Michigan Law Review

Volume 120 | Issue 2

2021

Municipal Reparations: Considerations and Constitutionality

Brooke Simone

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Civil Rights and Discrimination Commons](#), [Fourteenth Amendment Commons](#), and the [Law and Race Commons](#)

Recommended Citation

Brooke Simone, *Municipal Reparations: Considerations and Constitutionality*, 120 MICH. L. REV. 345 (2021).

Available at: <https://repository.law.umich.edu/mlr/vol120/iss2/5>

<https://doi.org/10.36644/mlr.120.2.municipal>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NOTE

MUNICIPAL REPARATIONS: CONSIDERATIONS AND CONSTITUTIONALITY

Brooke Simone*

Demands for racial justice are resounding, and in turn, various localities have considered issuing reparations to Black residents. Municipalities may be effective venues in the struggle for reparations, but they face a variety of questions when crafting legislation. This Note walks through key considerations using proposed and enacted reparations plans as examples. It then presents a hypothetical city resolution addressing Philadelphia's discriminatory police practices. Next, it turns to a constitutional analysis of reparations policies under current Fourteenth Amendment jurisprudence, discussing both race-neutral and race-conscious plans. This Note argues that an antisubordination understanding of the Equal Protection Clause would better allow political branches to rectify vestiges of past discrimination and ongoing inequities through reparations plans such as the hypothetical Philadelphia City Council resolution. With these suggestions in mind, municipalities must boldly imagine and extend reparations to marginalized groups that have suffered harms. Similarly, the Court must reimagine its constitutional doctrine.

TABLE OF CONTENTS

INTRODUCTION.....	346
I. CONSTRUCTING REPARATIONS.....	349
A. <i>Why Municipalities?</i>	350
B. <i>The Menu of Choices</i>	353
1. Who Are the Beneficiaries?	353
2. What Form of Compensation?	358
3. Who Pays?	367
C. <i>Philadelphia as a Case Study</i>	372
1. History of the Philadelphia Police Department.....	372

* J.D. Candidate, May 2022, University of Michigan Law School. I would like to extend my gratitude to Professor Leah Litman for her invaluable guidance; members of the Volume 119 and 120 Notes Offices, especially Veronica Portillo-Heap, Kate Markey, and Hannah Berl Hoffman; and editor-in-chief Ahmed Rizk. Thank you also to my friends for always listening, my dad for believing in me, and my mom for brainstorming this idea together. Finally, thank you to the visionaries who continue to fight for a more just world.

	2. Hypothetical Philadelphia Resolution	374
II.	THE CONSTITUTIONALITY OF REPARATIONS	377
	A. <i>The Legal Standard</i>	378
	B. <i>Constitutional Analysis of Reparations Under the Equal Protection Clause</i>	379
	1. Race-Neutral Reparations.....	380
	2. Race-Conscious Reparations.....	381
III.	A REIMAGINED EQUAL PROTECTION FRAMEWORK	384
	A. <i>Problems with Anticlassification Theory</i>	385
	B. <i>Antisubordination Theory: A Better Understanding</i>	387
	CONCLUSION	390

INTRODUCTION

The mere word “reparations” can prompt an involuntary response. Some consider reparations an incoherent absurdity or a frightening threat, many an impractical rallying cry, and others, a worthy but utopian demand.¹ Though renewed calls for reparations began decades ago,² there is still little consensus on what reparations truly mean or demand. But while public support for a commonly sought-after reparations program—a federal taxpayer-funded plan providing redress to the descendants of enslaved people—remains low,³ calls for reparations are no longer disappearing into the void. They are beginning to reverberate.

Political and civil unrest throughout the summer of 2020 galvanized state and local governments to consider programs to combat systemic racism, with some contemplating reparations. As Providence mayor Jorge Elorza noted, “There is an appetite and an urgency to make the most of this moment and

1. Peter C. Baker, *In Chicago, Reparations Aren’t Just an Idea. They’re the Law*, *GUARDIAN* (Mar. 8, 2019, 1:00 AM), <https://www.theguardian.com/news/2019/mar/08/chicago-reparations-won-police-torture-school-curriculum> [perma.cc/4L9E-9NNC].

2. See, e.g., Ashley D. Farmer, *The Black Woman Who Launched the Modern Fight for Reparations*, *WASH. POST* (June 24, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/06/24/black-woman-who-launched-modern-fight-reparations> [perma.cc/3MKG-EU7Z] (recounting the story of Audley “Queen Mother” Moore, “the founder of the modern reparations movement,” and her efforts beginning in the 1950s).

3. See Arianna MacNeill, *UMass Poll Shows Americans Split Over Feelings on Reparations*, *BLM*, *BOSTON.COM* (Apr. 30, 2021), <https://www.boston.com/news/racial-justice/2021/04/30/polls-black-lives-matter-reparations> [perma.cc/K99L-DXDG]; Katanga Johnson, *U.S. Public More Aware of Racial Inequality but Still Rejects Reparations: Reuters/Ipsos Polling*, *REUTERS* (June 25, 2020, 7:03 AM), <https://www.reuters.com/article/us-usa-economy-reparations-poll/u-s-public-more-aware-of-racial-inequality-but-still-rejects-reparations-reuters-ipsos-polling-idUSKBN23W1NG> [perma.cc/KE89-LBCM].

make sure there is real structural change that comes out of it.”⁴ Most of the jurisdictions that have discussed reparatory justice programs began doing so after May 25, 2020, when George Floyd’s murder catalyzed demands for racial justice.⁵ Many governments are in the strategy phase⁶ or are convening task forces to study the possibility of providing reparations.⁷ Others, like Durham, North Carolina, have announced concrete goals created by preexisting reparations task forces.⁸ While some jurisdictions have been less friendly to the idea of reparations,⁹ others have seen considerable momentum, and justifiably so. As Burlington mayor Miro Weinberger remarked, “[W]e’ll never fully realize the ideals of our country until the issue of reparations is addressed.”¹⁰

4. Deborah Barfield Berry & Nicquel Terry Ellis, *The Timing is Right for Reparations: Cities Propose Reparations Amid Nationwide Unrest*, USA TODAY (July 22, 2020, 3:44 PM), <https://www.usatoday.com/story/news/nation/2020/07/21/asheville-and-other-cities-consider-reparations-address-slavery/5453184002> [perma.cc/J9CN-DQTD].

5. See, e.g., Helier Cheung, *George Floyd Death: Why US Protests Are So Powerful This Time*, BBC NEWS (June 8, 2020), <https://www.bbc.com/news/world-us-canada-52969905> [perma.cc/C66X-XVNL].

6. In June 2021, the mayors of eleven cities pledged to provide reparations to some of their Black residents, though they have yet to iron out any of the details. Adam Beam, *11 US Mayors Pledge to Pay Reparations for Slavery to Small Groups of Black Residents*, USA TODAY (June 20, 2021, 1:35 PM), <https://www.usatoday.com/story/news/nation/2021/06/19/reparations-slavery-pledged-11-us-mayors-pilot-program/7753319002> [perma.cc/F9WU-ZFC8]. The announcement of the group, named the Mayors Organizing for Reparations and Equity, “mark[ed] the largest city-led effort at paying reparations to date.” *Id.*

7. Places that have recently considered or passed measures establishing a task force to make recommendations regarding reparations include Vermont; California; Providence, Rhode Island; Burlington, Vermont; Asheville, North Carolina; and Buncombe County, North Carolina. H.R. 478, 2019–2020 Gen. Assemb., Reg. Sess. (Vt. 2019); Act of Sept. 30, 2020, ch. 319, 2020 Cal. Stat. 3721 (codified at CAL. GOV’T CODE §§ 8301–8301.7 (West 2021)); *Declaration on Truth, Reconciliation, and Reparations*, CITY OF PROVIDENCE (July 15, 2020) <https://www.providenceri.gov/wp-content/uploads/2020/07/Mayors-Executive-Order-2020-13-1.pdf> [perma.cc/6QWS-WRY7]; Burlington City Council, Resolution Establishing a Task Force to Study a Proposal for Reparations and to Consider a City Apology for the Institution of Slavery (Aug. 18, 2020) [hereinafter Burlington Resolution] [perma.cc/HKC8-GBP6]; Asheville City Council, Resolution Supporting Community Reparations for Black Asheville (July 14, 2020) [perma.cc/PFL2-DETE] [hereinafter Asheville Resolution]; Buncombe County Board of Commissioners Resolution to Support Community Reparations for Black People in Buncombe County (Aug. 4, 2020) [perma.cc/GJC3-XBPP] [hereinafter Buncombe Resolution].

8. See, e.g., *Report of the Durham Racial Equity Task Force: An Urgent and Loving Call to Action*, CITY OF DURHAM (July 22, 2020), <https://durhamnc.gov/DocumentCenter/View/32853/FINAL-REPORT-Durham-Racial-Equity-Task-Force-72220> [perma.cc/V6DW-H4UK].

9. See, e.g., Ken Connors, *Council Votes Down Reparations, Looks to Form Race Relations Committee*, GOLDSBORO DAILY NEWS (Sept. 22, 2020), <https://www.goldsborodailynews.com/2020/09/22/council-votes-down-reparations-looks-to-form-race-relations-committee> [perma.cc/UR8A-GB27] (discussing the Goldsboro, North Carolina, city council’s 4-3 vote against a resolution supporting reparations for the Black community).

10. Courtney Lamdin, *Burlington Council Fails to Override Veto, Forms Reparations Task Force*, SEVEN DAYS (Aug. 11, 2020, 2:41 AM), <https://www.sevendaysvt.com/OffMessage/archives/2020/08/11/burlington-council-fails-to-override-veto-forms-reparations-task-force> [perma.cc/USG7-TFG7].

So, if a more perfect union is the goal, how should reparations be achieved? Public understanding of reparations is tied to chattel slavery,¹¹ but the concept is much broader.¹² Defined as “the act of making amends, offering expiation, or giving satisfaction for a wrong or injury,”¹³ reparations can theoretically be extended to any harmed group or individual by any group or individual. The conversation about reparations has historically focused on the federal government, but advocates are now concentrating their efforts on a more local level.

There are a host of philosophical, ethical, and political theory questions that accompany any debate about reparations, but a comprehensive discussion of these ideas extends beyond this Note. Instead, this Note will operate from three premises. First, it is grounded in a belief that reparations are good and warranted. Second, it avoids traditional punitive or adversarial methods and instead relies on restorative justice, favoring a community-centered, future-oriented focus on reconciliation.¹⁴ It also builds on transitional justice, which aims to provide redress for systematic abuses and facilitate the transformation of the systems that caused such abuses.¹⁵ Third, it adopts an understanding of collective responsibility rather than ethical individualism, in which only individuals have moral obligations for harms they themselves caused.¹⁶

Even with these principles in mind, determining the details of how a municipality should provide reparations is no easy task. Efforts by federal, state, and local governments, as well as private institutions, reveal several potential paths forward. This Note examines some of these paths in the context of a specific problem: systemic racism in the Philadelphia Police Department. Part I discusses various considerations involved in crafting reparations legislation

11. Calls for reparations often center on the unfulfilled promise of “forty acres and a mule” for formerly enslaved people. See, e.g., William Darity, Jr., *Forty Acres and a Mule in the 21st Century*, 89 SOC. SCI. Q. 656 (2008); Kaimipono David Wenger, *Forty Acres and a Lawsuit: Legal Claims for Reparations*, in RACE, ETHNICITY AND LAW 79, 80 (Mathieu Deflem ed., 2017). This phrase and accompanying ideas carry great weight in the public understanding of reparations.

12. Examples of suggested reparations include those for members of the Muslim community, victims of environmental injustice, and residents whose homes were destroyed through eminent domain. Reginald C. Wisenbaker, Jr., *Muslim Community Reparations*, 2 SAVANNAH L. REV. 391, 447 (2015); Catherine Millas Kaiman, *Environmental Justice and Community-Based Reparations*, 39 SEATTLE U. L. REV. 1327, 1350 (2016); Rebecca Ellis, *Portland Took These Black Families’ Homes. Some of Their Descendants Want Reparations*, OPB (Dec. 16, 2020, 2:30 PM), <https://www.opb.org/article/2020/12/16/portland-oregon-affordable-housing-reparations> [perma.cc/F2WY-L74K].

13. *Reparation*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/reparation> [perma.cc/TBE4-78NY].

14. See, e.g., RESTORATIVE JUSTICE IN TRANSITIONAL SETTINGS (Kerry Clamp ed., 2016).

15. See, e.g., David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043 (2010).

16. See, e.g., Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 543 (2003) (commenting on “a rich tradition of use of the community’s resources to repair damage done, even when there is no fault on the part of the community”). See generally Eric A. Posner & Adrian Vermeule, Essay, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003).

and proposes a hypothetical Philadelphia City Council resolution. Part II engages in a constitutional analysis of this resolution and other reparations plans under current Fourteenth Amendment jurisprudence. Part III argues for a reimagined vision of the Equal Protection Clause that would better allow political branches to rectify past and ongoing racial discrimination.

I. CONSTRUCTING REPARATIONS

Crafting reparations first requires an understanding of their import and purpose. For centuries, nonwhite groups have faced violence, exclusion, and discrimination. These groups continue to be treated like sub-citizens, if not sub-human, and denied rights, legal protections, and respect.¹⁷ Reparations addressing racial injustice seek to repair our racist society, close gulfs of disparity, and ensure equal opportunity for all.¹⁸ This endeavor to create transformational change in response to wrongs that have gone uncorrected and unrepented is necessary for healing and progress.¹⁹ In addition, public dialogue and awareness stemming from the process of creating reparations can be just as valuable as the ultimate outcome.²⁰ This increased consciousness advances a greater goal of social healing.²¹

As for their intended effects, reparations are both backward- and forward-thinking. They rectify past wrongs and also further distributive justice, the reconstruction of American society, and future peace and stability.²² Reparations seek to provide acknowledgment, restitution, and closure.²³ They provide hope of a better society and a more just world.

This Part addresses some of the most salient considerations in creating reparations legislation. Section I.A contends that municipalities are the best venue for current reparatory efforts. Section I.B then presents possible choices in crafting reparations, including variations in beneficiaries, compensation, and funding. Finally, Section I.C offers the case study of a hypothetical reparations plan to address Philadelphia's racially discriminatory police practices.

17. See, e.g., Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [perma.cc/6UQ7-4H7G].

18. See *id.*; Charles J. Ogletree, Jr., Essay, *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 284 (2003).

19. Eric J. Miller, *Republican, Rebellious Reparations*, 63 HOW. L.J. 363, 378 (2020).

20. See Coates, *supra* note 17; Ogletree, *supra* note 18, at 282–84.

21. Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 4 (2007).

22. See Posner & Vermeule, *supra* note 16, at 692; Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 824 (2006); Gray, *supra* note 15, at 1096.

23. Tressie McMillan Cottom, *Georgetown's Slavery Announcement Is Remarkable. But It's Not Reparations.*, VOX (Sept. 2, 2016, 2:30 PM), <https://www.vox.com/2016/9/2/12773110/georgetown-slavery-admission-reparations> [perma.cc/N5UX-Y8ST].

A. Why Municipalities?

Compared to federal and state governments, courts, or private institutions, municipalities²⁴ are the most suitable site for reparations. Of the various levels of government, they are the proper locus for two reasons. First, as Howard University political scientist Niambi Carter explains, there is a political will for reparations present in municipalities that is absent at the gridlocked state and federal level: “It’s really local activists and local actors, members of city councils . . . who are empowered in ways in their small communities to do things and to act outside of what the state would do and even the nation would do.”²⁵ By contrast, former U.S. Representative John Conyers introduced a reparations bill in every session of Congress from 1989 until his passing in October 2019, but these bills never came to a vote.²⁶ And although President Biden indicated his support for a reparations commission,²⁷ any sudden action is unlikely.²⁸ This federal reluctance isn’t entirely lamentable. Although local policymaking is often undervalued, decisions made closer to home can have larger impacts on Americans’ everyday life than decisions made in Washington, D.C.²⁹

Second, municipalities provide the opportunity for community-centered reparations that other levels of government do not. A local approach allows for powerful, close-to-home storytelling,³⁰ enabling greater understanding of

24. A municipality is defined as “a political subdivision of a state within which a municipal corporation has been established to provide general local government for a specific population concentration in a defined area. A municipality may be designated as a city, borough, village, or town . . .” *Municipality*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/topic/municipality> [perma.cc/HQ6P-2NHF].

25. Berry & Ellis, *supra* note 4; *see also* Kaiman, *supra* note 12, at 1371.

26. Kaimipono David Wenger, *From Radical to Practical (and Back Again?): Reparations, Rhetoric, and Revolution*, 25 J.C.R. & ECON. DEV. 697, 698 (2011); Sarah Hulett, *John Conyers, Detroit and Former Dean of House of Representatives, Dead at 90*, MICH. RADIO (Oct. 27, 2019), <https://www.michiganradio.org/post/john-conyers-detroit-and-former-dean-house-representatives-dead-90> [perma.cc/5X2S-W4T3].

27. Kevin Freking, *Biden Backs Studying Reparations as Congress Considers Bill*, AP NEWS (Feb. 17, 2021), <https://apnews.com/article/biden-study-reparations-congress-e3c045ece4d0e0eae393a18a09a4a37e> [perma.cc/GY6S-SVMX].

