 (2020) [hereinafter Michaels, *Shareholders*]; Jon D. Michaels, *Running Government Like a Business . . . Then and Now*, 128 HARV. L. REV. 1152, 1174–81 (2015) [hereinafter Michaels, *Running Government*] (reviewing NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940 (2013)); Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023 (2013) [hereinafter Michaels, *Progeny*]; Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653 (2018) [hereinafter Michaels, *American Deep State*].

attention to reparations projects. Even if those agencies are institutionally capable of supporting reparations work and even if the personnel who staff those agencies are enthusiastic about reparations, leaders and career personnel alike may nonetheless feel compelled to give priority to their agency's longstanding commitments, defined missions, and already extant beneficiary communities—quite possibly at the expense of reparations programs and their intended beneficiaries.[14] Moreover, a design structure of this sort demands a different kind of CFAA leader. Were responsibilities farmed out among the agencies, a CFAA director overseeing implementation would be selected based on that individual's dexterity and experience as a savvy, perhaps sharp-elbowed, bureaucratic insider rather than as a public-facing and dynamic messenger of a project that may well serve as a model for the rest of the nation.

Likewise, I would caution against undue reliance on contractors. The late-twentieth century and early twenty-first century bipartisan enthusiasm for businesslike government has never consistently produced the promised cost-savings or efficiencies.[15] Overseeing contractor waste, fraud, and abuse is, itself, costly (and requires an investment in in-house expert auditors)[16] and thus begs the question whether capturing some of the market's much ballyhooed élan is worth the candle. In my estimation, it is additionally imperative that the state signals its commitment to reparations by investing in and then nurturing in-house expertise

14. To take full advantage of that talent within the state bureaucracy, recruiting across agencies and/or creating a rather permissive culture of "seconding" personnel to the CFAA should be encouraged. For what it is worth, a significant number of agents working for the federal Freedmen's Bureau were dual assignees—on loan, as it were, from the War Department. *See* John Cox & LaWanda Cox, *General O. O. Howard and the "Misrepresented Bureau,"* 19 J. S. HIST. 427, 443 (1953).

15. A considerable amount of the ostensible savings has come in the form of labor arbitrage; except when we get to the upper tiers of the labor force, privately employed actors generally received lower wages and fewer benefits than their counterparts in federal or state civil service positions. *See* Michaels, *Progeny*, *supra* note 13, at 1044–50. Though some have treated that form of arbitrage as salutary (insisting government employees are wrongly or inefficiently paid "above market" wages), one cannot help but appreciate that supposed above-market government pay is in many respects a valuable cross-subsidy, one that has enabled many to achieve and maintain middle class status, purchase homes, and pay for children's college. *Cf.* Thomas Meehan, *Moynihan of the Moynihan Report*, N.Y. TIMES (July 31, 1966), https://www.nytimes.com/books/98/10/04/specials/moynihan-report.html [https://perma.cc/2FRR-TEJM] (describing Daniel Patrick Moynihan's policy proposal to expand the number of government jobs to alleviate poverty and enable workers to ascend to the middle class).

16. Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 729–30, 729 n.44 (2010) (cataloging reports of traditional service contractor waste, fraud, and abuse).

while underscoring that the CFAA's mission is, itself, coextensive with public service.[17]

Lastly, though I doubt the feasibility of turning over reparations responsibilities to a foundation, agencies undeniably partner with private trusts and may well in this context too; thus, such a co-governance scheme bears some mention.[18] I will circle back to donors, trusts, and foundations in Part VI.

II. PERSONNEL—SENIOR LEVEL

Assuming the Task Force adheres to its tentative recommendation in favor of a freestanding agency, the next consideration would be whether to make the agency head a political appointee or one directly elected like California's Attorney General, Treasurer, and Controller. It strikes me as imprudent to in any way suggest the CFAA is led by a partisan politician; thus, having CFAA heads stand for statewide election (perhaps as a stepping stone to higher office) could send highly problematic signals about an agency that'll certainly be heavily scrutinized from the moment of its inception. There are other prudential reasons for steering clear of an elected head. Given how complicated Californian ballots have become and how burdensome it has become to scrutinize a slew of ballot initiatives and evaluate dozens of judicial candidates, it may be best to avoid asking voters to research and select among candidates for yet another highly consequential state office.[19]

The question that follows, then, is whether there would be any particular or compelling reason to deviate from the standard appointments and removal processes—that is, selection of the CFAA head by the governor and continuing service of that CFAA at the governor's pleasure. For instance, is there a fear that future governors may try to weaken or undermine the work of the CFAA? If so,

17. *Cf.* EMERSON, *supra* note 9, at 115 (understanding the administration of the Freedmen's Bureau as "providing background conditions . . . for the active political engagement of all members of the democratic public").

18. *Cf.* Margaret H. Lemos & Guy-Uriel Charles, *Patriotic Philanthropy? Financing the State With Gifts to Government*, 106 CALIF. L. REV. 1129 (2018); Michaels, *Shareholders*, *supra* note 13, at 498, 518, 529, 533.

19. There is, of course, the possibility that an appointed CFAA head, without their own political base and electoral mandate, would be viewed as less formidable when the CFAA needs to partner with (or compete against) the likes of the Attorney General or Secretary of State—or needs to challenge or confront the governor. But I doubt that those risks, however real, outweigh the downsides of putting yet another statewide office holder up for election and outside of the Governor's ambit.

there might be reason to require, prior to removal, that the governor make a for-cause determination to the fact that the CFAA head has been dilatory or derelict in their duties.[20]

Regardless of whether the Task Force recommends that the governor retain summary removal power over the CFAA head, the Task Force should endorse the CFAA head having appointment and summary removal power over the leaders of each of the divisions, offices, or bureaus *except for the proposed reparations tribunal*. The chief reason for insulating the proposed tribunal from the rest of the CFAA, including its leadership, turns on questions and perceptions of fundamental fairness. Assuming I am properly appreciating the general purpose and aims of the proposed tribunal, the Task Force ought to underscore that there will be no policy-based or politically motivated interference with the adjudication of specific claims made against the state, its cities or counties, or private institutions. Initial appointments—and perhaps even longterm appointments—to this tribunal—could be vested in the state Justice Department or any other state entity that is capable of evaluating merit and competence and that functions autonomously from the CFAA.[21]

III. PERSONNEL—STAFF/CAREER LEVEL

My recommendation with respect to career personnel is, again, fairly straightforward—recruit and hire personnel in a manner consonant with the extant state civil service, albeit with some modest tweaks to the conventional framework.

For starters, in this current political environment, perhaps we cannot assume that a new, freestanding agency would necessarily be staffed by career civil servants. There is a trend, initially pushed by the businesslike government crowd[22]

20. One could go further and draw upon, say, the corporate-like leadership structure of the United States Postal Service, route appointments and removal through, say, a majority vote of the statewide elected officeholders, or assign appointments or removal to some other appointed multimember commission. Absent overriding fears centering on the relationship between the governor and head of the CFAA, though, it doesn't strike me as necessary or proper to get overly cute and experiment with anything too complex or convoluted, particularly as each of those alternative approaches is not without its drawbacks.

21. To the extent the Task Force believes the state court system would, for any number of reasons, be unlikely to vindicate just claims, there may be reason to ensure decisions of the tribunal are deemed final. *Cf.* EMERSON, *supra* note 9, at 69 (noting, with respect to the Freedmen's Bureau, that "Congress provided for the use of federal administrative tribunals to adjudicate employment contract disputes, where ordinary courts had failed to recognize the entitlements of Black workers").

22. *See generally* MICHAELS, *supra* note 10.

but now additionally championed by those most animated by suspicions of the so-called "deep state,"[23] to remove civil service protections for government employees.[24] Allegations of civil servant disloyalty are entirely without foundation and seem motivated largely by overt partisanship[25] or deep-seated antipathy to government.[26]

Civil service safeguards are a signature, if not defining, feature that helped usher in the modern era of professional, competent public administration and cement the political and legal legitimation of the twentieth-century administrative state.[27] In practical terms, civil service safeguards reward those who invest in their jobs and professional development, something not necessarily prudent for

23. *See generally* PAUL R. VERKUIL, VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT (2017); Michaels, *American Deep State*, *supra* note 13.

24. *See* Donald P. Moynihan, *Public Management for Populists: Trump's Schedule F Executive Order and the Future of the Civil Service*, 82 PUB. ADMIN. REV. 174, 175 (2022); Donald F. Kettl, *Is Government Better When Anyone Can Be Fired Anytime?*, GOVERNING (Aug. 12, 2021), https://www.governing.com/work/is-government-better-when-anyone-can-be-fired-anytime [https://perma.cc/DWZ5-V6B4]; Erich Wagner, *Trump Has Endorsed a Plan to Purge the Civil Service of "Rogue Bureaucrats,"* GOV. EXEC. (July 27, 2022), https://www.govexec.com/workforce/2022/07/trump-endorsed-plan-purge-civil-service-rogue-bureaucrats/375028 [https://perma.cc/QDE9-KBBM]. 2024 presidential candidate Ron DeSantis seemingly shares Trump's views. *See* Ron Filipkowski (@RonFilipkowski), X (Feb. 28, 2023, 4:20 AM), https://twitter.com/RonFilipkowski/status/1630543550008946692?s=20 [https://perma.cc/A42L-WKEN].

25. *See* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 582–87 (2015).

26. *See* Joe Davidson, *GOP Attacks Go Beyond FBI and Elections to Delegitimize Government*, WASH. POST (Aug. 24, 2022, 6:00 AM), https://www.washingtonpost.com/politics/2022/08/24/gop-attacks-fbi-doj-government-trump [https://perma.cc/M9FR-3TRN]; Jon D. Michaels, *The War on Federal Employees*, AM. PROSPECT (Dec. 11, 2017), https://prospect.org/power/war-federal-employees [https://perma.cc/7E2R-3GZG]; Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for "Deconstruction of the Administrative State,"* WASH. POST (Feb. 23, 2017, 9:28 PM), https://www.washington post.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html [https://perma.cc/9VXE-UV3Q]. That's not to say government service is free from personnel who invite genuine doubts as to their capacity to faithfully serve the public. But it is notable that such concerns have been raised and documented in contexts outside of those governed by traditional civil service laws and protections. *See, e.g.*, Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug. 27, 2020), https://www.brennancenter.org/ our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law [https://perma.cc/4UBU-HLC7]; Karen Yourish, Larry Buchanan & Denise Lu, *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html [https://perma.cc/N2HK-JZHA].