28. The bill to establish a reparations commission, H.R. 40, was passed out of the House Judiciary Committee in April 2021 but is expected to die in the divided Senate. *See* Juana Summers, *House Lawmakers Advance Historic Bill to Form Reparations Commission*, NPR (Apr. 15, 2021, 1:43 AM), <https://www.npr.org/2021/04/14/986853285/house-lawmakers-advance-historic-bill-to-form-reparations-commission> [perma.cc/X2C7-KP8L]; *see also* WILLIAM A. DARITY JR. & A. KIRSTEN MULLEN, *FROM HERE TO EQUALITY* 27 (2020) (“For [B]lack reparations to become a reality, a dramatic change in who serves as the nation’s elected officials must take place, both in Congress and in the White House.”).

29. *See* RYAN NUNN, JANA PARSONS & JAY SHAMBAUGH, *HAMILTON PROJECT, NINE FACTS ABOUT STATE AND LOCAL POLICY* 1 (2019), https://www.brookings.edu/wp-content/uploads/2019/01/StateandLocal_Facts_Web_20190128.pdf [perma.cc/8HX6-HZFC].

30. *See* Wenger, *supra* note 26, at 734–36.

connections between past and present;³¹ in turn, this animates the development of thoughtful, conducive reparations. Additionally, municipalities can solicit input more easily from community members and encourage their involvement.³² A municipality-based approach also allows for accessibility and proximity between government and beneficiaries once the policy is in place. Such a plan can more effectively empower the community and enable rebuilding relationships with perpetrators of the injustice.³³

Municipal reparations are not without shortcomings. According to economist William Darity Jr., municipalities' insufficient funds³⁴ and piecemeal actions "cannot meet the debt for American racial injustice."³⁵ He estimates an approximately \$10 trillion price tag for effective reparations to Black Americans.³⁶ Others argue that a "patchwork" of state or municipal reparations laws could distract from a comprehensive federal approach.³⁷ However, the viability and community-centered benefits of local reparatory justice plans outweigh these concerns, at least for now. As the system and appetite currently stand, municipalities must lead the way.³⁸

The limited viability of court-centered efforts further demonstrates why municipalities are the appropriate site for pursuing reparations. Courts are not effective venues for reparations due to procedural bars such as standing, statutes of limitations, and sovereign immunity, as well as the traumatic toll of the adversarial system.³⁹ Every lawsuit regarding slavery reparations has been dismissed.⁴⁰ Similarly, litigation pursued by survivors of the Tulsa, Oklahoma race massacre and their descendants has also failed.⁴¹ The district

31. See Alfred L. Brophy, *Realistic Reparations*, 1 FREEDOM CTR. J., no. 1, 2008, at 1, 16.

32. See discussion *infra* Section I.B.1.

33. See Kaiman, *supra* note 12, at 1359–60; Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMPAR. L. REV. 157, 186 (2004).

34. Some municipalities also recognize this limitation. Los Angeles mayor Eric Garcetti stated that "[c]ities will never have the funds to pay for reparations on our own." Beam, *supra* note 6.

35. Neil Vigdor, *North Carolina City Approves Reparations for Black Residents*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2020/07/16/us/reparations-asheville-nc.html> [perma.cc/Y5HU-K8Z6].

36. DARTY & MULLEN, *supra* note 28, at 264.

37. Victor Luckerson, *What a Florida Reparations Case Can Teach Us About Justice in America*, TIME (Sept. 10, 2020, 12:22 AM), <https://time.com/5887247/reparations-america-rosewood-massacre> [perma.cc/589H-4ZRB].

38. See Nick Martin, *Can Cities Do Reparations Alone?*, NEW REPUBLIC (July 31, 2020), <https://newrepublic.com/article/158612/can-cities-reparations-alone> [perma.cc/GRA6-QVVJ] ("[E]very . . . county, city, and town in America should be held accountable if they are standing still.").

39. Cf. Roht-Arriaza, *supra* note 33, at 169 (stating that "access to courts, national or regional, will be insufficient" to provide reparations for international mass atrocities).

40. See, e.g., *Cato v. United States*, 70 F.3d 1103, 1111 (9th Cir. 1995) (dismissed on sovereign-immunity and lack-of-standing grounds); *In re Afr.-Am. Slave Descendants Litig.*, 375 F. Supp. 2d 721 (N.D. Ill. 2005) (dismissed based on lack of standing, political-question doctrine, statute of limitations, and failure to state a claim), *aff'd*, 471 F.3d 754, 763 (7th Cir. 2006).

41. *Alexander v. Oklahoma*, 382 F.3d 1206 (10th Cir. 2004). In September 2020, victims and descendants brought a new lawsuit based on theories of unjust enrichment and state public-

court that decided *In re African-American Slave Descendants Litigation* noted that “legislatures provide a friendlier forum than courts for racial remedies” because they are not “constrained by [the] judicial doctrine and precedent” that doomed the plaintiffs’ case.⁴²

Litigation also retraumatizes communities by forcing them to prove in an adversarial setting that their harm and suffering are worthy of damages.⁴³ Operating through legislatures—specifically, municipal legislative bodies—instead shifts focus from compensation to community-oriented social healing, a conceptualization that better captures reparations’ deeper aim of repair while shedding the divisive, combative facets of litigation.⁴⁴ But litigation is not entirely futile, as it can set the groundwork for action by other political actors.⁴⁵ For instance, legislation providing reparations to interned Japanese Americans was spurred by failed litigation that raised public consciousness.⁴⁶

Lastly, municipalities have more latitude than private institutions in offering reparations. Several universities have implemented reparations atoning for histories rooted in slavery or otherwise racist beginnings.⁴⁷ These plans tend to extend narrow redress: apologies, symbolic commemoration on campus, establishment of research programs, or payment and services to descendants of those directly impacted by the university’s actions.⁴⁸ Accordingly, their impacts have been limited. While educational institutions should pursue more robust reparatory programs,⁴⁹ municipalities have broader reach to rectify

nuisance law. See Brakkton Booker, *Oklahoma Lawsuit Seeks Reparations in Connection to 1921 Tulsa Massacre*, NPR (Sept. 3, 2020, 1:47 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/09/03/909151983/oklahoma-lawsuit-seeks-reparations-in-connection-to-1921-tulsa-massacre> [perma.cc/2GSE-THBG]; First Amended Petition, *Randle v. City of Tulsa*, No. CV-2020-1179 (Okla. Tulsa Cnty. Dist. Ct. Feb. 2, 2021), https://7f71937d-3875-4a5d-8642-bfb10d690e0f.filesusr.com/ugd/7b82e9_6f2ce917ef5b4ff7aaa1b0fcf282cc2a.pdf [perma.cc/MY6N-8LPA]. Only time will tell how this case will proceed, but reluctant skepticism seems appropriate.

42. 375 F. Supp. 2d at 736.

43. See Kaiman, *supra* note 12, at 1350.

44. See Wisenbaker, *supra* note 12, at 447.

45. Wenger, *supra* note 26, at 718.

46. *Id.* at 714.

47. See Evan Gerstmann, *Will America’s Universities Point the Way Towards Reparations for Slavery?*, FORBES (Nov. 2, 2019, 8:00 AM), <https://www.forbes.com/sites/evangerstmann/2019/11/02/will-americas-universities-point-the-way-towards-reparations-for-slavery> [perma.cc/PS93-QLEB].

48. See, e.g., Tracy Scott Forson, *Enslaved Labor Built These Universities. Now They Are Starting to Repay the Debt*, USA TODAY (Oct. 14, 2020, 11:16 AM), <https://www.usatoday.com/story/news/education/2020/02/12/colleges-slavery-offering-atonement-reparations/2612821001> [perma.cc/P685-C2NV]. For discussion about categories of beneficiaries and forms of compensation, see *infra* Sections I.B.1, I.B.2.

49. See P.R. Lockhart, *Georgetown University Plans to Raise \$400,000 a Year for Reparations*, VOX (Oct. 31, 2019, 11:05 AM), <https://www.vox.com/identities/2019/10/31/20940665/georgetown-reparations-fund-slavery-history-colleges> [perma.cc/YWV9-DHFK]. Rather than considering reparations through their own initiative, some institutions’ hands have been forced. For example, the Virginia House of Delegates voted to require five colleges in the common-

systemic issues plaguing entire communities. Municipal governing bodies are also accountable to their constituents, whereas specific reparatory demands might be ignored by private institutions.

As this Section has shown, there are both inherent and comparative advantages to pursuing reparations on a local level. However, various actors—federal, state, and local governments, as well as private institutions—offer models for future reparations legislation. Municipalities can look to these examples when developing reparations, a process that prompts its own set of questions.

B. *The Menu of Choices*

Reparations must be carefully crafted based on the context and type of harm involved.⁵⁰ In addition to designing reparations, legislators need to determine how to pursue a reparations policy, including who is invited to participate in formulating the plan⁵¹ and how to properly monitor the program's success.⁵² But the policy itself will vary along at least three axes: the beneficiary group, the form of compensation, and the funding source.

1. Who Are the Beneficiaries?

One of the most difficult challenges in extending reparations to victims of injustice is deciding who is included in the beneficiary class.⁵³ There are three main categories of potential beneficiaries: directly harmed individuals, the descendants of directly harmed individuals, and groups of people.

First, directly harmed individuals, or victims, could receive reparations. One example of this kind of scheme is the reparations paid to Japanese Americans interned during World War II. Just a few years after the war, the federal government paid \$37 million dollars to 26,000 claimants through the Japanese-American Evacuation Claims Act of 1948.⁵⁴ Congress went on to allocate

wealth—the University of Virginia, Virginia Commonwealth University, Virginia Military Institute, the College of William & Mary, and Longwood University—to create scholarships and economic development programs for descendants of enslaved people who worked at the schools. Colleen Grablick, *VA Law Will Require Universities to Create Scholarships for Descendants of Slaves*, NPR (May 6, 2021), <https://www.npr.org/local/305/2021/05/06/993878297/v-a-law-will-require-universities-to-create-scholarships-for-descendants-of-slaves> [perma.cc/KEF4-6GBX].

50. Cottom, *supra* note 23.

51. “[D]eference must be provided to the community for their desires and what it is that they wish to see executed in their reparations program.” Kaiman, *supra* note 12, at 1370. A diverse body of knowledgeable experts is often also included. *E.g.*, CAL. GOV’T CODE § 8301.2 (West 2021).

52. For example, Princeton Theological Seminary’s plan includes an implementation committee to ensure accountability and report progress. *Response*, PRINCETON SEMINARY & SLAVERY, <https://slavery.ptsem.edu/response> [perma.cc/6K6T-YXEU].

53. Adeel Hassan & Jack Healy, *America Has Tried Reparations Before. Here Is How It Went.*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/us/reparations-slavery.html> [perma.cc/CJ5Y-CQY9].

54. See *id.*; Japanese-American Evacuation Claims Act of 1948, ch. 814, 62 Stat. 1231 (codified at 50 U.S.C. app. §§ 1981–1987 (2012)).

\$20,000 to every Japanese American survivor through the Civil Liberties Act of 1988; a total of \$1.6 billion was distributed to more than 80,000 claimants under the statute.⁵⁵ Another victim-based reparations plan is the 2013 North Carolina law compensating surviving victims of a state-sponsored eugenics program.⁵⁶ Over 7,600 people were sterilized through this program in the mid-twentieth century, many of whom were poor, Black, and disabled.⁵⁷

Reparations for directly harmed individuals often encounter the problem of proof. Careful recordkeeping is necessary to identify victims.⁵⁸ The Civil Liberties Act of 1988's implementation was feasible because there were start and end dates to the internment, victims were easily identified through official records, and more than half were still alive when compensation was awarded.⁵⁹ However, when records are inadequate, reparations can fall short. In North Carolina, record books failed to memorialize the names of hundreds who were sterilized, and others' records were lost or destroyed.⁶⁰ These victims were deemed ineligible and thus left out of reparative coverage.⁶¹ Moreover, the passage of time often worsens this problem of proof.⁶²

Limiting reparations to only those directly harmed may also limit the program's adequacy. Some believe that the Civil Liberties Act of 1988 did not amply address the stigmatic harms and generational trauma that Japanese Americans suffered.⁶³ Internment caused not only individual trauma for those

55. See Redress Case Files, NAT'L ARCHIVES, <https://www.archives.gov/research/japanese-americans/redress> [perma.cc/B82K-6D72]; Civil Liberties Act of 1988, Pub. L. No. 100-383, §§ 101–109, 102 Stat. 903, 904–11 (codified as amended at 50 U.S.C. §§ 4211–4220). The statute enacting the Civil Liberties Act of 1988 also provided restitution to the Aleut residents of the Pribilof and Aleutian Islands for “injustices suffered and unreasonable hardships endured while those Aleut residents were under United States control during World War II” as well as property loss. Act of Aug. 10, 1988, Pub. L. No. 100-383, § 1(5), 102 Stat. 903, 903 Aleutian and Pribilof Islands Restitution Act, Pub. L. No. 100-383, §§ 201–209, 102 Stat. 903, 911–16 (codified as amended at 50 U.S.C. §§ 4231–4239).

56. Current Operations and Capital Improvements Appropriations Act of 2013, S.L. 2013-360, § 6.18, 2013 N.C. Sess. Laws 995, 1019–23 (expired 2015).

57. Eric Mennel, *Payments Start for N.C. Eugenics Victims, but Many Won't Qualify*, NPR (Oct. 31, 2014, 5:04 PM), <https://www.npr.org/sections/health-shots/2014/10/31/360355784/payments-start-for-n-c-eugenics-victims-but-many-wont-qualify> [perma.cc/QSJ8-4GFY]; Hayley Fowler, ‘Act of Genocide.’ Eugenics Program Tried to ‘Breed Out’ Black People in NC, Report Says, NEWS & OBSERVER (Aug. 18, 2020, 10:34 AM), <https://www.newsobserver.com/news/state/north-carolina/article244411987.html> [perma.cc/XY32-C96N].

58. See Kyle D. Logue, *Reparations as Redistribution*, 84 B.U. L. REV. 1319, 1340 (2004).

59. Hassan & Healy, *supra* note 53.

60. Mennel, *supra* note 57; MOVEMENT FOR BLACK LIVES, REPARATIONS NOW TOOLKIT 87 (2020), <https://m4bl.org/wp-content/uploads/2020/05/Reparations-Now-Toolkit-FINAL.pdf> [perma.cc/M7TZ-YEAL] [hereinafter REPARATIONS NOW TOOLKIT].

61. Mennel, *supra* note 57.

62. See Kaiman, *supra* note 12, at 1367–68.

63. See, e.g., Brophy, *supra* note 16, at 500 (“[The Act] provided only a modest payment to each individual and it made no effort to correlate payments with amounts of suffering.”). On the other hand, some believe that “even token compensation for historical wrongs can reverberate through generations, affording a chance to heal” by acknowledging that the internment of

who were incarcerated but also cultural trauma experienced by their children, including emotional distress, lost cultural identity, and psychological struggle.⁶⁴ Reparations created new opportunities for Japanese Americans to address this trauma and move away from self-blame and shame,⁶⁵ but the Civil Liberties Act of 1988's token payments could not fully compensate for the consequences felt by future generations.⁶⁶ Restricting reparations to only those who were harmed may fail to address wider, forward-looking goals of redistributing societal opportunity, wealth, and stability.

Still, focusing on directly harmed victims can be one of the most straightforward methods for providing reparations, so long as there is sufficient evidence for identification. It may also be the method most easily justifiable to the public. Municipalities must survey the extent to which historical records are available and, in instances where they are lacking, provide other ways for victims to demonstrate harm and receive reparations. They should also consider whether the plan will meet long-term reparative goals.

A second possible class of beneficiaries is direct descendants of victims. Georgetown University, which was partially funded by the sale of 272 enslaved individuals in 1838, illustrates this method.⁶⁷ The university led the way among private institutions by establishing reparations in 2016,⁶⁸ issuing an official apology and renaming buildings on campus for Black Americans.⁶⁹ But the core of its reparations plan focused on the descendants of the enslaved. Georgetown announced admissions preferences for these descendants⁷⁰ and pledged \$400,000 per year to finance schools and health clinics in areas of rural Louisiana where many of them now live.⁷¹

As with victim-based plans, there are benefits and drawbacks to plans that provide reparations to descendants. Descendant-based reparations offer the opportunity to "right a wrong" despite the victims themselves being deceased. But proof through recordkeeping can again be a barrier. Fortunately,

Japanese Americans was a historic injustice. Tracy Jan, *Reparations Mean More Than Money for a Family Who Endured Slavery and Japanese American Internment*, WASH. POST (Jan. 24, 2020), <https://www.washingtonpost.com/graphics/2020/business/reparations-slavery-japanese-american-internment> [perma.cc/4CCJ-N3VV].

64. Donna K. Nagata, Jackie H.J. Kim & Teresa U. Nguyen, *Processing Cultural Trauma: Intergenerational Effects of the Japanese American Incarceration*, 71 J. SOC. ISSUES 356, 359–64 (2015).

65. *Id.* at 365.

66. See Brophy, *supra* note 16, at 500; Jan, *supra* note 63.

67. See Saahil Desai, *The First Reparations Attempt at an American College Comes from Its Students*, ATLANTIC (Apr. 18, 2019), <https://www.theatlantic.com/education/archive/2019/04/why-are-georgetown-students-paying-reparations/587443> [perma.cc/3NUW-89XH].

68. See *id.*

69. Cottom, *supra* note 23.

70. *Id.*

71. Gerstmann, *supra* note 47.

Georgetown's 1838 sale was extensively recorded, which provided the foundation for a genealogical study to identify descendants.⁷² To date, over 10,600 direct descendants have been identified.⁷³

Lastly, a group of people could be selected to receive reparations. This beneficiary class includes all members of an identity group that meet certain criteria. For example, Pennsylvania state representative Chris Rabb introduced legislation in August 2019 to provide group reparations.⁷⁴ His plan would establish an opt-in entitlement program for those who have suffered from state laws, court decisions, and government practices that have systematically disadvantaged Black Pennsylvanians.⁷⁵

One challenge of group-based reparations is deciding who defines the group. Some experts firmly believe that "[t]he boundaries of who is within the community are for the community to define, not for the perpetrator to identify and define."⁷⁶ However, allowing groups to determine their own scope could jeopardize a reparations plan's viability through infighting and division, lack of awareness of the political forces necessary to pass the reparatory measure, and ignorance of economic resources' availability.⁷⁷ Another common critique of group-based reparations is that they fail to distinguish among different degrees of harm and may potentially even benefit some who did not suffer harms at all.⁷⁸ Representative Rabb responds to this concern by allocating benefits based on various factors, including genealogical connection to an enslaved ancestor and whether one or more ancestors of African descent resided in Pennsylvania during specific historical periods.⁷⁹ This may assuage critics, but reparations' underlying goals of creating opportunity and animating systemic transformation do not always demand a direct equivalency between harm and compensation.⁸⁰

72. Lockhart, *supra* note 49.

73. GEO. MEMORY PROJECT, <https://www.georgetownmemoryproject.org> [perma.cc/7B8W-FGQJ].

74. Claire Sasko, *Pa. Rep. Chris Rabb on His Push for State-Level Reparations for Slavery*, PHILADELPHIA (Sept. 5, 2019, 12:56 PM), <https://www.phillymag.com/news/2019/09/05/state-level-reparations-rabb> [perma.cc/73PZ-ZNAT].

75. *Id.*

76. Kaiman, *supra* note 12, at 1370.

77. These are common manifestations of intragroup conflict as well as challenges that may arise when involving political "outsiders" in legislative efforts. *Cf.* Carol Ebdon & Aimee L. Franklin, *Citizen Participation in Budgeting Theory*, 66 PUB. ADMIN. REV. 437, 438, 441 (2006) (describing how average citizens do not "understand the realities of the fiscal situation" but instead expect government "miracles" in resource-allocation decisions).

78. *See, e.g.,* Gray, *supra* note 15, at 1062. Even worse, those who themselves were implicated in abuses could receive reparations. *Id.*

79. Memorandum from Rep. Christopher M. Rabb, Pa. House of Representatives, to All House Members (Aug. 25, 2019), <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20190&cosponId=30163> [perma.cc/EEK2-EGKL].

80. *See supra* notes 14–15 and accompanying text.

Despite these potential obstacles, there are also great benefits to group-based reparations compared to victim- or descendant-based plans. First, they often overcome the problem of proof. Group-based reparations do not require records of specific incident-inflicted injury, but rather more demonstrable membership in an identity group. Second, they offer a wider benefit. Because group-based plans have the potential to extend reparations to a greater number of people, they can address more pervasive, systemic harms. Third, they can counter a concern that victims or their descendants who have since achieved wealth and social or political success should not receive reparations.⁸¹ For example, group-based reparations often take the form of community reinvestment, such as job training or health education programs.⁸² These initiatives, while available to all group members, are typically only accessed by those with lesser means. Alternatively, reparations could be channeled to the most marginalized within the harmed group.⁸³ For example, activist Charlene Carruthers suggests directing reparations for Black oppression to Black women, queer, and transgender people,⁸⁴ groups whose challenges have been compounded by intersectional identity.

Overall, group-based reparations allow for the greatest vindication of broader, more systemic wrongs. This method helps ameliorate decades-old racial hierarchies, whereas providing reparations to individuals is more limited. Group members should be part of the conversation in defining the group's scope,⁸⁵ with members working alongside municipal decisionmakers to ensure the plan's practicality and operating through group representatives to present a unified front.

In weighing beneficiary options, policymakers should reflect on the purpose of their reparations plan. Is the plan primarily intended to empower historically disadvantaged communities, pay compensation to specific individuals,

81. See A. Mechele Dickerson, *Designing Slavery Reparations: Lessons from Complex Litigation*, 98 TEX. L. REV. 1255, 1260 (2020) (discussing critiques of reparations proposals as being unjust by including “undeserving” Black people such as Oprah). Ta-Nehisi Coates might disagree, articulating that “wealthy African Americans are not the equivalent of . . . wealthy white Americans.” See *How the 1st US City to Fund Reparations Pulled It Off*, ABC NEWS, <https://abcnews.go.com/US/video/1st-us-city-fund-reparations-pulled-off-76216631>.

82. For further discussion of community-reinvestment programs, see *infra* notes 126–142 and accompanying text.

83. See DORITY & MULLEN, *supra* note 28, at 267 (suggesting a portion of reparations funds be designated for “competitive application, with priority given to those applicants with lower current wealth or income positions”).

84. Destin Jenkins, *What Does It Really Mean to Invest in Black Communities?*, NATION (June 29, 2020), <https://www.thenation.com/article/society/invest-divest-police> [perma.cc/X7QY-ZPJ3].

85. See Miller, *supra* note 19, at 391 (“For groups who are oppressed and silenced, being at the center of the story is a form of victory in itself.”); MARIAME KABA, *WE DO THIS ’TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* 105 (2021) (explaining that the Chicago reparations ordinance was “one concrete way that some of us have chosen to fight to make [Black lives] matter. . . . [W]e who struggle together will have defined (in part) the vision of what we mean by Black lives mattering.”).

send a message, or something else? They should also consider what evidence is available to demonstrate harm and whether under- or overinclusivity is a greater concern. Additionally, they should match the beneficiary class to the harm: reparations for distinct incidents can be paid to individuals, while those for historic, systemic injuries are better served by group-based reparations. Similar contemplation is required when selecting forms of compensation.

2. What Form of Compensation?

The next consideration in creating reparations legislation is the form of compensation that reparations will take. One element must be included in any reparations plan that addresses current injustice: the government must pledge to stop perpetuating the harm.⁸⁶ Beyond that, common types of compensation fall into four categories: apology, investment, educational reform, and opportunity for individuals impacted by the criminal legal system.

Apologies are a predominant feature of reparations.⁸⁷ They are often rooted in the language of legislation itself. For instance, the purpose of the Civil Liberties Act of 1988 was to “apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens” of Japanese ancestry.⁸⁸ Apologies can also take nontextual forms, such as historical designations of the affected site⁸⁹ or victimized community,⁹⁰ museums,⁹¹ and days of commemoration.⁹² An apology’s significance lies in its symbolism and moral acknowledgment.⁹³ For some who were harmed, this acknowledgment is all that they seek; for others, the apology

86. REPARATIONS NOW TOOLKIT, *supra* note 60, at 18, 26.

87. The importance of apology is demonstrated by the fact that the California reparations task force will, among other recommendations, advise how the state can take steps to issue a sufficient formal apology. See CAL. GOV’T CODE § 8301.1(b)(3)(B) (West 2021).

88. 50 U.S.C. §§ 4202(2).

89. In February 2021, Athens, Georgia, adopted a resolution apologizing for “the county’s role in destroying Linnentown, [a] Black, middle-class community,” in the 1960s to make way for University of Georgia dormitories. Rachel M. Cohen, *Inside the Winning Fight for Reparations in Athens, Georgia*, THE INTERCEPT (Apr. 9, 2021, 7:00 AM), <https://theintercept.com/2021/04/09/reparations-georgia-athens-uga-linnentown> [perma.cc/LHE9-H486]. The resolution pledges to create an on-site memorial where Linnentown once stood, among other plans.

90. Kaiman, *supra* note 12, at 1370.

91. Roy L. Brooks, *Getting Reparations for Slavery Right—A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251, 283 (2004) (suggesting “Museum[s] of Slavery” throughout the country as part of reparations).

92. Wisenbaker, *supra* note 12, at 446; see also *National Sorry Day 2020*, RECONCILIATION AUSTL. (May 25, 2020), <https://www.reconciliation.org.au/national-sorry-day-2020> [perma.cc/7LFA-27PT] (explaining how Australia’s National Sorry Day acknowledges “the mistreatment of Aboriginal and Torres Strait Islander people who were forcibly removed from their families and communities”).

93. See Posner & Vermeule, *supra* note 16, at 730; Miller, *supra* note 19, at 366.

represents “something of an official promissory note on future reparative payments.”⁹⁴ Municipalities should include an apology in any reparations legislation because other forms of compensation lose force without it.⁹⁵

Another type of compensation is investment. Investment can take varied forms, including direct payments, housing benefits, and community reinvestment. Perhaps the most obvious—although by no means uncontroversial—reparatory measure is direct payments.⁹⁶ Direct payments could be made in cash, either as a lump sum or in installments.⁹⁷ They could also be extended through tax credits or deductions.⁹⁸ The only instance of a city extending reparations to people abused by a police force is illustrative.⁹⁹ Between 1972 and 1991, former Chicago Police Department detective Jon Burge directly participated in or approved the torture of at least 118 Chicagoans to force false confessions.¹⁰⁰ Most of the victims were Black.¹⁰¹ A forty-year struggle involving litigation, investigative journalism, and grassroots organizing ultimately led to a holistic package of reparations far surpassing remedies available through the courts.¹⁰² In 2015, the Chicago City Council passed a resolution condemning Burge and providing a \$100,000 direct payment to each torture victim.¹⁰³

Symbolic and practical benefits aside, Chicago’s plan also illustrates some of the insufficiencies and challenges of direct payments. Calculating a monetary amount for each beneficiary is difficult. Burge’s victims had varied prison sentences.¹⁰⁴ Some were innocent, some were exonerated, and some were guilty.¹⁰⁵ Despite these differences, each received the same amount of money from the city in reparations. This reveals how direct payment reparations may be stymied by administrability concerns as well as the inability to put a price

94. Posner & Vermeule, *supra* note 16, at 730.

95. See KATHERINE FRANKE, REPAIR: REDEEMING THE PROMISE OF ABOLITION 143 (2019) (“At a minimum, we owe this kind of recognition and remembrance . . .”).

96. Logue, *supra* note 58, at 1321.

97. *Id.* at 1321, 1358.

98. *Id.* at 1359.

99. Planet Money, *Paying for the Crime*, NPR, at 15:51, 16:43 (July 20, 2016, 6:34 PM), <https://www.npr.org/sections/money/2016/07/20/486785422/episode-713-paying-for-the-crime>. The significance of Chicago’s reparations plan cannot be overstated. See KABA, *supra* note 85, at 105 (“The Burge torture survivors’ reparations ordinance embodies (in part) what we mean when we say that #BlackLivesMatter. It provides a template for demands that should be met for all Black people living in this country.”).

100. Baker, *supra* note 1.

101. *Id.*

102. Joey L. Mogul, *The Struggle for Reparations in the Burge Torture Cases: The Grassroots Struggle That Could*, 21 LOY. PUB. INT. L. REP. 209, 209 (2015); see also Planet Money, *supra* note 99, at 13:57 (explaining that the statute of limitations had run by the time Burge’s reign of torture had been exposed).

103. Chicago City Council, Substitute Resolution 2015-256 (May 6, 2015) [hereinafter Chicago Resolution] [perma.cc/DS6M-MGUV]; Planet Money, *supra* note 99, at 17:25.

104. Planet Money, *supra* note 99, at 14:24.

105. *Id.* Others still had already sued the city and settled. *Id.*

tag on individual suffering. In that vein, it is difficult, if not impossible, to quantify the cost of psychological trauma.¹⁰⁶ Reparations recipients often consider the money offered inadequate to compensate for their suffering;¹⁰⁷ when asked if \$100,000 was enough, many Chicago torture victims responded that numbers miss the point.¹⁰⁸

Despite these drawbacks, direct payments offer the advantage of facilitating potentially large-scale wealth redistribution. The racial wealth gap persists regardless of mutable factors like educational attainment level or household income.¹⁰⁹ Accordingly, some argue that direct payments are the only way to truly achieve equity and hence the only just form of reparations.¹¹⁰ However, direct payments alone do not sufficiently build power in marginalized communities, in part because they are time limited and unaccompanied by structural support and empowerment.¹¹¹ They are restitution-like but do not necessarily generate equity. And the amount of money that is available and politically viable is insufficient to make amends for systemic harms.¹¹²

Another type of investment is housing benefits, including individualized homeownership assistance.¹¹³ There are stark disparities between white and

106. See Kaiman, *supra* note 12, at 1363.

107. Cf. Roht-Arriaza, *supra* note 33, at 158 (“What could replace lost health and serenity; the loss of a loved one or of a whole extended family; a whole generation of friends; the destruction of home and culture and community and peace?”). Japanese American John Tateishi, who was incarcerated at the Manzanar internment camp as a child, noted that money “wasn’t going to abrogate” the “three years of imprisonment and the 30 years of guilt and shame we lived with.” Isabella Rosario, *The Unlikely Story Behind Japanese Americans’ Campaign for Reparations*, NPR: CODE SWITCH (Mar. 24, 2020, 6:40 AM), <https://www.npr.org/sections/codeswitch/2020/03/24/820181127/the-unlikely-story-behind-japanese-americans-campaign-for-reparations> [perma.cc/WK54-J32E]; see also *supra* notes 63–66 and accompanying text.

108. Planet Money, *supra* note 99, at 22:28. Ronald Kitchen, who sued Chicago and settled for \$6.8 million, provides further evidence of this belief. Kitchen was adamant that “it’s not about how much money you get because the things that was taken away from you, you can’t buy that with money.” *Id.* So what *does* matter to these victims? Different individuals have different priorities. For victims who received reparations checks but remain incarcerated, their most pressing wish is a day in court, as promised to them by the resolution. *Reparations for the Chicago Police Torture Survivors*, CHI. TORTURE JUST. MEM’LS, <https://chicagotorture.org/reparations/ordinance> [perma.cc/ZWE7-2XX4] (“[The city] calls on local law enforcement officials to provide evidentiary hearings to the torture survivors who remain behind bars who had their coerced confessions used against in their criminal proceedings . . .”). For others, another part of the resolution matters most: the city’s schools teaching their stories. Planet Money, *supra* note 99, at 23:46. This curricular component is addressed later in this Section.

109. Dickerson, *supra* note 81, at 1278.

110. See, e.g., DARITY & MULLEN, *supra* note 28, at 265.

111. See REPARATIONS NOW TOOLKIT, *supra* note 60, at 28 (“[S]imply writing a check is not reparations.”); Jan, *supra* note 63 (“[R]eparations checks would do little for young African Americans segregated in neighborhoods devoid of jobs, education, even basic infrastructure.”).

112. Brophy, *supra* note 16, at 500 (“There is not enough wealth in the world to provide compensation for all the wrongs that have been done, and so payments are for limited tragedies and can be at best little more than symbolic.”).

113. Katherine Franke’s book *Repair: Redeeming the Promise of Abolition* provides an illuminating account of racial injustice and offers a model for reparations through property reforms

minority groups with respect to homeownership; in 2020, 73 percent of white families owned their home compared to only 44 percent of Black families.¹¹⁴ Black homeowners face higher tax assessments, lower property-value appreciation rates, and greater likelihood of being denied mortgages.¹¹⁵ Reparatory plans can play a critical role in mitigating these inequities.

Evanston, Illinois, provides a concrete example of housing-policy reparations.¹¹⁶ In March 2021, the city announced its first program in a larger reparations package: sixteen Black Evanstonians will receive \$25,000 to finance the purchase or repair of a home.¹¹⁷ Another example is the Department of Housing and Urban Development's Section 184 Indian Home Loan Guarantee Program, a home mortgage program for members of certain tribes that provides low down payments and flexible underwriting.¹¹⁸

Housing-policy reparations are subject to two critiques: the perceived lack of nexus between the compensation and the wrong, and their purported limited scope. But whether one looks at centuries-old wrongs, such as the theft of Black land during the antebellum period,¹¹⁹ or more recent ones, like overtaxing Black Detroit homeowners during the Great Recession,¹²⁰ it is clear that marginalized communities have been deprived of equal access to homeown-

including third-sector housing. See FRANKE, *supra* note 95. On a larger scale than housing benefits are land trusts, which could redress tragedies such as Hawaiian land dispossession. For more on Hawaiian land dispossession, see Rob Perez & Agnel Philip, *The Government Promised to Return Ancestral Hawaiian Land, Then Never Finished the Job*, PROPUBLICA (Dec. 19, 2020, 5:30 AM), <https://www.propublica.org/article/the-government-promised-to-return-ancestral-hawaiian-land-then-never-finished-the-job> [perma.cc/BU7D-VFRX], and *Developments in the Law—Unjust Enrichment*, 133 HARV. L. REV. 2062, 2148–71 (2020).

114. Michele Lerner, *One Home, A Lifetime of Impact*, WASH. POST (July 23, 2020), <https://www.washingtonpost.com/business/2020/07/23/black-homeownership-gap> [perma.cc/M86W-HWBB].