27. *See* MICHAELS, *supra* note 10, *passim*.

employees to do were they expecting to be cycled quickly through and replaced each time a new political administration is installed. Civil service safeguards permit (and indeed create space for) respectful resistance if and when political bosses or powerful special interests issue orders or make demands outside the scope of the agency's statutory mission or in clear tension with professional norms and expert assessments. And those safeguards strengthen the institutional culture and stability of an agency, as the staff remain in place no matter how much political turmoil exists in the arena of electoral politics.[28]

But I would go further. Simply defaulting to reliance on the civil service may not be enough. For years, public service has been increasingly maligned. Even before Donald Trump and his closest allies went on a sustained campaign of delegitimizing government work and government workers,[29] disparagement and—consequentially—demoralization was pervasive.[30]

It is therefore incumbent on any new agency to build a solid foundation of respect and support.[31] Some of that can be achieved through internal guidelines and practices, but a lot of it needs to be done informally. I mention this simply to encourage future agency leaders, the Task Force, legislative sponsors, and partnering institutions (public and private) to be mindful of agency morale and its importance, especially at the moment of an agency's inception and with, quite likely, the eyes of the nation on it.

Last, though hardly least, we need to be crystal clear about the tumultuous times in which we live.[32] Dr. Anthony Fauci's family has regularly needed an

28. *See, e.g.*, Michaels, *Running Government*, *supra* note 13, at 1163.

29. *See* Matthew Daly, *Interior Secretary Criticized for Saying 30% of Department Is Disloyal*, BLOOMBERG (Sept. 26, 2017, 2:52 PM), https://www.bloomberg.com/politics/articles/2017-09-26/interior-chief-says-third-of-employees-not-loyal-to-trump#xj4y7vzkg [https://perma.cc/J73Q-HE8U]; Michaels, *supra* note 26; Peter Stone, *Trump's Increasing Tirade Against FBI and DOJ Endangering Lives of Officials*, GUARDIAN (Sept. 12, 2022, 1:33 PM), https://www.theguardian.com/us-news/2022/sep/11/trump-mar-a-lago-witch-hunt-fbi-doj-safety [https://perma.cc/255D-A72H].

30. I and others had been studying this phenomenon well before the Trump presidency and underscored the bipartisan tendency for politicians to disparage government work and government workers. *See* MICHAELS, *supra* note 10; VERKUIL, *supra* note 23.

31. It may be of some note that the overall demographics of the California civil service are such that Black or African Americans represent 9.3 percent of the state civil service, as compared to 5.2 percent of the overall state labor force (and 5.5 percent of the state population). *See* ERAINA ORTEGA, CAL. DEP'T OF HUM. RES., 2020 ANNUAL CENSUS OF EMPLOYEES IN STATE CIVIL SERVICE 10 fig. (2022).

32. *See, e.g.*, Kleinfeld, *supra* note 12; Mason & Lauter, *supra* note 12; Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187 (2023); JON D. MICHAELS & DAVID L. NOLL, VIGILANTE DEMOCRACY (forthcoming 2024); Steven Simon & Jonathan Stevenson, *The Threat of Civil Breakdown Is Real*, POLITICO: MAG. (Apr. 21, 2023, 4:30 AM),

armed security detail.[33] Republican officials (and their families) in Arizona were harassed, threatened, and demonized for not being sufficiently partisan in the administration of the 2020 election.[34] Election officials in Fulton County, Georgia were brutally harassed.[35] (Gabriel Sterling, a Republican election official in Georgia, went so far as to plead with Donald Trump and his allies to cease the attacks: "Stop inspiring people to commit potential acts of violence. Someone is going to get hurt, someone is going to get shot, someone is going to get killed."[36]) Election officials in Detroit, Phoenix, and Las Vegas were greeted by angry armed protesters as they entered and left their worksites.[37] County public health officials[38] and school board members[39] around the country are likewise subject to

https://www.politico.com/news/magazine/2023/04/21/political-violence-2024-magazine-00093028 [https://perma.cc/XP3T-P33Y].

33. Dan Diamond, *Fauci Gets Security Detail After Receiving Threats*, POLITICO (Apr. 2, 2020, 8:21 AM), https://www.politico.com/news/2020/04/01/fauci-coronavirus-security-160901 [https://perma.cc/58DH-JFSW]; *cf.* Sravasti Dasgupta, *Steve Bannon Threatens Dr. Fauci and His Family Will Be "Hunted" After Midterms: "Paybacks Across the Board,"* YAHOO! (Oct. 25, 2022, 9:20 AM), https://finance.yahoo.com/news/steve-bannon-threatens-whole-fauci-061411492.html [https://perma.cc/C2WW-42MZ].