115. *Id.*

116. *Evanston Local Reparations*, CITY OF EVANSTON, <https://www.cityofevanston.org/government/city-council/reparations> [perma.cc/UD5N-ENGD].

117. Char Adams, *Evanston Is the First U.S. City to Issue Slavery Reparations. Experts Say It's a Noble Start.*, NBC NEWS (Mar. 26, 2021, 2:18 PM), <https://www.nbcnews.com/news/nbcblk/evanston-s-reparations-plan-noble-start-complicated-process-experts-say-n1262096> [perma.cc/7ZR3-N754]. To be eligible for the program, an applicant must have resided in Evanston between 1919 and 1969, be a direct descendant of such a resident, or have experienced housing discrimination due to the city's policies and practices after 1969. Evanston City Council, Resolution Authorizing the Local Reparations Restorative Housing Program 11 (Mar. 22, 2021) [perma.cc/6GDH-EY7A].

118. *Section 184 Indian Home Loan Guarantee Program*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/ih/homeownership/184 [perma.cc/VP68-ZXLS].

119. Coates, *supra* note 17.

120. Louis Aguilar, *Poll: Detroiters Want Reparations for Past Housing Discrimination*, BRIDGE DETROIT (Apr. 22, 2021), <https://www.bridgedetroit.com/poll-detroiters-want-reparations-for-past-housing-discrimination/> [perma.cc/L58F-8XXS].

ership. Some even contend that property reforms are the optimal form of reparatory compensation because of this strong linkage.¹²¹ And these plans may actually have far-reaching effects. Studies show that homeownership is critical to building generational wealth, which serves reparative goals.¹²² Accordingly, municipalities should consider providing reparations through housing policies when developing a plan with lasting impact. By decreasing mortgage rates,¹²³ passing inclusionary zoning laws that encourage affordable multifamily housing,¹²⁴ providing low down payment options, or establishing community land trusts,¹²⁵ housing-policy programs could significantly reduce homeownership disparities.

A final investment option is community reinvestment, which encompasses services and physical resources accessible to all members of a community. Senator Cory Booker's proposed Marijuana Justice Act of 2017, for example, would remove marijuana from the schedule of controlled substances and create reparations through a Community Reinvestment Fund.¹²⁶ This fund would allow the Department of Housing and Urban Development to establish a program to "reinvest in communities most affected by the war on drugs, which shall include providing grants to impacted communities for programs such as job training[;] . . . public libraries; community centers; programs and opportunities dedicated to youth; . . . and health education programs."¹²⁷ These programs would increase mobility and economic prosperity in neighborhoods that were disproportionately impacted by the criminalization of marijuana.¹²⁸

Another possibility for community reinvestment is establishing medical facilities. Black Americans receive disproportionately inadequate health care,¹²⁹ hospitals remain segregated, as highlighted by COVID-19 outcomes,¹³⁰ and

121. See, e.g., Adams, *supra* note 117 ("A historical report on [Evanston's] policies identified housing as the 'strongest case for reparations' by the city . . ."); see also FRANKE, *supra* note 95, at 17 ("For a group of people who suffered the atrocity of being property, remedy of that outrage makes most sense with property. . . . [Property] is the central right on which all others rest.").

122. See Lerner, *supra* note 114. Local governments are aware of the impact of housing benefits: Asheville, North Carolina, and Buncombe County have both pledged to increase Black homeownership as a strategy to support upward mobility. Asheville Resolution, *supra* note 7; Buncombe Resolution, *supra* note 7.

123. See Molly Solomon & Erin Baldassari, *One Way to Close the Black Homeownership Gap: Housing as Reparations*, KQED (Oct. 12, 2020), <https://www.kqed.org/news/11841801/what-we-owe-housing-as-reparations> [perma.cc/SN65-QAYX].

124. See Dickerson, *supra* note 81, at 1279.

125. See FRANKE, *supra* note 95, at 16.

126. Marijuana Justice Act of 2017, S. 1689, 115th Cong. §§ 2, 4 (2017).

127. *Id.* § 4(c) (cleaned up).

128. See Recent Proposed Legislation, *Marijuana Justice Act of 2017, S. 1689, 115th Cong.*, 131 HARV. L. REV. 926 (2018).

129. Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, 43 HUM. RTS., no. 3, 2020, at 19.

130. David A. Asch & Rachel M. Werner, Opinion, *Segregated Hospitals Are Killing Black People. Data From the Pandemic Proves It.*, WASH. POST (June 18, 2021, 11:15 AM),

community members involved in reparations planning have identified mental health as a priority.¹³¹ These problems offer worthy fodder for municipal reparations. As previously mentioned, Georgetown's reparations funds finance health clinics in Louisiana.¹³² Additionally, the Chicago reparations package included the financing of a center to provide psychological counseling to victims, their families, and others affected by law enforcement torture and abuse.¹³³ Unfortunately, local government funding has been insufficient to meet increased demand for the Chicago Torture Justice Center's services.¹³⁴

If implemented properly with adequate funds, community-reinvestment programs accomplish three goals: "ameliorat[ing] future conditions [in the community] to improve the lives of [the] marginalized community as a whole,"¹³⁵ preventing the type of historic injustice from occurring again,¹³⁶ and having a racially redistributive effect.¹³⁷ The Marijuana Justice Act of 2017 focuses primarily on the first and third goals, and the Chicago Torture Justice Center targets the first.

One drawback to community reinvestment is that it "conflates two separate obligations of government: to make reparation for wrongs it committed, and to provide essential services to the population."¹³⁸ Doing so allows the government to shirk responsibility by "slap[ping] a 'reparations' label" on what it is already obligated to do.¹³⁹ Also, this method of municipal reparations may fail to reach all who were harmed. Migratory patterns and individual choices may lead some who were affected to move elsewhere;¹⁴⁰ they would no longer be present to reap the reparations plans' benefits.

<https://www.washingtonpost.com/opinions/2021/06/18/segregated-hospitals-are-killing-black-people-data-pandemic-proves-it> [perma.cc/G4FJ-K6XD].

131. Jackie Botts, *California Reparations Committee Confronts Harms of Slavery, Debates Direct Payments*, CALMATTERS (July 26, 2021), <https://calmatters.org/california-divide/2021/06/california-reparations-committee-direct-payment> [perma.cc/AU67-GCVD].

132. Gerstmann, *supra* note 47.

133. See Chicago Resolution, *supra* note 103.

134. *History of Chicago's Reparations Movement*, CHI. TORTURE JUST. CTR., <https://www.chicagotorturejustice.org/history> [perma.cc/D7VC-K8R5]; Natalie Moore, *Burge Torture Survivors Seek Support for Counseling, Public Memorial*, WBEZ CHI. (Jan. 27, 2020, 6:00 AM), <https://www.wbez.org/stories/burge-torture-survivors-seek-support-for-counseling-public-memorial/24399765-07c4-4a09-a94a-2745fec582f7> [perma.cc/92S9-VCLA]. It is worth mentioning that another piece of the resolution—a public memorial—never came into existence. *Id.*

135. Wisenbaker, *supra* note 12, at 446.

136. Kaiman, *supra* note 12, at 1359.

137. Logue, *supra* note 58, at 1365.

138. Roht-Arriaza, *supra* note 33, at 188.

139. *Id.*

140. See, e.g., ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* (2010).

Despite these concerns, community reinvestment may be one of the most valuable forms of reparations. Rather than providing cash payments to redistribute wealth, it creates programs to do so in a more sustainable manner.¹⁴¹ For example, mental health resources ensure communities can address trauma associated with long-term harms,¹⁴² while youth and job support services extend reparations' value into the future.¹⁴³

A third major category of compensation that policymakers should consider is educational reforms. Educational reforms might have two components: curricular focus and financial assistance in higher education.¹⁴⁴ Implementing curriculum changes in public schools is a powerful form of reparations. For example, the Chicago City Council resolution required that the city's public schools "incorporate into [their] curriculum a history lesson about the Chicago Police torture cases and the struggles to hold those accountable and to seek reparations."¹⁴⁵ Many consider this change the reparations package's most meaningful component "because of what it asked from the

141. See Carlton Waterhouse, *African American Reparations: A Rough Sketch of the Road to Educational and Economic Restoration*, 63 HOW. L.J. 393, 402–03 (2020).

142. See Kristen Gwynne, *Chicago to Pay \$5.5 Million in Reparations for Police Torture Victims*, ROLLING STONE (May 6, 2015, 10:27 PM), <https://www.rollingstone.com/politics/politics-news/chicago-to-pay-5-5-million-in-reparations-for-police-torture-victims-187450> [perma.cc/E9VC-ZA7Y] (quoting Mariame Kaba applauding Chicago's establishment of a center for victims "to . . . receive care for the trauma they've experienced").

143. "Give a man a fish, and you feed him for a day. Teach a man to fish, and you feed him for a lifetime."

144. This Note focuses on these components because of their applicability to a variety of harms and because there are existing examples to analyze, but there are other potential reforms involving education. For ideas about media for public consumption and scholarly publications on historic injustices, see 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, 35 (2009). Another idea is expanded early childhood education programs and other efforts to reduce the opportunity and achievement gaps. See, e.g., Buncombe Resolution, *supra* note 7. Elsewhere, reparations advocates have called for the creation of K-12 educational programs for minority students. See, e.g., RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 244–46 (2000). Further, universities could extend admissions preferences to descendants of enslaved people. See Cottom, *supra* note 23; Natalie Colarossi, *Brown University Students Vote for Reparations to Give Preferential Admissions to Slave Descendants*, NEWSWEEK (Apr. 1, 2021, 10:15 AM), <https://www.newsweek.com/brown-university-reparations-could-mean-preferential-admissions-slave-descendants-1580422> [perma.cc/J2AT-F9EB]. Another example of an educational reform not discussed in this Note is granting student-loan forgiveness to historically disadvantaged minorities. See Wesley Whistle, *Cancel Black Student Debt as Reparations*, FORBES (July 11, 2020, 10:07 AM), <https://www.forbes.com/sites/wesleywhistle/2020/07/11/cancel-black-student-debt-as-reparations> [perma.cc/5WSP-8RSH]. Finally, there are demands to increase support to minority-serving institutions. See, e.g., Desai, *supra* note 67; see also *The Biden Plan for Education Beyond High School*, BIDEN HARRIS, <https://joebiden.com/beyondhs> [perma.cc/2MPF-F5KM] (outlining President Biden's plan to invest \$18 billion in grants to historically Black colleges and universities, tribal colleges and universities, and other under-resourced minority-serving institutions).

145. *Reparations for the Chicago Police Torture Survivors*, *supra* note 108.

city: not money, but time and talk.”¹⁴⁶ The curriculum had a noticeable impact on students grappling with the past,¹⁴⁷ though there was some pushback. Several parents opposed the teaching of material they considered confrontational and controversial.¹⁴⁸ Overall, however, this classroom initiative represents a hopeful vision for the future of reparations: commemorating past harm, imparting on younger generations the importance of ensuring that similar practices are not repeated, and generating a new narrative around social justice.¹⁴⁹

Financial support for higher education is another reparative option. For instance, in 1994 Florida passed a bill providing reparations for the 1923 race-based massacre of Black residents in Rosewood, Florida.¹⁵⁰ This bill gave survivors’ descendants preference for a minority scholarship fund, among other forms of compensation.¹⁵¹ Princeton Theological Seminary provides another example: in 2019, the seminary created a \$27.6 million endowment to pay reparations after a report detailed the institution’s deep ties to chattel slavery.¹⁵² Its plan includes thirty scholarships and five doctoral fellowships for descendants of enslaved people or those from otherwise underrepresented groups.¹⁵³ While the seminary’s plan supports descendants as well as historically marginalized groups more broadly, Chicago’s reparations plan maintains support—in the form of free tuition at community college—only for victims and their family members.¹⁵⁴ This more targeted assistance might make sense for recent, distinct harms with still-living victims.

One critique of financial assistance programs is that while they can make higher education a reality, they do not ensure fair treatment or opportunity upon matriculation.¹⁵⁵ Nevertheless, providing access to education “is fundamental to individual and community prosperity” and serves as a building block for future progress.¹⁵⁶

146. Baker, *supra* note 1.

147. “This sense of history, of course, will be central to any serious attempt at reparations in America.” *Id.*

148. Those parents who expressed opposition lived in an area “where many cops live.” *Id.*

149. *Id.*; Yamamoto & Obrey, *supra* note 144, at 35.

150. Act of May 4, 1994, ch. 359, § 5, 1994 Fla. Laws 3296, 3297–98 (repealed 2003).

151. *Id.*

152. Ed Shanahan, *US Private School Pledges \$27m in Slavery Reparations*, INDEPENDENT (Oct. 22, 2019, 1:51 PM), <https://www.independent.co.uk/news/world/americas/us-private-school-slavery-reparation-27m-princeton-theological-seminary-a9166146.html> [perma.cc/PS4X-FLYH].

153. *Princeton Theological Seminary Announces Plan to Repent for Ties to Slavery*, GATHER, <https://gather.ptsem.edu/princeton-theological-seminary-announces-plan-to-repent-for-ties-to-slavery> [perma.cc/J9VV-UR58].

154. See Chicago Resolution, *supra* note 103.

155. *Cf.* DARITY & MULLEN, *supra* note 28, at 249 (discussing affirmative action).

156. See Waterhouse, *supra* note 141, at 396–97; see also Tressie McMillan Cottom, *No, College Isn’t the Answer. Reparations Are.*, WASH. POST (May 29, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/05/29/no-college-isnt-the-answer-reparations-are>

Municipalities should strongly consider instituting educational reforms in any reparations legislation. The significance of curricular changes—both for students and for those who suffered at the hands of the government—fulfills reparations’ symbolic and didactic goals.¹⁵⁷ Financial assistance offers possibilities that may otherwise be unreachable due to headwinds in the paths of people of color.

The last major form of compensation generates opportunity for those impacted by the racially discriminatory¹⁵⁸ criminal legal system.¹⁵⁹ Municipalities could offer extensive reentry services like those Senator Booker championed at the federal level.¹⁶⁰ They could also expand employment opportunities by building off of existing infrastructure. For example, the Philadelphia Department of Commerce operates the Fair Chance Hiring Initiative, which provides financial incentives to businesses that hire returning citizens.¹⁶¹ Additionally, over 150 cities and counties have adopted “ban the box” policies for public sector employment.¹⁶² Such policies remove conviction and arrest history questions from the initial stages of job applications;¹⁶³ in doing

[perma.cc/ZXV4-EC8Y] (“[E]ducation . . . is an opportunity vehicle that works best when coupled *with* justice and not confused *for* justice.”).

157. DARITY & MULLEN, *supra* note 28, at 269 (“The work of national memory and national consciousness is an essential component of an effective program of [B]lack reparations.”).

158. In every part of the system, there are disparities in treatment and outcomes between white and Black people. *See, e.g.*, Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. MICH. J.L. REFORM 387, 400–02 (2017).

159. Certain options for this form of compensation are only practicable on a federal or state level. This includes the expungement of certain types of convictions, which Senator Booker included in his proposed legislation. Marijuana Justice Act of 2017, S. 1689, 115th Cong. § 3(c) (2017) (“Each Federal court shall issue an order expunging each conviction for a marijuana use or possession offense . . .”). Another idea is restoring voting rights for individuals convicted of felonies. All but two states have enacted felon-disenfranchisement laws for those currently serving sentences, and eleven states restrict voting even for those who have completed their sentences. *See* JEAN CHUNG, THE SENT’G PROJECT, VOTING RIGHTS IN THE ERA OF MASS INCARCERATION: A PRIMER (2021), <https://www.sentencingproject.org/wp-content/uploads/2015/08/Voting-Rights-in-the-Era-of-Mass-Incarceration-A-Primer.pdf> [perma.cc/2Y7B-MZEA]. *See generally* Richardson v. Ramirez, 418 U.S. 24 (1974) (holding that permanently disenfranchising individuals convicted of felonies does not violate the Fourteenth Amendment). The majority of Americans support restoring voting rights only to formerly, and not currently, incarcerated individuals. Jeff Manza, Clem Brooks & Christopher Uggen, *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OP. Q. 275, 283 (2004); Sam Levine & Ariel Edwards-Levy, *Most Americans Favor Restoring Felons’ Voting Rights, but Disagree on How*, HUFFPOST (Mar. 21, 2018, 6:56 PM), https://www.huffpost.com/entry/felons-voting-rights-poll_n_5ab2c153e4b008c9e5f3c88a [perma.cc/D4KK-XRWE].

160. *See* S. 1689 § 4(c)(2).

161. *Fair Chance Hiring Initiative*, CITY OF PHILA., <https://www.phila.gov/programs/fair-chance-hiring-initiative> [perma.cc/QF9H-ZKB3].

162. BETH AVERY & HAN LU, NAT’L EMP. L. PROJECT, BAN THE BOX 2 (2020), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-Oct-2020.pdf> [perma.cc/756S-64DS].

163. *Id.*

so, they help to erase stigma and employment obstacles. The latter is an extreme problem, with almost 75 percent of formerly incarcerated individuals unemployed a year after release.¹⁶⁴ These and other forms of reparatory compensation related to the criminal legal system would have a particularly stunning effect on Black and Latinx Americans, who currently constitute 56 percent of the nation's incarcerated population.¹⁶⁵

Opponents fear these plans would endanger the public or undermine retributivist punishment, but the plans' manifold societal benefits outweigh their purported failings.¹⁶⁶ For example, employees with criminal histories have higher retention rates and greater company loyalty.¹⁶⁷ Reparatory programs that provide this form of compensation would restore some dignity and agency to those dehumanized by our carceral system.

Municipalities face myriad choices in selecting a reparatory plan's form of compensation. Is the focus primarily on backward-thinking goals, achieved by apology and often direct payment? Or is it forward-thinking, actualized through community reinvestment, education reform, and opportunity for returning citizens?¹⁶⁸ Does the municipality want to build power in a historically victimized community, make a group or individual "whole," prevent future suffering, or provide resources? The answers to these questions will guide the substance of a given reparations policy.

3. Who Pays?

The last critical consideration in crafting reparations legislation is who will fund the plan. Reparations can be financed through taxpayer dollars, tax revenue from specific sales, private fundraising, or an invest/divest framework.

The most commonly floated idea for funding reparations is through general taxpayer dollars. A significant benefit of taxpayer-funded reparations is ease of implementation, as the government would not have to create a separate

164. ACLU, BACK TO BUSINESS: HOW HIRING FORMERLY INCARCERATED JOB SEEKERS BENEFITS YOUR COMPANY 4 (2017), https://www.aclu.org/sites/default/files/field_document/060917-trone-reportweb_0.pdf [perma.cc/27EA-PP3N].

165. *Criminal Justice Fact Sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet> [perma.cc/4H8H-XTLE].

166. This is true for municipal as well as federal and state options. See *supra* note 159. Record expungement removes barriers to housing, education, and employment; the wages of those whose records are expunged increase by over 20 percent within a year. See J.J. Prescott & Sonja B. Starr, Opinion, *The Case for Expunging Criminal Records*, N.Y. TIMES (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/opinion/expunge-criminal-records.html> [perma.cc/R5ZN-4UDS]. Expungement has also been found to reduce recidivism. *Id.* Similarly, restoring the right to vote reduces recidivism and increases public safety. NICOLE D. PORTER, THE SENT'G PROJECT, VOTING IN JAILS (2020), <https://www.sentencingproject.org/wp-content/uploads/2020/05/Voting-in-Jails.pdf> [perma.cc/7W3B-6ZDK].

167. ACLU, *supra* note 164, at 8.

168. This backward-thinking versus forward-thinking assessment is one way of categorizing some of the compensation options, but it's not the only way. There are also overlaps: for example, curricular reform is backward-thinking in teaching about the injustice.

framework to collect funds. On the other hand, an oft-articulated concern is the degree of “slippage” between taxpayers and wrongdoers.¹⁶⁹ Many argue that taxpayers are “not responsible for the . . . actions of their elected officials,” particularly those actions “that occurred when the current taxpayers likely were not even living in the municipality.”¹⁷⁰ But because most taxpayers have benefited from white supremacy and other systems of oppression,¹⁷¹ this negates their resistance to taking responsibility.¹⁷² Another critique is that there are inevitably some members of the beneficiary group who are themselves taxpayers and will therefore contribute to their own reparations.¹⁷³ This defeats the very essence of reparations. One solution to this paradoxical outcome would be to narrow the definition of the taxpaying class; for example, levying a special surcharge or tax on those not of the beneficiary group.¹⁷⁴

Taxpayer funding may work well for broad, national reparations. If culpability for massive atrocities like chattel slavery or Native land dispossession must be ascribed to someone (and ascribing culpability is necessary to any reparatory plan), then institutions such as the federal government make sense.¹⁷⁵ The federal government, in turn, is funded by taxpayers. However, municipal reparations might be better served through alternative methods. And unlike Congress, smaller jurisdictions can more easily establish a separate source of funding.¹⁷⁶

One such alternative is tax revenue from specific sales. This includes both levying new taxes on the sales of certain products and rerouting funds from

169. Logue, *supra* note 58, at 1338. For example, many Floridians opposed reparations for the Rosewood massacre, stating that “it was not fair for today’s taxpayers to be assessed damages for injuries which they had no part in causing.” C. Jeanne Bassett, Comment, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 FLA. ST. U. L. REV. 503, 508–09 (1994).

170. Kaiman, *supra* note 12, at 1373 (citing Brophy, *supra* note 22, at 830); *see also* Logue, *supra* note 58, at 1337–38 (noting that assigning blame for past harms to present-day Americans is problematic).

171. *See* Brooks, *supra* note 91, at 280.

172. Vermont state representative Hal Colston articulated that “white people need to take responsibility for this oppressive system . . . [They] benefit from it every day at the expense of people who did not benefit from it.” Nora Peachin, *Vermonters Find Reparations Work ‘Painful and Messy and Complicated’*, BURLINGTON FREE PRESS (July 26, 2021, 5:46 AM), <https://www.burlingtonfreepress.com/story/news/2021/07/26/reparations-what-vermonters-have-learned-government-grassroots-efforts/7948867002> [perma.cc/V3ZW-NCUX].

173. Posner & Vermeule, *supra* note 16, at 720.

174. *Id.* In the context of slavery, taxes could be imposed only on the descendants of slave owners and slave traders, or on families whose ancestors lived in the South during slavery, but nothing of this sort has been proposed because it would face serious constitutional objections. Logue, *supra* note 58, at 1338–39; Posner & Vermeule, *supra* note 16, at 720.

175. *See* Logue, *supra* note 58, at 1338; DARITY & MULLEN, *supra* note 28, at 245 (“[B]lack reparations is a debt that must be borne by all Americans . . . [R]eparations . . . are an obligation . . . driven by recognition of the need for national redemption. It is the federal government that should implement reparations . . .”).

176. *See supra* notes 25–28 and accompanying text. Some of the concerns regarding lack of federal political will and gridlock in Congress likewise apply here.

an existing sales tax to reparations programs. The first is the model that Evanston, Illinois, is implementing.¹⁷⁷ In 2019, the city voted to levy a 3 percent tax on the sale of marijuana to fund projects benefiting Black residents.¹⁷⁸ Up to \$10 million in sales-tax revenue will feed directly into a reparations fund over the next ten years.¹⁷⁹ There are also prototypes for the second option. These include Philadelphia's soda tax, which raises revenue for education initiatives.¹⁸⁰ In its first two years, the program provided free prekindergarten education for 4,000 children, funding for community schools, and improvements to the city's parks.¹⁸¹ Efforts like this could be rebranded, expanded, and included in reparations legislation. Municipalities should seriously contemplate using tax revenue from specific sales when creating reparations. This method is easy to execute and logical, as tax revenue is intended for public initiatives.

Private fundraising is another way to pay for reparations. As discussed previously, Georgetown University pledged \$400,000 annually in reparations through community reinvestment.¹⁸² The origin of this pledge is particularly noteworthy. After undergraduate students passed a referendum to increase their tuition by \$27.20 per semester to create a reparations fund,¹⁸³ the university announced it would instead fundraise the equivalent value from private donors.¹⁸⁴ Should its fundraising efforts prove successful, Georgetown could

177. Attorney and member of the National African American Reparations Commission Nkechi Taifa claimed that Evanston could "provide a blueprint for the rest of the country." Andy Fies, *Evanston, Illinois, Finds Innovative Solution to Funding Reparations: Marijuana Sales Taxes*, ABC NEWS (July 19, 2020, 11:03 AM), <https://abcnews.go.com/US/evanston-illinois-finds-innovative-solution-funding-reparations-marijuana/story?id=71826707> [perma.cc/GD8D-PL59].

178. Evanston City Council, Resolution Establishing a City of Evanston Funding Source Devoted to Local Reparations (Nov. 25, 2019) [hereinafter Evanston Resolution] [perma.cc/NS3E-RSFR]. This source of funding was intentional. Illinois ranks third in the nation for racial disparities in marijuana possession arrest rates. ACLU, *A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 8* (2020), https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf [perma.cc/7B8Z-ZMYC].

179. Eric Lutz, *One City's Reparations Programs That Could Offer a Blueprint for the Nation*, GUARDIAN (Jan. 19, 2020, 3:45 AM), <https://www.theguardian.com/us-news/2020/jan/19/reparations-program-evanston-illinois-african-americans-slavery> [perma.cc/ST96-QUWG].

180. Matt Petrillo, *Philadelphia Soda Tax Helps Send Thousands of Kids to Pre-K in Its First 2 Years*, CBS PHILLY (Mar. 8, 2019, 6:30 PM), <https://philadelphia.cbslocal.com/2019/03/08/philadelphia-soda-tax-helps-send-thousands-of-kids-to-pre-k-in-its-first-2-years> [perma.cc/J7HD-ERC7].

181. *Id.*

182. See *supra* notes 70–71, 132 and accompanying text.

183. V.P. Franklin, *Georgetown Students Demonstrate How Reparations Can Be Made to African-American Students*, ACLU (May 22, 2020), <https://www.aclu.org/news/racial-justice/georgetown-students-demonstrate-how-reparations-can-be-made-to-african-american-students> [perma.cc/8ET2-ZQDM].

184. Rachel L. Swarns, *Is Georgetown's \$400,000-a-Year Plan to Aid Slave Descendants Enough?*, N.Y. TIMES (Oct. 30, 2019), <https://www.nytimes.com/2019/10/30/us/georgetown-slavery-reparations.html> [perma.cc/NCN5-7PYV].

serve as a model for a more universal system of voluntarily financed reparations.¹⁸⁵ Meanwhile, others are turning to social media to crowdsource what they deem as reparations funds, encouraging “white people with disposable income or inherited wealth” to make contributions that finance Black individuals in crisis.¹⁸⁶ However, these types of private fundraising programs may let institutional wrongdoers off the hook and thereby jeopardize goodwill. In Georgetown’s case, the university’s failure to dip into its \$1.6 billion endowment caused widespread disappointment.¹⁸⁷

Lastly, the invest/divest framework could be applied to reparations. This approach has been central to organizing work for years¹⁸⁸ and recently gained traction through various racial justice platforms.¹⁸⁹ As activist and executive director of Law for Black Lives Marbre Stahly-Butts explains, this strategy calls for reallocating money from systems that harm marginalized communities to supportive community-based programs instead.¹⁹⁰ For example, the proposed Marijuana Justice Act of 2017 would have redirected some federal funding for prison construction and law enforcement activities to the aforementioned Community Reinvestment Fund.¹⁹¹

Funding through the invest/divest approach could be met with public pushback, particularly regarding the divest side of the ledger. In June 2020, less than half of Americans supported reducing their local police department’s

185. Gerstmann, *supra* note 47 (“Financially comfortable progressives may flock to donate dollars for reparations the way that they buy carbon offsets or donate to racially oriented nonprofits. The federal government could make it a check-off box on tax returns and supportive states could do the same.”).

186. See Michela Moscufo, *Crowdfunding Campaigns Start Their Own Form of Reparations in Lieu of a Federal Push*, NBC NEWS (Aug. 13, 2021, 7:36 AM), <https://www.nbcnews.com/news/nbcblk/crowdfunding-campaigns-start-form-reparations-lieu-federal-push-rcna1666> [perma.cc/8JWX-F32R]. William Darity Jr. has critiqued these efforts, stating, “I just don’t want them to call it reparations.” *Id.* Other groups engaging in private online fundraising have specifically avoided the term “reparations” and opted instead for “wealth redistribution.” Peachin, *supra* note 172.

187. Desai, *supra* note 67.

188. Liza Bayless, *Divest from Prisons, Invest in People—What Justice for Black Lives Really Looks Like, YES!* (Oct. 11, 2016), <https://www.yesmagazine.org/social-justice/2016/10/11/divest-from-prisons-invest-in-people-what-justice-for-black-lives-really-looks-like> [perma.cc/W2Q6-MDFU].

189. See *Invest-Divest*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/invest-divest> [perma.cc/KR5U-9SUK]. The Movement for Black Lives has articulated that reparations are not the same as invest/divest; they are different strategies. REPARATIONS NOW TOOLKIT, *supra* note 60, at 28. This Note suggests utilizing the two strategies in harmony.

190. Neighborhood Funders Grp., *Introduction on Criminalization and Divest/Invest*, YOUTUBE (Mar. 8, 2018), <https://youtu.be/cR57SIgWQYE>. The invest/divest framework can be applied to reallocate resources away from any exploitative forces; for example, those arguing for environmental reparations might ask for divestment from fossil fuels. See generally Kaiman, *supra* note 12.

191. See Recent Proposed Legislation, *supra* note 128, at 929.

budget.¹⁹² But public support is growing as awareness increases.¹⁹³ A poll from the same month showed that 76 percent of people who were familiar with proposals to move money from police budgets to local programs for houselessness, mental health assistance, and domestic violence assistance supported them.¹⁹⁴ As this support continues to grow, it would be a powerful statement for a municipality's reparations plan to adopt the very tool racial justice organizers have been advocating for.¹⁹⁵ Additionally, taking money from oppressive institutions and reallocating it to fund beneficial measures gets to the core meaning of reparations. It is in this way that reparations can become "abolition in action"¹⁹⁶ and truly realize their purpose.

* * *

Municipalities must remain self-aware when selecting from this menu of choices. A government that passes reparations legislation assumes the role of "justice provider," which may obscure its role as wrongdoer.¹⁹⁷ Additionally, the process of creating reparations "may expand [government] power by perpetuating a subservient relationship between the [government] and its subjects."¹⁹⁸ Municipalities must remember that they are not the focal point and should instead look to potential beneficiaries for guidance.¹⁹⁹ Appreciating this unique balance is vital not only to crafting reparations but also to implementing them.

192. Chris Jackson & Mallory Newall, *Americans' Concerns About COVID-19 Continue to Decline*, IPSOS (June 12, 2020), <https://www.ipsos.com/en-us/news-polls/abc-coronavirus-poll-wave-12> [perma.cc/5U9U-NNYS]. However, most Democrats support these initiatives, and support is also greater among younger Americans. *Id.*

193. See Giovanni Russonello, *Have Americans Warmed to Calls to 'Defund the Police'?*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/07/03/us/politics/polling-defund-the-police.html> [perma.cc/H3NA-F86L] ("[A]s people have learned more about the term ['defund the police'] and some city governments have even put it into action, Americans have shown some receptiveness to it. Recent polling suggests that many Americans have come to understand the phrase as a call not to simply eliminate the keepers of the peace, but to reinvest a portion of their funding in other programs and crime prevention techniques.").

194. Chris Jackson, Annaleise Azevedo Lohr & Christopher Cummins, *Americans Supportive of Peaceful Protests and Bipartisan Support for Police Reform*, IPSOS (June 12, 2020), <https://www.ipsos.com/en-us/news-polls/reuters-ipsos-data-police-reform-george-floyd-2020-06-12> [perma.cc/K2FK-TPHT]. The level of support was 93 percent for Democrats and 50 percent for Republicans. *Id.*

195. See generally Bayless, *supra* note 188.

196. Patisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1686 (2019).

197. See Gray, *supra* note 15, at 1064–65.

198. *Id.*

199. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 397 (1987); Miller, *supra* note 19, at 391.

C. Philadelphia as a Case Study

To demonstrate the aforementioned choices in action, this Section presents a hypothetical resolution offering reparations for the city of Philadelphia's racially discriminatory police practices. While other city actors inflict harms in discriminatory and malignant ways,²⁰⁰ the resolution presented here focuses on the Philadelphia Police Department (PPD) because police are the most visible manifestation of the criminal legal system,²⁰¹ have the greatest power to intervene in the daily lives of residents,²⁰² and are the agents through which the government wields its authority and enforces its laws.²⁰³ Narrowing the scope of this resolution to solely address the police department's racist activities offers an intelligible framework for evaluating municipal reparations.

Section I.C.1 discusses the history of the PPD. Section I.C.2 then presents a city council resolution providing reparations for the department's perpetuation of systemic racism.

1. History of the Philadelphia Police Department

The Philadelphia Police Department has a horrific history of racial discrimination.²⁰⁴ A 1924 city study found that Black people were disproportionately subjected to unlawful arrest, demonstrating a clear pattern of discrimination.²⁰⁵ In the 1950s, Black residents testified about flagrantly abusive police practices.²⁰⁶ Almost 90 percent of Philadelphians killed by police between 1950 and 1960 were Black, although they comprised only 22 percent of the city population.²⁰⁷ In 1967, Police Commissioner Frank Rizzo began a

200. Other manifestations of systemic racism include housing inequities, health disparities, and educational disparities caused by redlining, racially restrictive covenants, and gentrification; economic inequality due to imbalanced union membership and city contracting opportunities; and other forms of violence against communities of color.

201. *Redefining Public Safety*, VERA INST. OF JUST., <https://www.vera.org/centers/redefining-public-safety> [perma.cc/W5CE-AESW].

202. See DAVID WEISBURD ET AL., POLICE FOUND., THE ABUSE OF POLICE AUTHORITY: A NATIONAL STUDY OF POLICE OFFICERS' ATTITUDES 10 (2001), <https://www.policefoundation.org/wp-content/uploads/2015/06/Weisburd-et-al.-2001-The-Abuse-of-Police-Authority.pdf> [perma.cc/79KK-WWC3].