34. Maggie Haberman, *"I Took an Oath," Rusty Bowers, the Arizona House Speaker, Says of Rejecting Efforts to Overturn the Election*, N.Y. TIMES (June 21, 2022), https://www.nytimes.com/2022/06/21/us/rusty-bowers-testimony-hearing-jan-6.html [https://perma.cc/J94T-4SEL]. Though some might have harbored hope that Bowers' testimony would have chastened Republicans and their voters, such hope was quickly dispelled. The Arizona Republican Party promptly censured Bowers, and in 2022, he was primaried and routed by a Trump-backed candidate. *See* Allan Smith, *Rusty Bowers, a Jan. 6 Committee Star Witness, Loses GOP Primary in Arizona*, NBC NEWS (Aug. 3, 2022), https://www.nbcnews.com/politics/2022-election/rusty-bowers-jan-6-committee-star-witness-loses-gop-primary-arizona-rcna40647 [https://perma.cc/ Y284-QHW8].

35. Farnoush Amiri, *"Nowhere I Feel Safe": Election Officials Recount Threats*, ASSOC. PRESS (June 22, 2022), https://apnews.com/article/capitol-siege-2022-midterm-elections-georgia-election-recounts-5cffe294a372eb32dc68588784202314 [https://perma.cc/ FE72-PPYX].

36. Richard Fausset, *"It Has to Stop": Georgia Election Official Lashes Trump*, N.Y. TIMES (Dec. 1, 2020), https://www.nytimes.com/2020/12/01/us/politics/georgia-election-trump.html [https://perma.cc/XT23-5FCF].

37. Tim Sullivan & Adam Geller, *Increasingly Normal: Guns Seen Outside Vote-Counting Centers*, ASSOC. PRESS (Nov. 7, 2020), https://apnews.com/article/protests-vote-count-safety-concerns-653dc8f0787c9258524078548d518992 [https://perma.cc/PU47-JJPS].

38. Danielle Ivory & Mike Baker, *Public Health Officials in the U.S. Need Federal Protection from Abuse and Threats, a National Group Says*, N.Y. TIMES (Oct. 19, 2021), https://www.nytimes.com/2021/10/19/us/public-health-threats-abuse.html [https://perma.cc/JVP8-C7EM].

39. Hannah Natanson, *Death Threats, Online Abuse, Police Protection: School Board Members Face Dark New Reality*, WASH. POST (Nov. 9, 2021, 3:04 PM), https://www.washingtonpost.com/local/education/death-threats-online-abuse-police-protection-school-board-members-face-dark-new-reality/2021/11/09/db007706–37fe-11ec-9bc4–86107e7b0ab1_story.html [https://perma.cc/2CTX-9NWC].

abuse.[40] As was illuminated during the January 6 Commission proceedings (and substantiated elsewhere), officials who suffered (*and were largely unprotected*) are not likely to stay in their positions.[41] Even worse, some of these officials felt unsupported by local law enforcement officials whom they feared were unsympathetic to the dangers they labored under.[42]

The U.S. Attorney General, Merrick Garland, has promised to provide some support for, among others, the increasingly beleaguered school board officials,[43] perhaps seizing the opportunity to reestablish norms of democratic deliberation and overall respect, civility, and safety. But the pushback Garland has received has been withering,[44] and it is unclear what tangible steps have been taken.[45] While I

40. Zack Beauchamp, *"We Are Going to Make You Beg for Mercy": America's Public Servants Face a Wave of Threats*, VOX (Nov. 18, 2021, 5:30 AM), https://www.vox.com/ 22774745/death-threats-election-workers-public-health-school [https://perma.cc/FJC7-5JLH].

41. *See* Jess Bidgood, *America's Election Workers Are Leaving in Droves*, BOS. GLOBE (Oct. 23, 2022), https://apps.bostonglobe.com/nation/politics/2022/10/democracy-under-siege/election-workers-leaving-in-droves [https://perma.cc/HY6H-ZKTG]; Fredreka Schouten, *Alarm Grows as More Election Workers Leave their Posts Ahead of Election Day*, CNN (Sept. 1, 2022, 4:15 PM), https://www.cnn.com/2022/09/01/politics/election-workers-officials-harassment-kentucky-texas/index.html [https://perma.cc/K8W7-N8FC].

42. *See, e.g.*, Linda So & Jason Szep, *Special Report: Terrorized U.S. Election Workers Get Little Help from Law Enforcement*, REUTERS (Sept. 8, 2021, 5:46 PM), https://www.reuters.com/legal/government/terrorized-us-election-workers-get-little-help-law-enforcement-2021–09–08 [https://perma.cc/95QS-RDUA]; Alexandra Berzon & Nick Corasaniti, *2020 Election Deniers Seek Out Powerful Allies: County Sheriffs*, N.Y. TIMES (July 25, 2022), https://www.nytimes.com/2022/07/25/us/politics/election-sheriffs-voting-trump.html [https://perma.cc/9MYS-7G3F].

43. Gary Fields, *Garland Says Authorities Will Target School Board Threats*, ASSOC. PRESS (Oct. 5, 2021), https://apnews.com/article/merrick-garland-school-boards-violence-daaff3f659981354b7a9a536db5cf2e2 [https://perma.cc/QD3Q-BTBR].

44. Evan Perez & Tierney Sneed, *Attorney General Garland Faces Relentless GOP Pressure After Issuing Memo on School Board Threats*, CNN (Oct. 26, 2021, 10:04 AM), https://www.cnn.com/2021/10/25/politics/garland-school-board-senate-house-hearings/index.html [https://perma.cc/VA5A-LWAY].

45. Meanwhile, the threats have continued to intensify; they've also broadened beyond school, health, and election administration. This August, Florida Governor and 2024 presidential aspirant Ron DeSantis announced: "On bureaucracy, you know, we're going to have all these deep state people, you know, we're going to start slitting throats on day one and be ready to go." Martin Pengelly, *Outrage After DeSantis Says He'd "Start Slitting Throats" If Elected President*, GUARDIAN (Aug. 4, 2023, 11:37 AM), https://www.theguardian.com/us-news/2023/aug/04/ron-desantis-slitting-throats-federal-jobs-president-campaign [https://perma.cc/YQH4-JKS7]. Not one to be outdone, Trump recently declared that the former Chairman of the Joint Chiefs of Staff is a traitor who ought to be executed, prompting even the powerful, recently retired four-star general Mark Milley to secure additional security safeguards. Aliza Chasan, G*en. Milley Says He Has "Appropriate" Safety Measures after Trump Social Media Threat*, CBS NEWS (Sept. 27, 2023, 6:39 PM), https://www.cbsnews.com/news/general-milley-responds-to-trump-social-media-post-60-minutes [https://perma.cc/ND3D-N3FM].

sincerely hope I am wrong, I fear that the CFAA—whose work will surely span education, health, and voting—may be a particularly attractive target of political ire, harassment, and even violence. For that reason, I would urge the Task Force to consider specially investing in security arrangements—and to favor arrangements that are more formalized and institutionalized rather than ad hoc and reactive.[46] Assurances of an investment of that sort would help with recruitment and retention. They would also serve as a strong deterrent against those who, in the current political environment, feel emboldened to express disagreement through campaigns of harassment and abuse.

IV. PUBLIC ENGAGEMENT AND ACCESSIBILITY

For many of us, government is known or knowable based on our interpersonal points of contact. We "know" government not from watching *Meet the Press* or perusing the *Federal Register*. And most of us likewise don't even "know" government as we largely take for granted that the air we breathe is clean, the drinking water is uncontaminated, the foods we consume are true to their labels, and the workplaces we enter are accessible and safe. Instead, we gain an understanding of government based on our direct interactions—for example, DMV appointments, police stops, Postal Service deliveries, TSA pat downs, research assistance from town librarians, jury duty voir dires, and, perhaps, small talk with beach lifeguards or park rangers. Those contacts may be rewarding, enriching, confusing, frustrating, dispiriting, or, likely, a mixed bag.

I am hazarding a guess that there will be much curiosity, and no doubt lots of apprehensiveness and even distrust, about the new CFAA. If the Task Force shares my thinking, and my concerns, the CFAA's work must be accessible, legible, and democratic. Below I offer some simple, modest approaches that may have some salutary effects. As with practically everything else, the downsides are obvious: agency costs and, in some instances, administrative delays.[47]

46. California's new election workers' privacy bill represents a modest step in the right direction. S.B. 1131, 2021–22 Reg. Sess. (Cal. 2022).

47. One other likely downside will be further or intensified accusations that, given the beneficiary population and given the type of services provided, the CFAA is a crude, partisan instrument. Such accusations plagued the Freedman's Bureau, as unreconstructed southerners claimed the Bureau was an instrument of the Republican Party. Cox & Cox, *supra* note 14, at 429. General Howard, charged with leading the Bureau was not unaware of that accusation and directed agents to support and promote voting rights while "avoid[ing] partisan discussion." Cox & Cox, *supra* note 14, at 445. Surely, accusations notwithstanding, there is no reason to believe the CFAA won't likewise promote voting rights while refraining from opining on "partisan discussion."

First, the CFAA should host open houses and listening sessions at agency offices[48] and engage in social-media outreach; set up booths at town festivals, county fairs, farmers markets, carnivals, popular parks (on such holidays as Memorial Day, Juneteenth, and July 4), and in mass transit hubs; hold meetings in libraries, school cafeterias, and the like; and pass out business cards with an actual point of contact.[49]

Second, CFAA should consider initiating one or more deliberative-democracy programs to broaden, deepen, and sustain the public's formal engagement with the CFAA. Such programs may feature, among other things, deliberative polling[50] and some sort of empaneled cohort of citizens capable of investing substantial time and effort to evaluate and weigh in on particular policy questions more fully.

Third, CFAA should invest in visitors' lounges for its agency offices. I know that space, money, labor, and security are all at a premium, but these lounges need not be elaborate or special—just a safe, quiet place to sit, to collect one's thoughts or organize paperwork, and to ask questions of a live human being who could be one of the outreach liaisons mentioned above. Government offices can be imposing and cold, and interactions with government officials may, based on past experiences, be unsettling or intimidating. No one says things have to be that way. All that would be needed are trifling amounts of square footage and a couple of dozen dedicated hires spread across a state with a population nearing forty million people and an economy that Governor Newsom boasts is, at worst, the fifth largest in the world.[51]

Fourth, CFAA should commission artwork from among the population of beneficiaries. Here I would encourage the Task Force to borrow from the lessons

48. *Cf.* ADMIN. CONF. OF THE U.S., PUBLIC ENGAGEMENT WITH AGENCY RULEMAKING (2018).