203. For an example of a plan addressing multiple harms caused by multiple city departments, see Asheville Resolution, *supra* note 7.

204. See Dain Saint, Craig R. McCoy, Tommy Rowan & Valerie Russ, *Black and Blue*, PHILA. INQUIRER, <https://www.inquirer.com/news/inq/philadelphia-police-brutality-history-frank-rizzo-20200710.html>.

205. *Id.*

206. *Id.*

207. Gerald D. Robin, *Justifiable Homicide by Police Officers*, 54 J. CRIM. L. & CRIMINOLOGY 225, 226 (1963).

reign of racist police violence that continued once he became mayor.²⁰⁸ Almost two decades later in 1985, the PPD used war devices against its own people, inflicting one of the city's worst tragedies.²⁰⁹ The department dropped a bomb on the home of MOVE, a Black liberation group, killing eleven people, including five children, and decimating a primarily Black neighborhood.²¹⁰

Such horrors are not confined to last century. Racial disparities persist today along nearly every metric. Although the city entered into a consent decree requiring the police department to abandon its stop-and-frisk policy in 2011,²¹¹ a recently leaked PPD memo revealed that the department uses other tactics to circumvent the consent decree.²¹² A 2020 report found that Black Philadelphians are three times as likely as white Philadelphians to be stopped by the police, and Black and Latinx men are twice as likely to be frisked and searched than their white counterparts.²¹³ Yet despite being frisked and searched at the highest rate, Black men are the least likely to be found with contraband.²¹⁴ Although only 60 percent of the city's population is nonwhite,²¹⁵ Philadelphians of color comprised 92 percent of the city's jail

208. See, e.g., Jake Blumgart, *The Brutal Legacy of Frank Rizzo, the Most Notorious Cop in Philadelphia History*, VICE (Oct. 22, 2015, 3:00 PM), <https://www.vice.com/en/article/kwxp3m/re-membering-frank-rizzo-the-most-notorious-cop-in-philadelphia-history-1022> [perma.cc/3CQ7-VT4K].

209. Lindsey Norward, *The Day Philadelphia Bombed Its Own People*, VOX (Aug. 15, 2019, 9:03 AM), <https://www.vox.com/the-highlight/2019/8/8/20747198/philadelphia-bombing-1985-move> [perma.cc/J4ZZ-R793].

210. *Id.*

211. *Philadelphia Reaches Settlement in 'Stop and Frisk' Lawsuit*, CBS PHILLY (June 21, 2011, 1:30 PM), <https://philadelphia.cbslocal.com/2011/06/21/philadelphia-reaches-settlement-in-stop-and-frisk-lawsuit> [perma.cc/4SXE-GQ3X]; see Complaint, *Bailey v. City of Philadelphia*, No. 10-cv-05952, 2010 WL 4662865 (E.D. Pa. Dec. 20, 2011).

212. Samantha Melamed, *A Leaked Memo Suggests Philly Police Use Vehicle Stops to Get Around Stop-and-Frisk Reform*, PHILA. INQUIRER (Mar. 2, 2021), <https://www.inquirer.com/news/philadelphia-police-stop-and-frisk-racial-disparities-vehicle-20210302.html> [perma.cc/TL7N-BF4S]; see also Samantha Melamed, *Study: High Rates of Stop-and-Frisk Even in Philly's Lowest-Crime Black Areas*, PHILA. INQUIRER (Oct. 2, 2017), <https://www.inquirer.com/philly/news/crime/stop-frisk-policing-philadelphia-racial-bias-lance-hannon-villanova-20171002.html> [perma.cc/VM9K-BP6P] (reporting the results of a study based on 2014–2015 police data finding 70 percent more frisks in Black neighborhoods than in non-Black areas).

213. Chad Pradelli & Cheryl Mettendorf, *Action News Investigation: Racial Disparities in Philadelphia Police's Use of Stop-and-Frisk, Data Shows*, 6ABC ACTION NEWS (Feb. 3, 2021), <https://6abc.com/stop-and-frisk-philadelphia-data-philly/6413942> [perma.cc/8TA5-P4MD].

214. *Id.*; cf. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). In *Floyd*, the court relied on evidence that in over 4.4 million *Terry* stops conducted by the New York City Police Department between January 2004 and June 2012, Black and Hispanic individuals were stopped significantly more than white individuals despite being less likely to have contraband. It found the city liable for Fourth and Fourteenth Amendment violations.

215. *QuickFacts: Philadelphia City, Pennsylvania*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/philadelphiacitypennsylvania> [perma.cc/B5YW-Q26L].

population in November 2020.²¹⁶ Eighty-one percent of victims shot by Philadelphia police officers between 2007 and 2013 were Black.²¹⁷ In October 2020, in the same neighborhood where the MOVE home once stood, twenty-seven-year-old Walter Wallace, Jr., was killed by Philadelphia police.²¹⁸

Pervasive racism is one cause of such striking disparities. The Plain View Project, a database chronicling social media posts by police officers nationwide, revealed widespread bigotry within the PPD.²¹⁹ This racism extends beyond policing and into every facet of life.²²⁰ Indeed, state representative Chris Rabb noted that Philadelphia is “the poorest big city in the country, and that poverty is directly related to racism.”²²¹

Philadelphia has taken some steps in the right direction. In November 2020, the city council issued a formal apology for the MOVE bombing and established the anniversary as “an annual day of observation, reflection and recommitment.”²²² While this was heartening, the city has a long way to go. A reparations plan would help the city begin to make amends. The city should extend reparations as redress for decades of racism in the community. Doing so would also help its residents, particularly those harmed by Philadelphia’s racist past and present, build prosperity and power.

2. Hypothetical Philadelphia Resolution

This Section offers a hypothetical Philadelphia City Council resolution providing reparations for systemic racism.²²³ Such a resolution could be

216. FIRST JUD. DIST. OF PA., PHILADELPHIA JAIL POPULATION REPORT: JULY 2015–NOVEMBER 2020 (2020), <https://www.phila.gov/media/20201208121016/Full-Public-Jail-Report-November-2020.pdf> [perma.cc/KN4P-WB86].

217. Tom McCarthy, *Philadelphia Police Shooting Victims Are 81% African American, Report Finds*, GUARDIAN (Mar. 24, 2015, 6:30 PM), <https://www.theguardian.com/us-news/2015/mar/24/philadelphia-police-black-people-shooting> [perma.cc/GP3P-8XVF].

218. John Ismay, *35 Years After MOVE Bombing That Killed 11, Philadelphia Apologizes*, N.Y. TIMES (May 15, 2021), <https://www.nytimes.com/2020/11/13/us/philadelphia-bombing-apology-move.html> [perma.cc/XW87-JPTR].

219. *Database: Philadelphia*, PLAIN VIEW PROJECT, <https://www.plainviewproject.org/data?city=philadelphia> [perma.cc/KMZ4-BNC3].

220. See BRIC TV, *Reparations for Victims of Police Violence – Mariame Kaba*, YOUTUBE (Oct. 12, 2016), <https://youtu.be/OcCsGgKmSig> (“[M]ost of the harm that’s caused by violent policing has less to do with numbers of people killed, but rather the daily, mundane harassment, targeting, injury, violence that young people of color face in their communities on a daily basis.”).

221. Sasko, *supra* note 74.

222. Laura McCrystal, *Philly City Council Has Formally Apologized for the Deadly 1985 MOVE Bombing*, PHILA. INQUIRER (Nov. 16, 2020), <https://www.inquirer.com/news/philadelphia/move-bombing-apology-philadelphia-walter-wallace-20201112.html> [perma.cc/8TFA-995].

223. Research conducted while drafting this hypothetical resolution informed its language and style. The following sources were consulted, among others: Philadelphia City Council materials and previous council resolutions, to understand their typical cadence and structure; text of proposed and enacted reparations plans written by more than a dozen legislatures, to identify patterns and word choice; and law review articles regarding legislative drafting. Ann Arbor

passed only after establishing a commission, analyzing findings, and engaging community members. While it does not encompass all the options available to a municipality when crafting reparations, this resolution provides an example of various choices the city could make.²²⁴ It also demonstrates the basic structure and goals of a thorough municipal reparations plan. This resolution identifies a group as the beneficiary class. It provides compensation through apology, community reinvestment, educational reforms, and opportunities for those impacted by the criminal legal system. The reparations are funded by the invest/divest framework.

RESOLUTION

Apologizing and extending community reparations to minority residents for past and continuing systemic racism perpetrated by the Philadelphia Police Department.

WHEREAS, the Council of the City of Philadelphia acknowledges that the Philadelphia Police Department has engaged in racially discriminatory police practices for decades; and

WHEREAS, the City acknowledges that the Department participates in a culture of systemic racism and bias; and

WHEREAS, these practices and this culture cause damage, trauma, and oppression that harms minority communities and the City of Philadelphia as a whole; and

WHEREAS, the City recognizes and appreciates the important contributions that Philadelphians of color have made to our city and our nation; and

WHEREAS, the City is committed to eradicating racism and bias in its governing systems, policies, and structures, including the Police Department and other departments; and

WHEREAS, the City of Philadelphia recognizes an obligation to stop its discriminatory practices, redress past injuries, and mitigate continuing harm through reparations; now, therefore, be it

RESOLVED, BY THE COUNCIL OF THE CITY OF PHILADELPHIA, AS FOLLOWS:

Section 1. The City issues a formal apology for its law enforcement decisions, attitudes, and practices that have harmed Philadelphians of color.

Section 2. The Philadelphia Police Department pledges to stop its discriminatory practices. It will undergo a departmental review involving individual

mayor Christopher Taylor provided additional guidance regarding the drafting of local government resolutions.

224. This hypothetical resolution may both cast too wide and too narrow a net in different regards. It is meant to be illustrative, not definitive.

incident and officer investigations, de-escalation and implicit bias training, and the shifting of resources to unarmed first responders.

Section 3. The City will establish a health center to provide low-cost health care services and psychological counseling to minority residents.²²⁵

Section 4. The City will establish three community centers with free youth educational programs and after-school care.²²⁶ Each center will have a food garden, library, and memorial dedicated to Philadelphians of color, acknowledging the history of discriminatory actions by the Police Department.

Section 5. The City will establish a free program that provides job training and business ownership training to minority residents.²²⁷ The program will have online and in-person options.

Section 6. The City will enhance reentry services for formerly incarcerated Philadelphians²²⁸ and expand its Fair Chance Hiring Initiative program.²²⁹

Section 7. The School District of Philadelphia will incorporate into its curriculum a history of the Philadelphia Police Department, including Commissioner Rizzo's tenure, the MOVE bombing,²³⁰ and the protests of summer 2020.

Section 8. The City will establish a college scholarship program for Philadelphians of color.

225. See Nina Feldman, *Health by Zip Code? Some Philly Neighborhoods Are 'Primary Care Deserts'*, WHYY (Oct. 24, 2018), <https://whyy.org/articles/health-care-by-zip-code-some-philly-neighborhoods-are-primary-care-deserts> [perma.cc/XX4L-R8TQ] (announcing a report finding "several shortage areas in primary care access for Philadelphians").

226. See Michael D'Onofrio, *Segregation, Academic Achievement Gap Persist in Philadelphia Schools*, *Advocates Say*, PHILA. TRIB. (June 7, 2019), https://www.phillytrib.com/news/local_news/segregation-academic-achievement-gap-persist-in-philadelphia-schools-advocates-say/article_b28e1bfb-d11c-5635-a15a-777284522ad8.html [perma.cc/ZWD6-Y87Y] (discussing educational disparities in Philadelphia); Joel Wolfram, *Big Bucks for Child Care: Families Who Don't Qualify for Assistance Say They Need Help*, WHYY (Jan. 28, 2020), <https://whyy.org/articles/big-bucks-for-child-care-families-who-dont-qualify-for-assistance-say-they-need-help> [perma.cc/3XHJ-GG9Y] (discussing many Philadelphians' lack of access to childcare).

227. See Nydia Han & Heather Grubola, *Action News Data: Philadelphia-Area Unemployment Numbers Show Gaps Between Certain Races*, 6ABC ACTION NEWS (Aug. 12, 2020), <https://6abc.com/unemployment-racial-disparities-race-jobs/6367493> [perma.cc/EF2G-R42D] (illustrating the higher unemployment rate for Black Philadelphians); Ayana Jones, *Report: Racial Disparities Prevalent in Job Opportunities in Philly*, WHYY (Aug. 18, 2020), <https://whyy.org/articles/report-racial-disparities-prevalent-in-job-opportunities-in-philly> [perma.cc/4JSM-XFMA] ("Of the five cities [surveyed], Philadelphia had the lowest number of Black-owned firms per capita . . .").

228. See *Office of Reentry Partnerships*, CITY OF PHILA., <https://www.phila.gov/departments/office-of-reentry-partnerships> [perma.cc/JV9Q-MQ87].

229. See *Fair Chance Hiring Initiative*, *supra* note 161.

230. See Norward, *supra* note 209 ("The MOVE bombing remains largely forgotten nationally."); Akela Lacy, Opinion, *Philadelphia Keeps Revisiting MOVE Bombing History Because We Never Truly Learned It*, PHILA. INQUIRER (June 4, 2021), <https://www.inquirer.com/opinion/commentary/move-bombing-philadelphia-remains-aftermath-20210604.html> [perma.cc/LQ6W-MALF].

Section 9. The City will establish a Commission of community and government members to notify residents about the reparations, facilitate implementation, and monitor the programs' success. The Commission will provide biannual reports to the public and City Council.

Section 10. The City will act towards the immediate establishment and funding of these reparations through the reallocation of approximately 45% of the Police Department Operating Budget annually, or a minimum of \$342 million, adjusting for inflation.²³¹

II. THE CONSTITUTIONALITY OF REPARATIONS

As legislators wade through choices about reparations, they must also keep in mind the legal restraints on such programs. Reparations should be both effective and constitutional; leaving out either component will lead to inevitable failure.²³² Addressing the constitutional concern entails crafting a plan that courts would uphold as consistent with the Equal Protection Clause of the Fourteenth Amendment.²³³

The Fourteenth Amendment guarantees that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”²³⁴ The amendment was passed after the Civil War to secure the basic rights of newly freed slaves and confer congressional authority to prevent racial oppression.²³⁵ It is often considered our nation’s most important amendment, yet its meaning and reach are still contested.²³⁶ Instead of using the amendment to empower governmental oversight of enlarged rights, the Supreme Court has

231. See CITY OF PHILA., THE MAYOR’S OPERATING BUDGET IN BRIEF FOR FISCAL YEAR 2021, at 17 (2020) <https://www.phila.gov/media/20200501075517/REVISED-Budget-in-Brief-FY21.pdf> [perma.cc/4NVX-S9ZN] (showing a police budget of \$760 million in fiscal year 2021). Austin cut its police budget by approximately 35 percent in August 2020. Jemima McEvoy, *Austin Cuts Police Budget by a Third as Defunding Efforts Gain Momentum*, FORBES (Aug. 13, 2020, 2:39 PM), <https://www.forbes.com/sites/jemimamcevoy/2020/08/13/austin-cuts-police-budget-by-a-third-as-defunding-efforts-gain-momentum> [perma.cc/TQ9F-9XMR]. It is important to acknowledge here the important work of organizers and coalitions advocating for police abolition in Philadelphia, including the Black Philly Radical Collective. See Robert Huber, *Inside the Fight to Abolish Police in Philadelphia*, PHILA.: CITY LIFE (Nov. 21, 2020, 8:58 PM), <https://www.phillymag.com/news/2020/11/21/abolish-philadelphia-police> [perma.cc/2VVQ-BZWW]. If the Philadelphia Police Department is abolished, this funding source should be revisited to ensure that municipal monies can still be reallocated to fund reparations.

232. Brophy, *supra* note 16, at 535; see also Posner & Vermeule, *supra* note 16, at 747.

233. State constitutions are also relevant but not considered in this Note. For example, Michigan and California have constitutional amendments prohibiting affirmative action in employment, contracting, and education. MICH. CONST. art. I, § 26; CAL. CONST. art. I, § 31.

234. U.S. CONST. amend. XIV, § 1.

235. Darby & Levy, *supra* note 158, at 435; see also *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.”).

236. See Victor Li, *The 14th*, A.B.A. J., May 2017, at 37, 38.

often eschewed the amendment's historical roots and conceived of it narrowly.²³⁷ This narrow interpretation is particularly problematic for programs that aim to address harms inflicted upon racial minorities, such as reparations.

Section II.A outlines the applicable legal standards for different Fourteenth Amendment challenges. Section II.B then turns to a constitutional analysis of reparations. In Section II.B.1, race-neutral reparations are evaluated under constitutional doctrine; Section II.B.2 tracks race-conscious reparations such as the hypothetical Philadelphia plan and determines that they would likely fail judicial review.