49. *See* Hollie Russon Gilman & K. Sabeel Rahman, *Building Civic Capacity in an Era of Democratic Crisis*, NEW AMERICA 13 (2017) (describing New York City's Public Engagement Unit). Though it has faded from contemporary public discourse and has been widely criticized, the concept of maximum feasible participation still has its champions and may be of particular relevance to an outfit like the CFAA.

50. *See* JAMES S. FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION 25–30, 119–23 (2011). Stanford University, where James Fishkin teaches, has a dedicated Deliberative Democracy Lab, which is "devoted to research about democracy and public opinion obtained through Deliberative Polling." DELIBERATIVE DEMOCRACY LAB, https://deliberation.stanford.edu [https://perma.cc/4FDF-NDJW].

51. *See ICYMI: California Poised to Become World's 4th Biggest Economy*, OFFICE OF THE GOVERNOR OF CALIFORNIA (Oct. 24, 2022), https://www.gov.ca.gov/2022/10/24/icymi-california-poised-to-become-worlds-4th-biggest-economy [https://perma.cc/D4X4-2GTT].

of the New Deal.[52] There is no money or time for commissioning grand buildings—and perhaps that is for the best. But hallway murals, monographs that can be posted online and shared with libraries and schools, and music that can be played in the aforementioned visitors' lounges? All of that is feasible. And, again, light touches can go a long way.

Finally, CFAA should advertise. Yes, advertise. Most federal agencies are expressly prohibited from drumming up public support for their programs, campaigns, or initiatives.[53] Some members of Congress deem this "propaganda," and the Government Accounting Office has sanctioned agencies for engaging in certain forms of public outreach. Meanwhile, the United States military has an *annual advertising budget* of approximately $667 million.[54] That is larger than the entire operating budget of the federal Occupational Safety and Health Administration (OSHA), twice as large as the total budget for the U.S. Department of Labor's Wage and Hour Division, and four times larger than what Congress annually appropriates in total to the National Highway Traffic Safety Administration.[55] And whereas the federal EPA was sanctioned for attempting to generate public enthusiasm (and invite broader public comment) for a proposed regulation of some significance,[56] the military spends its money cross-marketing military service with action heroes in films, video games, and comic books.[57] The military also helps orchestrate what (by design) appears to be organic demonstrations of public support and gratitude for the troops, of the sort regularly on display in high-profile sporting events. As the late Senator John McCain

52. *See Surviving the Dust Bowl: The Works Progress Administration*, PBS, https://www.pbs.org/wgbh/americanexperience/features/surviving-the-dust-bowl-works-progress-administration-wpa [https://perma.cc/EH7R-ARV6].
53. *E.g.*, David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1487–88 (2013); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 491–94 (2005).
54. *See* MICHAELS, *supra* note 10, at 215.
55. *Id.* at 215–16. These numbers are admittedly several years old, but I have no reason to believe much has substantially changed. *Id.*
56. Eric Lipton & Michael D. Shear, *EPA Broke Law With Social Media Push for Water Rule, Auditor Finds*, N.Y. TIMES (Dec. 14, 2015), https://www.nytimes.com/2015/12/15/us/politics/epa-broke-the-law-by-using-social-media-to-push-water-rule-auditor-finds.html [https://perma.cc/A5X6-3Q3M].
57. MICHAELS, *supra* note 10, at 216; Pranshu Verma, *Inside the Pentagon's Long Debate: Do Games Make Good Troops?*, WASH. POST (June 10, 2022, 3:55 PM), https://www.washingtonpost.com/video-games/2022/06/10/military-gaming [https://perma.cc/WBC7-4G4N]; Reuben Baron, The *MCU's Relationship With the Military, From Iron Man to Captain Marvel*, CBR (Mar. 16, 2019), https://www.cbr.com/captain-marvel-mcu-military-relationship [https://perma.cc/ 2BLT-YS8S].

documented, the Pentagon spends millions of dollars to underwrite highly staged patriotic displays at pro and college sporting events.[58] I want to be clear that there certainly can be a happy medium between an allergy to public promotion (of the sort we see with congressional restrictions imposed on domestic regulatory agencies) and a voracious appetite for it. And given the public's longstanding skepticism of government, and lack of understanding of the contributions government makes, it is imperative on government to put some effort into countering those narratives, demystifying the work government does, and touting its successes.[59]

V. PARTNERSHIPS

At various times, I have referred to outreach and alluded to engaging allies and complementary institutions. Identifying and then working closely with such partners is critical to any organizational initiative. But I want to underscore that multiple levels of engagement seem vitally important here, again because of the CFAA's newness, the skepticism with which it'll likely be greeted in some, perhaps many, corridors, and the likelihood that other states and localities will be watching closely to see if the CFAA succeeds or fails. There will surely be no shortage of opportunities to team up with large corporations, foundations, and service organizations. There will be no shortage of invites to talk up editors at the New York Times or meet with pundits and philanthropists at, say, the Aspen Ideas Festival or Renaissance Weekend. But none of that should come at the expense of identifying (and prizing) grass-roots partners: church leaders, teachers, youth sports coaches, and small business owners who run delis, style and cut hair, or prepare tax returns. And, to be sure, as widespread distrust in elites and elite institutions continues apace,[60] as surely seems to be the case, reliance on

58. Les Carpenter, *Report Highlights the Obscene Price of NFL's Paid Patriotism*, GUARDIAN (Nov. 5, 2015), https://www.theguardian.com/sport/blog/2015/nov/05/report-highlights-the-obscene-price-of-nfls-paid-patriotism [https://perma.cc/E6KS-MSZV].

59. One of the canonical bases justifying government regulatory interventions is what economists and political scientists refer to as information asymmetries. When the market doesn't have adequate incentives to level those asymmetries, the government may intervene to do that work. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 26–28 (1982). It stands to reason that government interventions to correct misunderstandings are important not only when it comes to external disinformation regarding, say, consumer product safety or a societal health risk but also about its own responsibilities and functions. This ought to be especially the case when certain market actors benefit immensely from perpetuating and amplifying disinformation about the government.

60. *See* Marc Hetherington & Jonathan M. Ladd, *Destroying Trust in the Media, Science, and Government Has Left America Vulnerable to Disaster*, BROOKINGS (May 1, 2020),

community intermediaries will only become more important to the success of the CFAA.[61]

Additionally, there are few things more challenging than internecine fighting among groups who each have just and pressing claims against the state. Such fighting is undoubtedly music to the ears of those who don't believe in any remediation, let alone reparations. Rather than chop down the ideas of, say, Black reparations on their merits (which may not only be difficult but also, at least in some spaces, impolitic), it may be advantageous for those opponents to stoke dissent and protest in other minority communities, particularly those also harboring genuine grievances against the state.[62]

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https://www.brookings.edu/blog/fixgov/2020/05/01/destroying-trust-in-the-media-science-and-government-has-left-america-vulnerable-to-disaster [https://perma.cc/2E75-4KES]; David Klepper, *Choose Your Reality: Trust Wanes, Conspiracy Theories Rise*, ASSOC. PRESS (July 9, 2022), https://apnews.com/article/covid-technology-health-government-and-politics-new-york-cfb56a95aec23dddbabcf3ebbe839f05 [https://perma.cc/9GAV-DJYC]; Sarah McCammon & Liz Baker, *Disinformation Fuels Distrust and Even Violence at all Levels of Government*, NPR (Mar. 1, 2021), https://www.npr.org/2021/03/01/971436680/from-the-u-s-capitol-to-local-governments-disinformation-disrupts [https://perma.cc/2HCM-V3DJ].

61. EMERSON, *supra* note 9, at 169–70 (noting one of the challenges to the Freedmen Bureau's durability was "unable to carry out its transformative egalitarian mission because national and local public opinion was not engaged to sustain it.").

62. One needs to look no further than the attacks on affirmative action in higher education currently being waged in the courts of law and public opinion. White critics have been fighting affirmative action for decades, with only mixed success. Increasingly, however, they are framing the injuries not in terms of a zero-sum game between Black/Brown candidates and white candidates but rather one that pits Black/Brown candidates against other minority groups, principally Asian Americans. *See, e.g.*, Dennis Saffran, Opinion, *Affirmative Action is Racist—Against Asians*, NEWSWEEK (Oct. 24, 2022), https://www.newsweek.com/affirmative-action-racistagainst-asians-its-time-scotus-overturn-it-opinion-1753623 [https://perma.cc/C9FK-FLC4]; Natasha K. Warikoo, *How Conservative Activists Are Using Asian Americans to Argue Against Affirmative Action*, PBS NEWSHOUR (Oct. 3, 2017), https://www.pbs.org/newshour/education/column-conservative-activists-using-asian-americans-argue-affirmative-action [https://perma.cc/6ZSY-5VSW]. Without getting into the myriad problems with that formulation, I note only that the strategy may well prove effective. *See, e.g.,* Alexander Nieves, *California Voters Reject Affirmative Action Measure Despite Summer of Activism*, POLITICO (Nov. 4, 2020), https://www.politico.com/states/california/story/2020/11/04/california-voters-reject-affirmative-action-measure-despite-summer-of-activism-9424555 [https://perma.cc/VZ9W-GMNV]; Adam Liptak, *Supreme Court Seems Ready to Throw Out Race-Based College Admissions*, N.Y. TIMES (Oct. 31, 2022), https://www.nytimes.com/2022/10/31/us/supreme-court-harvard-unc-affirmative-action.html [https://perma.cc/3Q7G-PX3X]. There is, for sure, plenty of pushback and resistance to the framing of affirmative action as a contest between Black/Brown Americans and Asian Americans. *See, e.g.*, Benjamin Chang, Opinion, *I'm an Asian American Harvard Student. The Anti-Affirmative-Action Case Does Not Speak for Me*, WASH. POST (Feb. 4, 2022), https://www.washingtonpost.com/opinions/2022/02/04/harvard-asian-

This Essay has little to add regarding cross-group political organizing or coalition building. Still, it strikes me that concerted efforts to understand how different communities in various civil rights struggles partnered and supported each other and embraced broad conceptions of communal self-interest, *notwithstanding evident and understandable frustration that one—and only one—ally secured particularly valuable benefits*, will be absolutely critical to maintaining and strengthening relations with California's Latinx, Indigenous peoples, and Asian American communities, all of whom may credibly make claims of their own on Sacramento's lawmakers. Here too CFAA public outreach efforts may be especially useful.