A. The Legal Standard

Depending on the nature of a reparations policy challenged under the Equal Protection Clause, courts apply one of several standards of review to guide their analysis.²³⁸ Thus, the court's first task is to determine the appropriate standard, an inquiry which hinges on whether the plan is a race-conscious or race-neutral remedy.²³⁹ If it is deemed race-neutral, a court applies rational basis review. By contrast, if it is deemed race-conscious, a court applies strict scrutiny.²⁴⁰

Rational basis review is the most deferential standard of review. When it applies, courts uphold a policy so long as it is rationally related to a legitimate governmental interest.²⁴¹ To establish a legitimate interest, the government's purported justification can be hypothetical or post hoc,²⁴² and "the existence of facts supporting the legislative judgment is to be presumed."²⁴³ Regarding rational relation, the government can act in a piecemeal fashion to address its concerns,²⁴⁴ and both under- and overinclusivity are acceptable.²⁴⁵ As a result, nearly every law analyzed under rational basis review is upheld.²⁴⁶

On the other hand, race-conscious policies are suspect and therefore subject to the most exacting judicial examination: strict scrutiny.²⁴⁷ To be upheld

237. See *id.* at 40–41; Darby & Levy, *supra* note 158, at 435.

238. See Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 292 (2015).

239. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955).

240. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

241. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 799 (2006).

242. See *Williamson*, 348 U.S. at 488.

243. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

244. *Williamson*, 348 U.S. at 489.

245. *Vance v. Bradley*, 440 U.S. 93, 108 (1979).

246. Winkler, *supra* note 241, at 799.

247. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290–91 (1978) (opinion of Powell, J.); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

under strict scrutiny, a challenged program must be narrowly tailored to further a compelling government interest.²⁴⁸ First, the Court has held that a government's interest in remedying societal or general discrimination is not "compelling" under this standard.²⁴⁹ The only practices that governments can remedy are those linked to a judicial, legislative, or administrative finding or evidence of previous de jure discrimination.²⁵⁰ Second, to satisfy narrow tailoring, the program must be tied to an exact injury suffered by a specific individual or group of individuals²⁵¹ and cannot be under- or overinclusive.²⁵² The standard also demands a "good faith consideration of workable race-neutral alternatives"²⁵³ and a temporal limitation.²⁵⁴

Some judges and scholars believe that the Court has applied a less rigorous form of strict scrutiny to certain race-conscious remedies, particularly with respect to higher-education affirmative action plans.²⁵⁵ However, this treatment is not extended widely, and most race-conscious remedies fail both prongs of the legal test.²⁵⁶ So although Justice O'Connor famously pronounced "[i]t is not true that strict scrutiny is strict in theory, but fatal in fact,"²⁵⁷ race-conscious reparations would likely be deemed unconstitutional, as Section II.B.2 will demonstrate.

B. *Constitutional Analysis of Reparations Under the Equal Protection Clause*

Applying the Court's jurisprudence to the hypothetical Philadelphia City Council resolution and other reparations programs illustrates the constitutional practicability of effective reparations. Race-neutral reparations plans that provide redress for isolated incidents would likely be upheld, but they are necessarily quite limited in scope. Race-conscious remedies, by contrast, more

248. *Adarand*, 515 U.S. at 227.

249. *Id.* at 220 ("[S]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986))).

250. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496–97 (1989) (plurality opinion) (quoting *Bakke*, 438 U.S. at 307); *see also* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–21 (2007).

251. *See Croson*, 488 U.S. at 499–500.

252. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1327–28 (2007); Spece & Yokum, *supra* note 238, at 296.

253. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

254. *Id.* at 342.

255. *See, e.g., Parents Involved*, 551 U.S. at 803, 832–38 (Breyer, J., dissenting).

256. *See Winkler, supra* note 241, at 839. Winkler's empirical analysis found that only 27 percent of racial classifications have survived strict scrutiny. *Id.* Further, those enacted by state and local governments survive only 17 percent of the time. *Id.* at 842.

257. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995).

effectively address structural inequities but would also be more vulnerable to constitutional challenges.²⁵⁸

1. Race-Neutral Reparations

Race-neutral municipal reparations are likely viable under existing Fourteenth Amendment doctrine. Some harms can be satisfactorily addressed by race-neutral reparations, as “remedying a particular person’s injury does not really require race-conscious efforts by the government One can simply measure the injury and provide . . . compensation.”²⁵⁹ Accordingly, extending compensation to a beneficiary class of victims or their descendants can be race neutral.²⁶⁰ Take, for example, North Carolina’s 2013 reparations legislation. Although the state’s sterilization program was designed to “breed-out” non-working Black residents,²⁶¹ other marginalized groups also fell victim to the eugenics campaign.²⁶² Accordingly, the state’s reparations plan does not mention race but rather describes a qualified recipient as “[a]n individual who was asexualized involuntarily or sterilized involuntarily under the authority of the Eugenics Board of North Carolina.”²⁶³

Such race-neutral reparations would likely pass constitutional muster at rational basis review. As previously discussed, courts applying rational basis review consider a government policy to have a legitimate interest even if it is based on conjecture.²⁶⁴ Presenting factual evidence in support of a policy is not necessary.²⁶⁵ Here, in the context of race-neutral reparations, providing

258. Dino Robinson, founder of Shorefront Legacy Center in Evanston, Illinois, stated matter-of-factly regarding Evanston’s reparations: “We anticipate litigation” Ashley Brown, Emilie de Sainte Maresville & Allie Yang, *How the 1st US City to Fund Reparations for Black Residents is Making Amends*, ABC NEWS (Mar. 1, 2021, 8:49 AM), <https://abcnews.go.com/US/1st-us-city-fund-reparations-black-residents-making/story?id=76118463> [perma.cc/ZME3-W3SZ].

259. Michael E. Rosman, *The Quixotic Search for Race-Neutral Alternatives*, 47 U. MICH. J.L. REFORM 885, 888 (2014); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring) (“Nothing prevents Richmond from according a contracting preference to identified victims of discrimination.”).

260. Though victim- or descendant-based reparations for incidents can be race-neutral, not all are. For example, Florida’s reparations program for the Rosewood race-based massacre, see *supra* note 151, extended compensation to “the African-American families of Rosewood, Florida, who demonstrate real property and personal property damages,” those who were evacuated, and their direct descendants. Act of May 4, 1994, ch. 359, § 3, 1994 Fla. Laws 3296, 3297.

261. See Gregory N. Price, William Darity Jr. & Rhonda V. Sharpe, *Did North Carolina Economically Breed-Out Blacks During its Historical Eugenic Sterilization Campaign?*, 15 AM. REV. POL. ECON., no. 1, 2020, at 1, <https://doi.org/10.38024/arpe.pds.6.28.20>.

262. See Mennel, *supra* note 57.

263. Current Operations and Capital Improvements Appropriations Act of 2013, S.L. 2013-360, § 6.18, 2013 N.C. Sess. Laws 995, 1019–23 (expired 2015).

264. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955). It is worth noting that a legislature would probably not have the votes to pass a reparations plan based on conjecture.

265. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

redress for actual, harmful events such as North Carolina's sterilization campaign would certainly exceed this legitimate interest requirement. Plans such as Chicago's that are grounded in facts would similarly satisfy this element.²⁶⁶ Race-neutral reparations would also meet the lenient standard for rational relation between the government interest and its action. This fit can be achieved through incremental, overinclusive, or underinclusive actions.²⁶⁷ Accordingly, the deficiencies and piecemeal manifestation of the Chicago resolution²⁶⁸ would not be its death knell.²⁶⁹ Likewise, North Carolina's sterilization reparations were underinclusive,²⁷⁰ but that would not necessarily make the law void.²⁷¹

While some reparations can be race neutral, others cannot. If a municipality's goal is to remedy the effects of past and continuing systemic discrimination, then trying to achieve it in a race-neutral way is "impossible or quixotic."²⁷² Municipalities striving to address the war on drugs' racially disparate impact, decades of housing discrimination, or bias in policing must explicitly recognize race.²⁷³ Rectifying these types of harms in a race-neutral fashion would belie the symbolic meaning of reparations.²⁷⁴ And a court would probably not recognize such facially neutral plans as actually race neutral due to underlying race-conscious aims.²⁷⁵

2. Race-Conscious Reparations

Race-conscious reparations plans such as the hypothetical Philadelphia City Council resolution better tackle systemic injustices but are likely to fail strict scrutiny. First, these reparations are unlikely to meet the compelling interest requirement. The Philadelphia resolution provides reparations for "a

266. This law could be upheld at rational basis review but would likely fail if subjected to strict scrutiny because there was never a determination of a civil violation. Torture victim Andrew Wilson filed a civil rights lawsuit in 1989 but did not prevail, despite presenting evidence of twenty-five other Black men who were tortured. Mogul, *supra* note 102, at 213. Much later in June 2010, Burge was found guilty of perjury and obstruction of justice. *Id.* at 218–19.

267. *Williamson*, 348 U.S. at 489; *Vance v. Bradley*, 440 U.S. 93, 108 (1979).

268. See *supra* note 134 and accompanying text.

269. See *Williamson*, 348 U.S. at 489.

270. See *supra* notes 60–61.

271. See *Vance*, 440 U.S. at 108.

272. Rosman, *supra* note 259, at 888–89.

273. These issues correlate to the reparations plans of Evanston, Illinois; Asheville, North Carolina; and the hypothetical Philadelphia resolution.

274. Charles Lane, Opinion, *Would Reparations for Slavery Be Constitutional?*, WASH. POST (Aug. 12, 2019, 6:25 PM), https://www.washingtonpost.com/opinions/would-reparations-for-slavery-be-constitutional/2019/08/12/76677182-ba10-11e9-b3b4-2bb69e8c4e39_story.html [perma.cc/VK29-F2A6].

275. Brophy, *supra* note 16, at 527 ("A reasonable interpretation of the Equal Protection Clause—which looked to the likely effect of reparations—would almost certainly conclude that reparations is a race-based program.").

culture of systemic racism and bias.”²⁷⁶ As this overtly refers to general societal discrimination, courts would consider it too amorphous to constitute a compelling interest.²⁷⁷ Pennsylvania representative Chris Rabb’s proposed plan that provides reparations for “white supremacist activity” and “generations of systemic racism bolstered by public policy and cultur[al] practice statewide”²⁷⁸ would face the same challenge.

Instead of redressing general discrimination, the constitutional standard demands that a government can only remedy practices for which there was a determination of discrimination or evidence of de jure discrimination.²⁷⁹ In the case of the Philadelphia resolution, this cannot be satisfied.²⁸⁰ There *have* been some findings of racial discrimination: various reports have revealed bias in Philadelphia Police Department behavior,²⁸¹ federal courts enjoined specific Philadelphia police practices in the 1980s for violating the Fourteenth Amendment,²⁸² and some cases regarding racialized police misconduct²⁸³ and stop-and-frisk racial targeting²⁸⁴ have settled.²⁸⁵ However, these address discrete circumstances. The city would have to craft its reparations in a limited way to address only these specific findings.²⁸⁶ But narrowing the interest to respond only to particular findings of discrimination undermines a key aim of wide-scale reparations and would not suffice to redress pervasive racism more broadly.²⁸⁷

276. See *supra* Section I.C.2.

277. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 220 (1995) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986)).

278. Sasko, *supra* note 74; Memorandum from Christopher M. Rabb, *supra* note 79.

279. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–21 (2007); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 301–02, 307 (1978) (opinion of Powell, J.).

280. Similarly, Evanston’s broad reparations plan would most likely fail to satisfy this element. It is based on the expansive findings of the city’s Equity and Empowerment Commission. Evanston Resolution, *supra* note 178.

281. See Saint et al., *supra* note 204.

282. See, e.g., *Cliett v. City of Phila.*, No. 85-1846, 1985 WL 3181, at *1 (E.D. Pa. Oct. 17, 1985); *Spring Garden United Neighbors, Inc. v. City of Phila.*, 614 F. Supp. 1350 (E.D. Pa. 1985); *Arrington v. City of Phila.*, No. 88-2264, 1989 U.S. Dist. LEXIS 19117, at *2 (E.D. Pa. Feb. 13, 1989).

283. See *Settlement and Monitoring Agreement and Stipulations of the Parties*, NAACP v. City of Phila., No. 96-cv-6045 (E.D. Pa. Sept. 4, 1996); Michael Janofsky, *Philadelphia Is in Accord in Police Corruption Case*, N.Y. TIMES (Sept. 5, 1996), <https://www.nytimes.com/1996/09/05/us/philadelphia-is-in-accord-in-police-corruption-case.html> [perma.cc/T79F-24H4].

284. See *supra* note 211 and accompanying text.

285. Other relevant lawsuits failed to yield beneficial judgments. See, e.g., *Rizzo v. Goode*, 423 U.S. 362, 366 (1976) (declining to require the police department be held accountable for a “pervasive pattern of illegal and unconstitutional mistreatment by police officers . . . directed against minority citizens in particular”); *United States v. City of Phila.*, 482 F. Supp. 1248, 1252 (E.D. Pa. 1979) (dismissing a Department of Justice suit regarding “police abuse in Philadelphia . . . [with] a disproportionately severe impact on [B]lack and Hispanic persons”).

286. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492, 509 (1989) (plurality opinion). Even then, they might not satisfy the legal standard, depending on how capaciously or restrictively the rule is interpreted.

287. See Brophy, *supra* note 16, at 529–30.

Second, race-conscious reparations like those imagined for Philadelphia fail to meet the narrow tailoring requirement. This constraint hinges largely on the scope of the beneficiary class and proves potentially fatal for group-based reparations redressing systemic injustices.²⁸⁸ Most race-conscious reparations would fall within this category. The hypothetical resolution extends reparations to “minority residents” and “Philadelphians of color,”²⁸⁹ a “beneficiary class . . . defined by race rather than by status as victims of government illegality.”²⁹⁰ These designations are not specific groups that have suffered specific injuries, as is required to satisfy narrow tailoring.²⁹¹ Evanston’s provision of reparations to “African American residents of the City”²⁹² shares this constitutional defect.

Defining the beneficiaries as broad racial groups also means that the reparations are both under- and overinclusive, which violates the narrow tailoring requirement. For example, individuals not personally affected by racist policing could use the hypothetical Philadelphia health center, while those who *were* affected might not take advantage. The same logic applies to those affected by the war on drugs with respect to the Marijuana Justice Act’s grants for community centers and job training.²⁹³ Accordingly, the requirement that the fit between the government’s interest and its actions be “as perfect as practicable”²⁹⁴ can rarely, if ever, be fulfilled by group-based community-reinvestment reparations.

There are additional challenges to narrow tailoring beyond those posed by the beneficiary class. The Philadelphia City Council would have to demonstrate that it at least considered workable race-neutral alternatives.²⁹⁵ But as previously discussed, pursuing a race-neutral option to rectify racially discriminatory police practices necessarily fails to sufficiently address systemic harms. It also undermines the very purpose of reparations. To illustrate this point, suppose that a program based on the Section 184 Indian Home Loan Guarantee Program, which provides home mortgage loans to members of federally recognized tribes,²⁹⁶ instead extended loans to all individuals below a certain income level in a particular geographic location. This would impair

288. See Posner & Vermeule, *supra* note 16, at 719 (“Attempts to tailor the beneficiary class will quickly encounter insuperable difficulties . . .”).

289. See *supra* Section I.C.2.

290. Posner & Vermeule, *supra* note 16, at 715.

291. See *Croson*, 488 U.S. at 499–500.

292. Evanston Resolution, *supra* note 178.

293. See *supra* notes 126–128 and accompanying text.

294. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 934 n.85 (1973).

295. See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Croson*, 488 U.S. at 507.

296. Section 184 Indian Home Loan Guarantee Program, *supra* note 118; Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5,462–67 (Jan. 30, 2020).

the reparations' symbolic meaning²⁹⁷ by failing to acknowledge the race-based injustices inflicted upon indigenous people.

Finally, the Philadelphia resolution could be invalidated for its limitless extent into the future.²⁹⁸ In fact, the resolution envisions programs such as after-school care, business ownership training, and reentry services becoming permanent fixtures in the community. The same applies to the suggested school curriculum, with experts calling on "the educational dimension of [a] reparations program [to] . . . continue in perpetuity."²⁹⁹ These hypothetical programs, and others like them, raise constitutional red flags for their lack of "logical end point[s]" as demanded by the Court.³⁰⁰

The analyses above demonstrate how reparations plans like the Philadelphia resolution would be vulnerable to constitutional challenges, leaving municipalities powerless to provide effective, comprehensive reparations. More broadly, modern equal protection doctrine thwarts efforts to undo inequities in direct contradiction of the Fourteenth Amendment's very purpose.³⁰¹ And unfortunately, this twisted conception of equal protection is only gaining traction.³⁰²

III. A REIMAGINED EQUAL PROTECTION FRAMEWORK

The current equal protection framework does not allow municipalities to adopt effective reparations that can adequately address structural racism. This is because existing doctrine reflects an anticlassification understanding of the Equal Protection Clause.³⁰³

Anticlassification theory requires the Court to be skeptical of all racial classifications, including those that provide positive benefits, because "race is

297. See Lane, *supra* note 274.

298. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986); see also Brophy, *supra* note 16, at 532–33 (explaining that reparations should "have a logical, definite stopping point" if they are to pass constitutional muster).

299. DORITY & MULLEN, *supra* note 28, at 268.

300. *Grutter*, 539 U.S. at 342.

301. See Leah Litman, *How the Court Inverted Constitutional Protections Against Discrimination*, ATLANTIC (Oct. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/how-court-inverted-constitutional-protections-against-discrimination/616911> [perma.cc/DM4V-UMH3].