VI. FUNDING

The cost of living in California is already quite high, prohibitively high for many. And tax increases, always a politically dicey proposition, may be especially so if opponents use the prospects of a tax hike to further stoke tensions between and among those groups who, as just discussed, likewise have grievances against the state. For these reasons, some may seek private donors to underwrite reparations programs.[63]

Though this may seem like a fortuitous and attractive possibility, there are reasons to be especially wary. First, one has to be highly careful about signaling that reparations ought to be treated as a form of charity or noblesse oblige, apart from rather than constitutive of the collective, public responsibility to provide recompense for the systemic racism that Californians endorsed, condoned, or unwittingly but inescapably benefited from. Already too many indirect beneficiaries of systemic racism insist that they have received no such benefits

american-student-believes-in-affirmative-action [https://perma.cc/UD8P-LE7Z]; Asian American Legal Defense and Education Fund (AALDEF), Press Release, *AALDEF Files Amicus Brief in Supreme Court on Behalf of 121 Asian American Groups and Educators in Support of Race-Conscious Admissions at Harvard* (Aug. 1, 2022), https://www.aaldef.org/press-release/aaldef-files-amicus-brief-in-supreme-court-on-behalf-of-121-asian-american-groups-and-educators-in-support-of-race-conscious-admissions-at-harvard [https://perma.cc/7DAB-B7PB].

63. *See* Juan Olivarez & Leslie Starsoneck, *Philanthropy and Reparations: Righting the Past*, DOROTHY A. JOHNSON CENTER FOR PHILANTHROPY: DEI & INCLUSIVE GROWTH (Jan. 19, 2021), https://johnsoncenter.org/blog/philanthropy-and-reparations-righting-the-past/ [https://perma.cc/Q5CK-Q2KL]; Saul Levmore, *Privatizing Reparations*, 84 B.U. L. REV. 1291 (2004); Erin B. Logan, *L.A. Creates Advisory Commission to Study Reparations Pilot Program for Some Black Angelenos*, L.A. TIMES (June 18, 2021), https://www.latimes.com/california/story/2021-06-18/l-a-creates-a-commission-to-study-reparations [https://perma.cc/6LQ3-56CN].

directly. To signal that corporate charitable trusts will foot the bill only furthers that misapprehension that only the very rich, or only those who have deep historical roots to antebellum times, were advantaged by generations of racist public policy.[64]

Second, with donors comes strings. Donors may have particular, and quite possibly idiosyncratic or self-serving, priorities that will inescapably become CFAA priorities. Credible reports indicate that big donors tried (and to varying extents succeeded) in shaping and influencing policy with respect to such outfits as Newark's public schools, the National Park Service, and the Center for Disease Control.[65]

Third, there is the danger that California is setting a bad or at least unsustainable precedent. Because California is the first mover or because there is considerable corporate and personal in-state wealth, a CFAA could soak up much, if not most, of the available charitable money—leaving little left for those jurisdictions which might follow Sacramento's lead. Setting certain expectations that reparations will be privately raised, rather than publicly financed, will make it much harder for those other communities to embark on reparations projects, let alone provide similar levels of support.

CONCLUSION

Any number of complications—both those relating specifically to institutional design and those that sound in substantive programming or constitutional litigation—may affect how the state proceeds with (or decides to abandon) the CFAA. And, given the enormity of the proposed undertaking and the all-but-certain political and legal pushback, compromises will be inevitable. Still, as this Essay aimed to underscore, a strong and cohesive design is an absolutely critical component of any successful program or set of programs. This is especially true when it comes to an initiative so bold, so fraught, and so potentially generative that it could and likely will be the model for many other states and municipalities to follow.

64. Likewise, albeit for slightly different reasons, I worry about the creation of a new tax, especially any kind of "sin" tax to underwrite the reparations initiative—as if, again, reparations aren't otherwise worth appropriations drawn from the public fisc. *Compare* EVANSTON, ILL. C126-R-19 (2019) (funding city reparations program through the imposition of a cannabis tax), *with* Providence (RI) Reparations, https://aaagpvd.com/providence-reparations [https://perma.cc/QXW4-DV4W] (drawing upon federal funds expressly targeting harms associated with public health and economic displacement).

65. *See* Michaels, *Shareholders*, *supra* note 13, at 536–38; *see also* DALE RUSSAKOFF, THE PRIZE: WHO'S IN CHARGE OF AMERICA'S SCHOOLS? 27–29 (2015).