302. See Chiraag Bains, *Amy Coney Barrett Could Bring Down Decades of Anti-discrimination Law*, SLATE (Oct. 26, 2020, 5:44 PM), <https://slate.com/news-and-politics/2020/10/barrett-supreme-court-race-discriminatory-laws.html> [perma.cc/8XJY-LDGY] (arguing that Justice Barrett's disposition to the idea that "race-conscious countermeasures against discrimination are themselves discriminatory" could presage steps backward by the Supreme Court on disparate impact liability, affirmative action, and other equal protection issues).

303. See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1287 (2011).

[neither] a morally relevant basis for treating people differently”³⁰⁴ nor a legitimate consideration in crafting public policy.³⁰⁵ This theory follows a conception known as the colorblind Constitution,³⁰⁶ first articulated in Justice Harlan’s dissent in *Plessy v. Ferguson*³⁰⁷ and championed today by Justice Thomas.³⁰⁸

On the other hand, antistubordination theory encompasses the idea that the Equal Protection Clause is meant to protect historically subjugated groups who are likely to be victims of oppression.³⁰⁹ It also protects groups of discrete and insular minorities who lack political power.³¹⁰ Constitutionality hinges on whether a given policy perpetuates or remediates subordination, not whether it is composed in race-conscious language.³¹¹ This antistubordination understanding is preferable for both its historical foundation and current practical application. Correspondingly, it would allow for governments to remedy past and current discrimination through race-conscious reparations.

By examining municipal reparations, including the hypothetical Philadelphia plan, Section III.A reveals serious shortcomings in existing approaches to the Equal Protection Clause that arise from anticlassification theory. Section III.B advocates for an antistubordination understanding of the Equal Protection Clause.

A. Problems with Anticlassification Theory

The dominant anticlassification doctrine does not allow for effective race-conscious reparations. Unfortunately, given recent jurisprudence and the Court’s current composition, anticlassification theory has emerged as the Court’s primary—if not only—normative understanding of the Equal Protection Clause.³¹² At least three tenets of anticlassification theory frustrate reparatory efforts: (1) the prohibition of most benign, race-conscious remedial

304. Darby & Levy, *supra* note 158, at 431.

305. *Id.* at 435–36.

306. This conception maintains that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion). Justice Roberts’ statement in *Parents Involved* ignores the reality that it is impossible to stop noticing race, even if only subconsciously, and that structural hierarchies and barriers still exist.

307. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind . . .”).

308. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (“That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race.”).

309. See Darby & Levy, *supra* note 158, at 431.

310. See *United States v. Carolene Prods. Co.*, 308 U.S. 144, 152 n.4 (1938).

311. See Ruth Colker, *Anti-subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1015 (1986).

312. See John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 893 (1995); Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1602–03 (2020). But see Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antistubordination?*, 58 U. MIA. L. REV. 9, 13 (2003) (“[A]ntistubordination

measures; (2) the doctrine's obsession with individualization; and (3) the belief that all classifications are stigmatic.

First, reparations plans like the Philadelphia resolution directly contravene anticlassification theory's bar on benign, race-conscious classifications. Anticlassification theory considers a law's "evil" to be "the differentiation rather than who is acted upon."³¹³ Under this framework, the Court is concerned with the very existence of a classification that divides on the basis of a forbidden category, like race,³¹⁴ rather than the law's purpose and effects. A policy such as the Philadelphia resolution that provides job training only to minorities divides on the basis of race and would therefore be struck down. So too would reparatory housing benefits for Black residents of Evanston. Anticlassification theory thus impedes governments' ability to eradicate hierarchical systems that result from pervasive racism.³¹⁵ Because of this, municipalities like Philadelphia are unable to sufficiently address both obvious and latent discrimination.

Second, the Philadelphia resolution violates the anticlassification approach's "choice to privilege individualism as a core equal protection value."³¹⁶ This approach envisions the Fourteenth Amendment as guaranteeing rights to individuals—doing so without attention to individuals' group identities, namely race.³¹⁷ Sweeping reparations policies like the Philadelphia resolution clash with this individualization principle because they extend benefits to a group based on race rather than individuals' precise circumstances.³¹⁸ But their breadth is necessary to make them effective. Wide-scale reparations confront systemic, not individual, injuries.³¹⁹

values have played and continue to play a key role in shaping what the anticlassification principle means in practice.”).

313. Ruth Colker, *The Anti-subordination Principle: Applications*, 3 WISC. WOMEN'S L.J. 59, 64 (1987). Anticlassification theory “implies, absurdly, that there is an equivalent constitutional injury in being racially classified by the U.S. Census and in being subjected to Jim Crow laws.” Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1234 (2002).

314. See Balkin & Siegel, *supra* note 312, at 10.

315. See Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 2–3, 54 (1991).

316. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 554 (2003).

317. See *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (“[R]ights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual.”).

318. Anticlassification theory deems any race-based state action as “caus[ing] ‘fundamental injury,’” *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (quoting *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987)), because “‘personal rights’ to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.” *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

319. See Roy L. Brooks, *Racial Reconciliation Through Black Reparations*, 63 HOW. L.J. 349, 356 (2020).

Third, the anticlassification tenet that race-based policies “carry a danger of stigmatic harm”³²⁰ does not permit effective municipal reparations. The Court has stated that race-conscious programs “reinforce common stereotypes”³²¹ that “stamp minorities with a badge of inferiority.”³²² In so holding, it has blocked myriad integrationist or remedial measures. These notions are premised on the erroneous idea that all racial classifications are stigmatic.³²³ What the Court overlooks is that stigma is a product of cultural context, so assessing the purpose and context of a race-conscious remedy is necessary to determine if it stigmatizes.³²⁴ Here, Philadelphia’s establishment of youth educational programs would not stigmatize. The plan invests resources as recompense for racist policing and aims to *limit* stratifying, stigmatic effects on racial minorities.³²⁵ This flips anticlassification ideology on its head: ignoring race is what allows stigma to persist.³²⁶

Considering municipal reparations from an anticlassification perspective demonstrates the theory’s flaws. The Court, relying on anticlassification theory, irrationally and increasingly views benign, race-conscious remedial measures designed to promote equality and foster opportunity as purportedly invidious discrimination.³²⁷ Through this lens, broad, race-conscious reparations cannot become reality.

B. Antisubordination Theory: A Better Understanding

An antisubordination approach would allow legislatures to enact race-conscious reparations that survive strict scrutiny and ameliorate injustices. For decades, scholars have advocated for an equal protection framework grounded in antisubordination principles rather than anticlassification theory.³²⁸ This Note now joins the chorus. The antisubordination approach is predicated on the accurate understanding that society has entrenched hierarchies that subordinate historically disadvantaged groups.³²⁹ Under antisubordination theory, inquiry into a law’s purpose is essential: Is the law intended

320. *Croson*, 488 U.S. at 493.

321. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.).

322. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring).

323. Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are Not Equal*, 44 WAKE FOREST L. REV. 107, 108 (2009); see also *supra* note 302.

324. *Id.* at 110.

325. *Id.* at 112 (noting that race-conscious programs are “the means by which to *limit* the relevance and stigmatic effects of race” (emphasis added)).

326. *Id.* at 138.

327. See Girardeau A. Spann, *Fisher v. Grutter*, 65 VAND. L. REV. EN BANC 45, 49 (2012).

328. See, e.g., Colker, *supra* note 313, at 60. Others more forcefully argue that “[c]olorblind strict scrutiny . . . serves no legitimate constitutional purpose.” Anderson, *supra* note 313, at 1231. Various scholars posit new legal tests based on antisubordination, such as a looser standard of review or different prima facie elements. See, e.g., Colker, *supra* note 311, at 1059–62.

329. See Balkin & Siegel, *supra* note 312, at 31; J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2366 (1997).

to subordinate or to remediate? Inquiry into a law's effects is even more critical: Does the law operate to oppress or to empower?³³⁰ Antisubordination theory would have courts uphold laws that protect or advance the interests of minorities,³³¹ as these laws have both beneficial purpose and effect.

This antisubordination approach would allow for race-conscious remedial schemes such as the Philadelphia resolution because it is more pragmatic and flexible³³² in at least three ways: (1) societal discrimination can be a compelling interest; (2) the government can more easily meet narrow tailoring requirements; and (3) neither alleged stigmatization nor special treatment are disqualifying.

First, addressing general discrimination in municipal reparations would likely be a compelling interest under antisubordination theory because of such a plan's intention and effects.³³³ Accordingly, the hypothetical resolution's endeavor to correct "a culture of systemic racism and bias"³³⁴ could be upheld. The same is true of plans that redress "historic and continued discrimination,"³³⁵ as in Burlington, Vermont, and "bias and racism in our governing systems, policies, and structures,"³³⁶ as in Providence, Rhode Island.

Second, municipalities would not be as restricted in their efforts to satisfy narrow tailoring under an antisubordination theory. Unlike anticlassification theory—which requires a tie to specific injuries suffered by specific individuals³³⁷—an antisubordination approach would permit actions that remedy past disparities or chip away at hierarchical inequities. Antisubordination theory allows efforts to eliminate the power disparities between white people and minorities.³³⁸ Philadelphia could attempt to do so through a college scholarship program for students of color, for example. Also, municipalities would not have to consider race-neutral alternatives because benign classifications are not problematic under antisubordination theory. This provides greater freedom to Philadelphia City Council members, as well as their counterparts elsewhere, in drafting reparations legislation.

Third, under an antisubordination theory, municipal reparations would not present concerns of supposed stigma nor special treatment. Regardless of

330. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 153 (1976) ("[Antisubordination analysis] does not turn on whether the law embodies a classification, racial or otherwise; it is sufficient if the state law simply has the effect of hurting [B]lacks.").

331. See Darby & Levy, *supra* note 158, at 431.

332. Colker, *supra* note 311, at 1013.

333. See *supra* notes 311, 329–330 and accompanying text.

334. See *supra* Section I.C.2.

335. Burlington Resolution, *supra* note 7.

336. *Declaration on Truth, Reconciliation, and Reparations*, *supra* note 7.

337. See *supra* notes 288–292 and accompanying text.

338. Colker, *supra* note 311, at 1007.

whether reparations provide “psychological counseling to minority residents”³³⁹—as in the Philadelphia City Council resolution—or “economic development programs and opportunities” to Black residents—as in Evanston’s plan³⁴⁰—they would no longer be viewed as stigmatizing and thus not constitutionally disqualified. Antisubordination theory recognizes that *racism*, not the remedial imposition of a racial distinction, is what thwarts equality of opportunity.³⁴¹ Antisubordination theory also does not consider race-conscious remedies “special treatment.” On the contrary, it considers them worthy attempts to provide the full protection of the law where that protection has been shirked.³⁴²

Beyond these doctrinal differences, antisubordination theory is a preferable standard for two additional reasons: it is more faithful to the history of the Equal Protection Clause, and it is better suited to the current reality. To begin, antisubordination theory is more consistent with the Fourteenth Amendment’s history and intent.³⁴³ In drafting the amendment’s language, “equal” was of secondary importance to “protection;” its main purpose was to provide the protection of the laws to all people, not to ensure that protection was extended equally.³⁴⁴ As the doctrine developed, suspect classes emerged “in response to a history of subordination of [B]lack and women, not from a general hostility to differentiations.”³⁴⁵ Antisubordination theory upholds this history and the Fourteenth Amendment’s underlying intent by affirming the constitutionality of laws that provide protection from and ameliorate the impact of marginalization. Municipal reparations plans discussed in this Note are prime examples of such race-conscious laws that an antisubordination theory would allow.

Antisubordination theory is also more attuned to the needs of the present. America is not a postracial society but a deeply unequal one³⁴⁶ whose laws operate to maintain that inequality.³⁴⁷ Because “the lived experience of Black and brown people in this country continues to underscore the need for race-conscious policymaking,”³⁴⁸ governments must be able to enact legislation that

339. See *supra* Section I.C.2.

340. Evanston Resolution, *supra* note 178 (cleaned up).

341. Cf. Anderson, *supra* note 313, at 1201 (describing an integrative view that recognizes segregation’s central role in preventing equality of opportunity); DARTY & MULLEN, *supra* note 28, at 252 (“What really cripples [B]lack Americans is racism, not an alleged victimization mentality.”).

342. See Colker, *supra* note 313, at 62; Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 YALE L.J.F. 343, 347–48 (2019).

343. Colker, *supra* note 311, at 1012. In contrast, anticlassification theory “does a disservice to . . . history.” *Id.*

344. JACOBUS TENBROEK, *EQUAL UNDER LAW* 237 (1965); see also Colker, *supra* note 311, at 1012 n.27.

345. Colker, *supra* note 311, at 1028.

346. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 327 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

347. MacKinnon & Crenshaw, *supra* note 342, at 357.

348. Tatiana S. Laing, Comment, *Seeing in Color: The Voting Rights Act as a Race-Conscious Solution to Prison-Based Gerrymandering*, 50 SETON HALL L. REV. 499, 499 (2019).

takes race into account if they hope to eliminate the effects of past and ongoing subordination and instead create equality of opportunity.³⁴⁹ As this Note has argued, broad-based reparations require explicitly considering race, and only if courts adopt an antistatutory approach would the municipal reparations presented here survive strict scrutiny. Antistatutory theory would allow reparations to be extended to “Philadelphians of color”³⁵⁰ and other groups that face long-term, structural disadvantages resulting from racial stratification.³⁵¹

Certainly, adopting an antistatutory understanding requires greater effort than maintaining an anticlassification approach; individuals and legal doctrine alike would have to acknowledge differences and strive to avoid negative effects.³⁵² Nevertheless, to fulfill the Equal Protection Clause’s purpose, allow race-conscious remediation, and usher in a more perfect union, the Court must undertake the work of antistatutory.

CONCLUSION

“And so we must imagine a new country,” writes Ta-Nehisi Coates in his seminal call to action *The Case for Reparations*.³⁵³ This appeal to imagination is not singular, nor is it unique to reparations. Social movements are reimagining the law’s possibilities within a broader attempt to reimagine the state and push for radical transformation.³⁵⁴ Abolitionists like Mariame Kaba ask that we create a new way: “What can we imagine for ourselves and the world?”³⁵⁵

As municipalities and other jurisdictions endeavor to meet racial justice demands, they must pass reparations. Beyond the considerations outlined in this Note, municipalities should be imaginative in choosing how to best rectify wrongs and further future equity, while amplifying the voices of those who have been affected by government and societal wrongdoing.³⁵⁶ Governments that

349. See *supra* notes 14–17 and accompanying text.

350. See *supra* Section I.C.2.

351. See Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action after Fisher v. University of Texas*, 62 UCLA L. REV. 272, 277 (2015); Balkin & Siegel, *supra* note 312, at 9.

352. Destiny Peery, Comment, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J.L. & SOC. POL’Y 473, 484 (2011).

353. Coates, *supra* note 17.

354. See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 409, 476 (2018).

355. KABA, *supra* note 85, at 5; see also Sidney Madden, Sam Leeds & Rodney Carmichael, ‘I Want Us to Dream A Little Bigger’: Noname and Mariame Kaba on Art and Abolition, NPR: LOUDER THAN A RIOT (Dec. 19, 2020, 8:00 AM), <https://www.npr.org/2020/12/19/948005131/i-want-us-to-dream-a-little-bigger-noname-and-mariame-kaba-on-art-and-abolition> [perma.cc/49QL-DRPK]; Mariame Kaba, *To Stop Police Violence, We Need Better Questions—and Bigger Demands*, MEDIUM: GEN (Sept. 25, 2020), <https://gen.medium.com/to-stop-police-violence-we-need-better-questions-and-bigger-demands-23132fc38e8a> [perma.cc/AF66-SPDR].

356. See Miller, *supra* note 19, at 391.

perpetrated violent abuses like the Tulsa, Oklahoma massacre³⁵⁷ should undoubtedly provide reparations. These victim-based, incident-focused plans are likely to pass constitutional muster. But reparations should not be confined by an anticlassification approach that stifles hope of remediating structural racism. Municipalities like Philadelphia must be able to deliver expansive reparations to their minority residents. An alternative understanding of the Equal Protection Clause would allow for broader reparations legislation to invest in communities of color. But this, too, will take imagination and effort. Advocates for race-conscious legislation must speak loudly and persuasively to redirect the constitutional path and restore the true intent of the Fourteenth Amendment.³⁵⁸

Our nation is facing a reckoning, and reparations offer an opportunity to remake our society.³⁵⁹ It is time for municipalities to become imaginative in constructing reparations. For these municipal visions to become legal reality, the Court, too, must join this effort and reimagine the constitutional doctrine.

357. For a brief history of the Tulsa Race Massacre, see Miller, *supra* note 19, at 368–70. Oklahoma passed some initiatives “designed to bring a measure of healing,” but they did not directly benefit survivors of the massacre and were extremely limited in scope. *Id.* at 374. “Sadly, the families remain uncompensated, Greenwood remains unreconstructed and underdeveloped, and Tul[s]a remains a racially segregated city.” *Id.* at 377–78. The centennial of the massacre was commemorated on May 31 of this year. DeNeen L. Brown, *In Tulsa, Solemn Remembrances of a Century-Old Race Massacre by Survivors and Descendants*, WASH. POST (June 1, 2021, 6:07 AM), <https://www.washingtonpost.com/history/2021/05/31/tulsa-massacre-anniversary-survivors-descendants> [perma.cc/9HDV-3A2D].

358. Peery, *supra* note 352, at 495.

359. DARITY & MULLEN, *supra* note 28, at 244.